IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. C.L. 1993 / W 127

BETWEEN	PAUL WHITE	CLAIMANT
A N D	HOMEL GRANT	1ST DEFENDANT
A N D	CARLOS DALEY	2ND DEFENDANT

Mr. Christopher Samuda instructed by Piper and Samuda for Plaintiff.

Mr. Christopher Dunkley instructed by Cowan Dunkley Cowan for Defendants.

**PRACTICE AND PROCEDURE-
APPLICATION FOR RELIEF FROM SANCTIONS-
JUDGMENT ENTERED BECAUSE OF FAILURE TO COMPLY WITH COURT ORDERS- APPLICATION TO SET ASIDE JUDGMENT**

10TH, 20th, 23rd March and 7th April 2006

BROOKS, J.

In light of the urgency of the situation, which I shall describe later, I made an order on the 23rd March 2006 granting the Defendants' application for relief from sanctions. I then promised to put my reasons in writing at a later date. I now fulfil that promise.

On 13th June 2005, Sinclair-Haynes J. (Ag.) ordered that judgment be entered in favour of Mr. Paul White against the defendants Messrs Homel

Grant and Carlos Daley. It was the third time in the course of this claim that judgment was being entered in favour of Mr. White. On the previous two occasions the judgments were entered in default of Appearance and Defence respectively. On the third occasion the default was as a result of Messrs. Grant and Daley failing to comply with orders made by the court during the course of case management. Mr. Samuda, appearing on behalf of Mr. White described "a history of dilatoriness (by) the defendants".

Messrs. Grant and Daley now apply to the court for relief from the sanctions imposed for their latest failure. Mr. Samuda vigorously opposed the application highlighting the defaults previously mentioned.

The issue to be determined is whether Messrs. Grant and Daley have satisfied the requirements of rule 26.8, to allow the court to grant them the relief which they seek. I shall first outline some of the history of the matter, state the law as I understand it and then set out my reasons for the decision which I made in respect of the issue.

The History

This is a claim for damages for personal injury suffered by Mr. White. He alleges that he sustained the injuries as a result of the negligent handling of Mr. Daley's bus by Mr. Grant.

It is important to note that this case did come on for trial prior to the advent of the Civil Procedure Rules 2002, but was then adjourned on Mr. White's application. As a result of the change to the new régime it came on for hearing in a Case Management Conference on 15th January, 2004, at which time a number of orders were made. The case came on for Pre-Trial Review on 27th July, 2004 and at that time it was revealed that Messrs. Grant and Daley had not complied with any of the orders for the filing of documents, made at the Case Management Conference. That Pre-Trial Review was part-heard and adjourned to the 21st September, 2004. On the 20th September, (one day before the scheduled hearing) Messrs. Grant and Daley filed **some** of the outstanding documents.

There is no record of a hearing having taken place on 21st September, but on 19th October, 2004 at the continuation of the Pre-Trial Review the court made an order for Messrs. Grant and Daley to file, by specific dates, the documents still outstanding. The court then stipulated that Messrs. Grant and Daley's Statement of Case would stand struck out unless they complied with the orders then made. The case was again set for Pre-Trial Review to be held on 13th June, 2005.

Once again Messrs. Grant and Daley, fell short. Some of the orders were complied with, but the requirement to file a Statement of Facts and a

Listing Questionnaire, on or before specific dates in November, 2004 was not obeyed. Their Attorney-at-Law, Mr. Dunkley, candidly admitted that this latest default was not his clients' but was due to inadvertence in his own offices. He deposed that the documents were in fact "prepared, signed and on file but inadvertently not filed in court".

To compound their default, neither Messrs. Grant or Daley nor their legal representative attended the hearing on 13th June, 2005. Sinclair-Haynes J. (Ag.) then confirmed that their Statement of Case stood struck out and ordered the entry of the judgment against them. Later that day, apparently prompted by a courtesy telephone call from the learned judge, Mr. Dunkley filed the outstanding documents. Two days later (15th June, 2005) he filed the notice of the present application and his affidavit in support.

The Law

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 be always mindful that it does not send a contrary signal to litigants and their attorneys-at-law. Sir Swindon Thomas made this point in *R.C. Residuals Ltd. v. Linton Fuel Oils Ltd.* [2001] 1 WLR 2782 (at p. 2789).

Rule 26.8 of the Civil Procedure Rules governs applications for relief from sanctions. I shall treat the terms of rule 26.8 (1) as having been complied with, as this application was filed promptly and was supported by an affidavit.

Rule 26.8 (2) provides:

> "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." (Emphasis supplied.)

I have emphasized the words "only" and "and" in the rule, in order to demonstrate that, if they are to succeed, Messrs. Grant and Daley are obliged to satisfy all three requirements of the rule. Authority, if any is needed for this position, may by found in the judgment of McCalla J.A. (Ag.) in the unreported Court of Appeal decision of *International Hotels Jamaica Ltd. v. New Falmouth Resorts Ltd.* (SCCA 56 and 95 of 2003, delivered November 18, 2005).

