



[2022] JMSC Civ 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV06215

BETWEEN	THE DIRECTOR OF PUBLIC PROSECUTIONS	CLAIMANT
AND	NORMAN WASHINGTON BURTON	DEFENDANT

IN CHAMBERS

Mrs Andrea Martin- Swaby Deputy Director of Public Prosecution for the Office of the Director of Public Prosecution.

Mr Lawrence Haynes and Ms. Rochelle Haynes for the Defendant.

Mrs Tamara Francis Riley- Dunn instructed by Nelson Brown Guy and Francis for interested party- Ms Andrea Simpson.

Heard 23rd November 2021 and 20th January 2022.

Application for Relief from Sanctions- CPR Rule 28.8

L Shelly-Williams J

Background

[1] The Claimant filed an application for relief from sanctions dated the 30th of March 2021 which prayed that: -

- a. The Applicant is granted relief from the sanction contained in the order of the Honourable Mr. Justice Kirk Anderson made on 11th day of February 2019 for failing to comply with the Order made by the Honourable Mrs. Justice Lawrence Beswick on the 24th day of May 2017.

- b. Time is extended for the Applicant to file and serve Claim Form with amended claim number.
- c. Costs of this Application be costs in the claim.
- d. Such further or other relief as the Court deems just in the circumstances.

- [2]** The claim stems from a Restraint Order made in the United Kingdom in 2010. The Claimant- the Director of Public Prosecution (DPP, is the designated Central Authority as per the Mutual Legal Assistance (Criminal Matters) Act. One of the functions of the Central Authority is to facilitate the registration of Foreign Restraint Orders. On the 27th of July 2010 a restraint order was made in the Crown Court of England and Wales concerning the assets of the Defendant, Mr Norman Burton, that were located in Jamaica.
- [3]** On the 4th day of August 2010, the DPP filed a Fixed Date Claim Form and affidavit in support which was numbered by the Registrar as HCV 016164 of 2010 for the registration of a Foreign Restraint Order.
- [4]** In 2014, the Central Authority for the United Kingdom wrote to the DPP seeking a variation of the Foreign Restraint Order in Jamaica as well as the registration of a Foreign Confiscation Order.
- [5]** The DPP filed a Fixed Date Claim Form on the 26th day of May 2015 which sought an order for the registration of the Foreign Confiscation Order. The Fixed Date Claim Form was numbered 2010 HCV 06164 by the DPP.
- [6]** The applications were heard by the Campbell J, who granted the Orders sought, to include the registration of the Foreign Confiscation Order.
- [7]** On the 5th day of November 2015, Mr. Norman Burton filed a Notice of Application for Court Orders seeking declarations that the Fixed Date Claim Form was invalid and that all subsequent proceedings be held to be null and void.

[8] On the 2nd day of November 2015, the DPP filed a Notice of Application for Court Orders seeking the assignment of a new number by the Registrar for the Fixed Date Claim Form filed in 2015, as well as an order for the enforcement of the Foreign Confiscation Orders.

[9] Both applications were heard before Lawrence-Beswick J on the 3rd and 10th May 2015. Lawrence-Beswick J handed down her written judgment of the 24th of May 2017. One of the orders of Lawrence- Beswick J ie order number four, stated that-

Order in terms of para 1., that is, that the HCV number 06164 of 2010 of the Fixed Date Claim Form dated 26th May 2015, be amended by the Registrar to a 2015 number. The Applicant DPP must file the Fixed Date Claim Form with the amended number, and any consequent amendments. The applicant DPP must also refile any documents to which amendments must be made, consequent on this order. The amended documents must be served on Mr. Norman Burton by the DPP within seven days of receipt of the amended Fixed Date Claim Form from the Supreme Court Registry.

[10] As a result of the judgment handed down by Lawrence-Beswick, J, the DPP filed a Fixed Date Claim along with a supporting affidavit on the 31st of May 2017. That Fixed Date Claim Form was given a 2017 number and not a 2015 by the Registrar. This was contrary to the order of Lawrence- Beswick J. The Fixed Date Claim Form along with the affidavit was served on the Defendant.

[11] Subsequent to this decision of Lawrence- Beswick J the DPP, on the 4th of October 2017, filed an appeal against this decision. This application was made out of time. Brooks, JA, as he then was, heard the application on the 27th of October 2017 and dismissed the application. That dismissal was served on the DPP in January 2018. On the 21st of December 2018 the application for extension of time was heard by a full court in the Court of Appeal and was dismissed.

