[2019] JMSC Civ 221

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016HCV01740**

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| **BETWEEN** | **ANGELLA CLARKE – MORALES** | **CLAIMANT** |
| **AND** | **SUNSWEPT JAMAICA COMPANY LIMITED** | **DEFENDANT** |

**IN CHAMBERS**

Mr Lijyasu Kandekore for the Claimant

Ms Stephanie Williams instructed by Henlin, Gibson Henlin for the Defendant.

Heard: October 31, 2019 and November 5, 2019

**Application for relief from sanctions**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

**[1]** The claim in this matter is for the return of goods belonging to the Claimant which had been left at 'Windswept', a property owned by the Defendant in Unity Hall, St. James or Damages in lieu thereof. The Claimant also seeks Aggravated Damages, Costs and Attorney's Costs arising from an eviction exercise carried out between the 30th of November and the 1st of December 2015, when pursuant to a Court Order the Claimant was evicted from these premises by bailiffs acting on behalf of the Defendant.

**[2]** On the 7th of June 2018, the matter was scheduled for a Case Management Conference, Counsel for the Claimant and the Defendant were both present. On that day the Learned Judge made a number of orders four of which are of relevance to this hearing and are as follows:

a. Trial set for March 14th, 2019
b. Skeleton submissions and list of authorities to be filed and exchanged on or before 21st February 2019.
c. Trial Bundle to be prepared by Claimant's Attorney.
d. Any other affidavits to be filed on or before 18th July 2018.

**[3]** On the 14th of March 2019 the matter came up for Trial. The trial was unable to proceed as a number of Case Management Orders had either not been complied with or had been complied with late in the day. The following orders were made by the Judge:

1. The trial is adjourned to the 27th of November 2019.
2. The documents filed by the Defendant are taken as filed within time.
3. Claimant to comply with orders made at the first hearing on or before the 19th of July 2019.
4. No affidavits after 31st July 2019
5. If Claimant fails to comply with Order 3 the statement of case stands struck out.

**[4]** On the 19th of July 2019, the Claimant having failed to comply with the orders made, the sanction contained in the unless order took effect. On the 26th of July 2019, Counsel for the Defendant filed an application for judgment after striking out which was supported by affidavit evidence of Yolande Hanlan an agent for the Defendant.

**[5]** On the 31st of July 2019, Counsel for the Claimant filed an Index and Trial Bundle containing a number of documents one of which is an affidavit from Derrick Hanlan,

a witness for the Defendant. This document however was incomplete as several exhibits which had been attached were not included in the bundle.

**[6]** On the 9th of August 2019, the Claimant filed an application seeking an extension of time within which to file the Judge's Bundle with an affidavit of Mr. Kandekore attached, this matter was listed for hearing on the 18th of September 2019. On the 29th of August 2019, the Claimant filed an application for an extension of time to file photographic evidence. An affidavit from Angella Clarke – Morales with photographs exhibited was attached to this application. This matter was also listed for the 18th of September 2019.

**[7]** At the hearing before the Learned Master on the 18th of September 2019, both applications were refused and on the 20th of September 2019, this application was filed in which the Claimant now seeks the following orders:

1. Relief from sanction pursuant to Rule 26.8
2. Re-instatement of the case for the Claimant
3. Extension of time within which to file the Judge's Bundle
4. Extension of time within which to file written submissions and authorities
5. That the affidavit of the Claimant/Applicant filed on the 29th of August 2019 be allowed to stand as filed in time.

**[8]** This latest application was scheduled for hearing on the 17th of October 2019 but was unable to proceed on that day as the matter had been listed before a Master instead of a Judge in Chambers. In addition to which Counsel for the Defendant was absent as a result of a commitment in the Court of Appeal. On that date the matter was adjourned for hearing on the 31st of October 2019.

**[9]** On the 30th of September 2019, the Claimant filed their skeleton arguments and list of authorities and these were served on Counsel for the Defendant on the same date.

**[10]** The matter having come on for hearing, Counsel for the Claimant has sought to persuade the Court that this is a matter in which the Court should exercise its discretion to grant relief from sanctions and extend the time for compliance as the failing was not that of the Claimant but her Attorney. as his hard drive on which all the relevant documents had been stored had 'crashed' and this situation was only recently addressed with the purchase of a new hard drive in October. He has also pointed to the fact that the Orders have now been complied with and the trial date can still be met.

**[11]** Ms. Williams presented the Court with written submissions in which she has set out a chronology of events similar to that outlined above. She has asked the Court to reject the application made by Mr. Kandekore on the basis that he has failed to meet the requirements of Rule 26.8. In putting forward her submissions she has outlined that this application for relief from sanctions comes 63 days after the sanction had already taken effect and could not be described as being promptly made.

**[12]** She has also noted that the failure to comply with the orders made on the 14th of March 2019 was not an aberration, as the Claimant had already failed to comply with those very orders which were first made on the 7th of June 2018. She has also indicated that in advancing the explanation in respect of the computer issues, Counsel has been very vague in outlining when this in fact occurred and the date it was remedied. She argues that these are details which would be pertinent for a Court tasked with deciding whether the explanation for the default is in fact a good one and without which the explanation cannot stand.

**[13]** It was also submitted by Ms Williams that in addition to the failings outlined above the failure to comply in relation to the skeleton arguments and list of authorities was deliberate as Counsel had previously stated before the Master that it was his intention to make oral submissions hence no written ones being filed. It was noted that this submission was not challenged by Mr. Kandekore.