Rule 26.8 (3) states:

> "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 that party's attorney-at-law;

(c) whether the failure to comply has been or can he 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."

In *International Hotels* McCalla J. emphasized the need for tribunals at first instance to demonstrate compliance with rule 26.8 (2) as well as 26.8 (3). In *R.C. Residuals Ltd. v. Linton Fuel Oils Ltd.* the U.K. Court of Appeal, in contemplating similar, though less stringent, provisions in their Civil Procedure Rules (rule 3.9 (1), stated that the court considering an application for relief from sanctions, was obliged to consider systematically each of the matters listed in the rule (Kay LJ at p. 2788).

In *International Hotels* our Court of Appeal, was also of the view that in considering applications for relief from sanctions, trial judges should bear in mind the alternatives to striking out (*per.* P. Harrison J.A.). It would seem however that this latter consideration applies more to the time of the making of the 'unless' order, than to the consideration of relief after that sanction has already been applied. If it were otherwise, the importance and effect of the 'unless' order, would be diluted.

Applying the Law to the Facts

Against the background of those guidelines I shall consider each provision in turn.

a. Was the failure to comply intentional?

In his affidavit, Mr. Dunkley stated that the failure was unintentional and indeed was as a result of inadvertence. This has not been contradicted by Mr. White and it would be difficult to establish that the documents were not prepared and ready as stated by Mr. Dunkley.

b. Is there a good explanation for the failure?

The same explanation of inadvertence applies to this question as well. It may well be considered a good, that is, a reasonable, explanation.

c. Has the defaulting party generally complied with all other relevant rules, practice directions orders and directions?

Prior to the failure to comply with the orders on Case Management, the only failures by Messrs. Grant and Daley were in respect of the filings of the appearances and a defence respectively. The defaults were cured and they were ready to proceed to trial under the old rules. It was Mr. White who was not ready for trial. 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 the previous defaults, I am prepared to make that classification.

In *R.C. Residuals Ltd. v. Linton Fuel Oils Ltd.* (*supra)* the court granted relief from sanctions where there had been a previous default, which default had caused the failure to meet a trial date. Kay L.J. in considering the application for relief laid a lot of store by the later efforts by the solicitors to comply and the fact that they failed to do so by only a matter of minutes. This he stressed over and above the previous failure.

Having found that Messrs Grant and Daley have satisfied the three requirements of rule 26.8 (2), I am now permitted to examine the elements of rule 26.8 (3) to determine whether my discretion should be granted in their favour.

a. Will the interests of the administration of justice be served?

There has been fairly recent authority, (though pre-dating the Civil Procedure Rules) to the effect that a defendant who genuinely wishes to defend a claim, and has a reasonable prospect of success, should be afforded the opportunity so to do (see *Moncure v. DeLisser* (1997) 34 JLR 423).

Here, Messrs Grant and Daley assert that Mr. White was the author of his own misfortune, by alighting from their bus when it was unsafe for him so to do. They should be allowed to present their defence if they can, all other considerations being favourable. Mr. White, on the other hand, will not be unduly prejudiced by the further delay, if the claim has to be tried, as

the trial was set for Tuesday, the 28th March 2006, the week after the delivery of the decision herein. I find that the interests of justice would have been served if the trial were allowed to proceed.

b. Was the failure to comply due to Messrs. Grant and Daley's default or due to that of their attorney-at-law?

It has already been stated that Mr. Dunkley has admitted culpability for the default.

c. Has the failure to comply been remedied?

The documents in compliance have already been filed.

d. Can the trial date still be met if relief is granted?

The trial date of 28th March could have been met. A judge's bundle had already been prepared and this is a straightforward negligence matter. The parties should have had no difficulty preparing themselves for trial. It is for this reason that I considered the matter urgent and I made the orders prior to handing down my reasons. I have given much weight to this element of the rule.

e. What effect would the granting of the relief, or not, have on each party?

I need not consider this element in any detail. I think that I have sufficiently considered the question under the heading dealing with the

interests of justice and I find that greater hardship would be imposed by the refusal than by the grant of relief.

Conclusion

Having considered the facts of this case against the background of the provisions of rule 26.8 of the Civil Procedure Rules, I find that despite the previous defaults by Messrs. Grant and Daley, the interests of justice and the overriding objective of dealing with cases justly, require that they be afforded an opportunity to present their defence at a trial. All defaults have been cleared and the trial date could still have been met. I therefore made the following orders on the 23rd March, 2006.

1. The judgment entered against the Defendants on 13th June 2005, is hereby set aside.
2. The costs of this application in the sum of $12,000.00 are to be the Claimant's. The Defendants shall pay the said costs on or before 27th March, 2006.
3. The parties are to attend for the scheduled trial on 28th March. Should the Defendants not attend prepared to proceed with the trial, their statement of case should stand as struck out.