[12] On the 26th day of February 2019, the matter came before Anderson J, who made an unless order which stated that: -

The Claimant shall by or before February 20th, 2019, comply with number four of the orders made by Beswick J. on May 24th 2017,

failing which, the Claimant's statement of case shall stand as struck out without the need for any further court order.

- [13] Subsequent to the unless order, the DPP wrote to the Registrar on two occasions, to have the order of Lawrence- Beswick J complied with. The DPP exhibited two letters that were written to the Registrar dated the 19th of March 2019 and the 3rd of July 2019 urging her, to comply with the order of Lawrence- Beswick J by inserting a 2015 number of the Fixed Date Claim Form. On the 17th of July 2020 the Registrar responded to the DPP and complied with the order of Beswick J inserting the 2015 number on the Fixed Date Claim Form.
- [14] The DPP then filed an application for relief from sanctions on the on the 30th of March 2021. The explanation for the delay in filing is encapsulated in the affidavit of Mrs Andrea Martin-Swaby. The explanation proffered was that the Claimant had no control of the actions of the Registrar.
- [15] In the submissions of the DPP filed in this matter, the Claimant indicated that they had sought the advice of the Attorney General as to the procedure they were to follow. It took several letters before they received a response in May 2021. On receiving the response from the Attorney General the DPP, then filed the application for relief from sanctions. This explanation of the request of advice from the Attorney General, was not included in the affidavit in support of the application and, as such, cannot be relied upon.

Claimant's submission

- [16] The Claimant asserted that they had complied with the orders of Lawrence- Beswick J in that they had filed the Fixed Date Claim Form as prescribed by the order. The affidavit of Mrs Martin-Swaby indicated that they had spoken to the Registrar about inserting the 2015 number on the Fixed Date Claim Form as ordered by the learned Judge but the Registrar failed to do so. To buttress their submission, they indicated that they made a request of the Registrar to file an affidavit in this matter. They were unsuccessful in their request.

- [17] They submitted that they did all they could to comply with the order of the court but the numbering of the Fixed Date Claim Form was outside their control. They argued that the application was made promptly under the circumstances and as such the order they are requesting should be granted.
- [18] They further submitted that the non-compliance was not intentional as again it is the Registrar that failed to comply with the order of the court. They also argue that they have generally complied with the orders of the court.

The Defendant's submission

- [19] The Defendant's submission is that the application for relief from sanctions was not made expeditiously and as such no relief should be granted. They submitted that the order of Anderson J was made from February 2019 and the application for relief from sanctions was made in March 2021. They submit that there is no explanation for the delay and as such no relief should be granted.
- [20] They further submitted that nothing was presented to the court as to the efforts, if any, that were made by the DPP to comply with the order of the Lawrence- Beswick J. They argue that it was not until the unless order was made by Anderson J, that there was any attempt to comply with the order. That attempt they argued, was outside the time allotted for the DPP to comply with the order. They submitted that no order should be granted for relief from sanctions.

Submissions on behalf of Andrea Simpson

- [21] Ms. Andrea Simpson was named as a Defendant in the original Fixed Date Claim Form, however her name was deleted from the Fixed Date Claim Form when it was refiled by the DPP. She has made submissions in this case as her name appears on a number of the properties that are the subject of the various orders made by the court. She has filed an application to have the various orders dismissed against the properties on which her name appears.

[22] Counsel for Ms. Simpson submitted that the application for extension of time should not be granted. She has submitted that the application for relief of sanctions was not made promptly and there was no explanation given for the delay. She has indicated that in granting the order for relief from sanctions her client would be prejudiced. She would be prejudiced as the properties she has an interest in would be in jeopardy as well as she would be prejudice in relation to cost. She also submitted that the Claimant had not satisfied the cost order made against it. She later withdrew that submission, as she indicated that she had not submitted the sums being claimed for cost to the Claimant.

The Law

[23] Rule 26.8 of the Civil Procedure Rules (2002) outlines the procedure in making an application for relief from sanctions. It states that: -

(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 directions orders and directions.

(3) *In considering whether to grant relief, the court must have regard to-*

(a) The interests of the administration of justice;

(b) Whether the failure to comply was due to the party or the 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.*

[24] There have been a number of cases where Judges have opined on the approach to be taken by the court in these applications. In the case of **National Workers Union v Shirley Cooper** 2020 JMCA Civ 62 Dunbar –Green JA (Ag) as she then was, stated at paragraph 57 that: -

*Rule 26.8(1) of the CPR stipulates that an application for relief from sanctions 'must' be made promptly and supported by evidence on affidavit. That preliminary test must be satisfied before the court can proceed to a consideration of the additional criteria under rule 26.8(2), (see Phillips JA, in **University Hospital Board Management v Hyacinth Matthews** [2015] JMCA Civ 49, paragraph [36]).*

[25] This leads to the issue as to the meaning of promptness. In the case of **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another**, [2013] JMCA Civ 1, the court opined that a one-month period would fail to satisfy the requirement of promptness.

[26] In the case of **Meeks v Meeks** [2020] JMCA Civ 20 F Williams JA stated at paragraph 23 of his decision that: -

*... What amounts to promptness is significantly dependent upon the circumstances of the particular case. In **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 this court, in discussing some of the possibly relevant matters, opined as follows: '[66] If the assessment of whether the application was made promptly should be dependent solely upon the time at which the breach occurred, the respondent's application was made approximately a year after the deadline for compliance and that could be viewed as amounting to inordinate*

delay. However, the fact that there had been partial compliance and that there was in effect no negative delays to the matter proceeding to trial, were circumstances which ought to be taken into consideration. [67] Further, the circumstances under which the breach was brought to the attention of the court at the time of trial ought also to be considered...

- [27] Similarly, Brooks JA, as he then was, at paragraph 10 of **HB Ramsay and Associates Limited and others v Jamaica Redevelopment Foundation Inc and another, (supra)** stated that:

In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case'.

- [28] However, in paragraph 31 of the said Judgment Brooks JA opined that:-

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 need not consider the merits of the application...

- [29] Smith JA in the case of **Norma McNaughty v Clifton Wright and Others (unreported)**, Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2005, judgment delivered 25 May 2005, stated at page 12: “

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 likely 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 foundation for achieving the overriding objective of enabling the Court to deal with cases justly.

Once the party in default has satisfied the threshold of applying promptly for relief from sanctions the court would then proceed to consider whether or not the application satisfies section 28.8 (2) of the rules.

Failure to comply was not intentional

[30] Rule 26.8 (2) (a) indicates that once the threshold of promptness has been satisfied the court would then decide whether it would exercise its discretion to grant the order for relief. In exercising its discretion, the court should firstly enquire as to whether the failure was intentional. In the case of **Re Jokai Tea Holdings Ltd** [1992] 1 WLR 1196, Lord Nicholas Brown-Wilkinson at page 1203 stated that:-

if a party can clearly demonstrate that there was no intention to ignore or flout the order and that failure to obey was due to extraneous circumstances such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have.

Good explanation for failure

[31] The court would then seek to enquire as per Rule 26.8 (2) (b) as to whether there is a good explanation for the failure. In the Privy Council case of the **Attorney General v Universal Projects Limited**, [2011] UKPC 37, at paragraph 18 the court, in considering a similarly worded rule in the Civil Procedure Rules of Trinidad and Tobago, opined at paragraph 18 that the absence of a good explanation within the meaning of the rule, was fatal to the application.

The party in default has generally complied with all other relevant rules, practice directions orders and directions

[32] The final issue that must be satisfied as per Rule 26.8 (2) (c) is whether or not there has been compliance with Rule, court orders and directions. Dunbar-Green JA (Ag) as she then was stated at paragraph 76 of **The National Workers Union v Shirley Cooper** in relation to compliance of court orders that: -

The third criterion is that the appellant must show that there was general compliance with all other relevant rules, practice directions, orders and directions. This does not mean there must have been compliance in every instance because being generally compliant is a matter of degree. The spirit of this rule is that there must be a demonstrable proclivity to comply.

Analysis

- [33] This application stems from the original order of Lawrence-Beswick J which spoke to a Fixed Date Claim Form being filed, and a 2015 number being inserted on it.
- [34] The order of Lawrence- Beswick J was to be enforced by two parties i.e. the DPP, who was to file the Fixed Date Claim Form, and the Registrar, who was to affixed a number bearing a particular year. The order of Lawrence-Beswick J was made on the 24th of May 2017. The DPP filed the Fixed Date Claim Form as per the order on the 31st of May 2017. They then served the Fixed Date Claim Form on the Defendant as per the said order of Lawrence-Beswick J. The question then is whose responsibility was it to insert the 2015 number on the Fixed Date Claim Form. The submission of Counsel for the Defendant Norman Burton was that it was the responsibility of the Claimant to bring the order of the Learned Judge to the attention of the Registrar who would then comply with the order. This was also the submission for Counsel for Ms. Andrea Simpson who submitted that the Claimant had failed to produce any proof to the court that they had brought the order of the Learned Judge to the attention of the Registrar before the expiration of the unless order. They argued that in the absence of such evidence, the Claimant must be held responsible for the non- compliance of the order.
- [35] The affidavit of Mrs. Andrea Martin-Swaby on behalf of the Claimant indicated that she had brought the order of Lawrence-Beswick J to the attention of the Registrar but she, the Registrar, failed to comply until 2020.
- [36] I note that there were two letters written by counsel from the DPP to the Registrar about the need to insert the 2015 date on the Fixed Date Claim Form. These letters are dated the 19th of March 2019 and the 3rd of July 2019. These dates were, of course, outside the time period given by Anderson J for the order of Lawrence-Beswick J to be complied with.
- [37] If I accept the affidavit of Mrs. Andrea Martin-Swaby, that she had brought the order of the learned Judge to the attention of the Registrar, then that would mean

that it is the Registrar who failed to comply with the order of Lawrence-Beswick J and not the Claimant. This would lead to the question as to whether the Claimant should be held accountable for the inaction of the Registrar?

- [38] Once the unless order was made it is clear that the Claimant made attempts to have the Registrar comply with the order of Lawrence-Beswick J. Those efforts bore fruit as the order has now been perfected. The Registrar wrote to the DPP in July 2020 and indicated that a 2015 number was assigned to the Fixed Date Claim Form. The Claimant, through its efforts, achieved the goal of having the Registrar comply with the order of Lawrence- Beswick J.

Delay

- [39] The delay in question in this case is two years. The Claimant proffered two reasons for the delay. The first reason was that the perfecting of the order was outside of their purview and as such they could not have complied with the unless order. There was a second explanation that was in the submissions of the Claimant but not in their affidavit. That explanation, was that they had sought advice from the Attorney General's office, which they received after several months. This was not included in the affidavit attached to the application and as such will not be considered.
- [40] The Claimant did make efforts to have the Registrar comply with the unless order, they, having filed the Fixed Date Claim Form within the time ordered by the court. In her affidavit, Mrs Andres Martin- Swaby showed that they made efforts before to, and after the unless order was made to have the Registrar comply. Following the decision of **Meeks v Meeks**, I will take into consideration the circumstances of the delay. This is an unusual situation where the compliance of the unless order was outside the power of the Claimant. I have to also consider the attempts by the Claimant to have the Registrar comply.

[41] Each case must be decided on its own facts. In this case, although the delay can be considered to be long, in keeping with the overriding objectives of the Rules, I find that the Claimant has satisfied Rule 26.8(1).

Was the failure to comply intentional?

[42] The Claimant in this case, did, comply with the order of Lawrence-Beswick J as far they could. They filed the Fixed Date Claim Form in the time stipulated to do so. The non-compliance being the fault of the Registrar, I find that the failure to comply by the Claimant, was not intentional.

Is there a good explanation for failure to comply?

[43] The Claimant has offered an explanation for the failure to comply which I accept. It is simply that the compliance was outside of their control. The Registrar who failed to comply with the order has offered no explanation for this failure.

[44] I accept the affidavit of Mrs. Martin-Swaby, that she had brought the order of the learned Judge to the attention of the Registrar. A letter requesting the Registrar to provide an affidavit in relation to this matter was exhibited to the court, but no such affidavit has been forthcoming.

Has there been general compliance of court orders?

[45] There have been a number of court orders made in relation to this Claim. The first set of orders, were for the Claimant to file the Fixed Date Claim Form with a supporting affidavit within a particular time period and to serve it on the Defendant within a seven-day period. Those orders were complied with. Following that initial order of Lawrence-Beswick J, there was an appeal to the Court of Appeal that was unsuccessful. The case then came back before Anderson J who made a number of orders which included an unless order.

[46] I find that there has been general compliance with court orders by the Claimant.

The interest of the Administration of Justice.

[47] This is a case where the Claimant's case was struck out due to the non-compliance by the Registrar of the Supreme Court. In keeping with the overriding objectives of the Civil Procedure Rules, I find that based on the circumstances of this case, the Claimant should be granted relief from sanctions.

Order

- a) Claimant is granted relief from sanctions.
- b) Time is extended until the 30th of January 2022 for the Fixed Date Claim Form with the 2015 number affixed along with supporting affidavit to be filed and served.
- c) Leave granted for appeal.
- d) Claimant's attorney to prepare file and serve the order.
- e) No order as to cost.