**[14]** Ms Williams also highlighted that the Claimant as well as her attorney were present when this 'Unless Order' was made and would have been aware of the consequences of any failure to comply. Counsel has also submitted that in approaching this application, the Court should be mindful that the relevant rules are markedly different from an application for an extension of time as the wording makes it clear that the requirements are far more rigid and an applicant has to show compliance with the requirements of 26.8(1) and (2) in order to succeed.

**[15]** It was also submitted by Ms. Williams that, contrary to the submissions of Mr. Kandekore, the trial date would be in jeopardy if this application were to be granted, as the Defence would need time to take instructions and file an affidavit in response to that of Mrs. Clarke-Morales which was filed on the 29th of August 2019. In putting forward her submissions she has placed two authorities before the Court on which she seeks to rely, the Court of Appeal decision of ***HB Ramsay etal v Jamaica Redevelopment Foundation [2013] JMCA Civ 1*** and the Supreme Court decision of ***Corey Jackson v Annmarie Phillips [2017] JMSC Civ 30*** in which the Courts treated with similar applications pursuant to Rule 26.8.

**DISCUSSION/ANALYSIS**

**[16]** In **Elenard Reid etal v Nancy Pinard etal C.L. 2002/R032 delivered 27th February 2009** it was noted by Sykes J (as he then was) that '*unless orders are treated quite differently from other orders. It indicates that time is running out for the erring litigant and he really needs to do what is required of him by this order.'*

**[17]** Similar sentiments were echoed in the dicta of Ward L.J. in the UK decision ***Hytec Information Systems v Coventry City Council [1997] 1 WLR 1666*** *where he stated as follows;*

> *"An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order."*

**[18]** In examining the consequences of the failure of the erring party to meet this order, his Lordship continued as follows;

> "*Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure."*

**[19]** The framework against which the submissions of Counsel for the Claimant fall to be considered is outlined at Rule 26.8 of the CPR which provides 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 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 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.
>
> [emphasis supplied]

**[20]** The Court of Appeal decision ***HB Ramsay & Associates Ltd etal v Jamaica Redevelopment Foundation Inc etal [2013] JMCA Civ 1*** is authority for the position that all the requirements of Rule 26.8 (1) and (2) must be satisfied before the Court's discretion can be exercised on an Applicant's behalf. In order to arrive at a decision on this application the Court must consider whether these requirements are satisfied by the circumstances present herein.

**Was the application made promptly – Rule 26.8 (1)**

**[21]** In addressing this requirement Mr Kandekore has sought to highlight the fact that although this application was filed on the 20th of September 2019, he had filed two earlier applications on the 9th and 29th of August 2019 respectively for an extension of time within which to comply with the Case Management Orders. He has submitted that this should be considered by the Court as indicative of an intention on the part of the Applicant to act promptly in the circumstances. In examining this assertion, it is noted that the earlier of the two applications was made twenty-one days after the time allowed for compliance. Additionally, in seeking an extension of time it failed to recognise that the sanction having taken effect the order which should have been sought was for relief from sanctions.

**[22]** An examination of this application reveals that the extension sought only related to the filing of the trial bundle and did not address the failure to file the legal submissions and list of authorities or the additional affidavits which should have been filed by the 19th and 31st of July 2019 respectively.

**[23]** The application which was filed on the 29th of August 2019, an additional 20 days after the first, was also deficient as it only sought an extension of time to file an additional affidavit which was filed on the same day. The current application for relief from sanctions was filed two months and a day after the unless order took effect and four months and 5 days after the order was made in the presence of the Claimant and her Attorney. As noted by Brooks JA in ***H.B. Ramsay and Associates Ltd***, '*where such orders are made the party affected is given notice of*

*the requirement and the penalty for non-compliance. The deadline for compliance should therefore be uppermost in his mind*.'

**[24]** In the instant case, the Claimant had already failed to comply with the case management orders made on the 7th of June 2018, a failure which had resulted in the trial date of March 14th, 2019 not being effective. As such, the need to comply with the extended time should have been a priority for the Claimant and the failure to meet these dates should have been immediately obvious and resulted in a prompt application for relief to the Court. The circumstances as outlined reveal that the Claimant was dilatory as this application was only made after the earlier applications for an extension of time had failed. In light of the numerous lapses, delays and missed opportunities on the part of the Claimant, I am not persuaded that the application for relief from sanctions was made promptly.

**Whether the failure to comply was intentional**

**[25]** It has been submitted by Mr. Kandekore that the failure to comply with the scheduled date was not intentional as the Claimant had done all that she needed to do. He submitted that he on the other hand was unable to file the relevant documents within time because of a computer malfunction, circumstances he says that were beyond his control. Ms Williams has highlighted that Mr. Kandekore served her firm with the Order from the adjourned hearing on the 18th of July 2019 which was one day before the sanction took effect. In those circumstances, she submitted, it could not have escaped Counsel that the need to comply with the date requirements was urgent. On a review of the documents and submissions, it is evident that neither the Defendant or their Counsel had been advised of this difficulty by Counsel for the Claimant, neither did he seek to advise the Court of same at the time of the filing of the Trial Bundle on the 31st of July 2019.

**[26]** The absence of legal submissions and the list of authorities was also not addressed until the 30th of September 2019 and the Court has to consider whether this delay was intentional in circumstances where it had been the unchallenged submission

of Counsel on behalf of the Defendant that Mr Kandekore had previously advised that these had not been filed as it had been his intention to make oral submissions.

**[27]** This situation was very similar to that which was before the Court in **Corey Jackson v Annmarie Phillips etal** wherein Counsel for the Applicant had failed to file the List of Documents and Listing Questionnaire in spite of a Court Order to do so. The explanations advanced were twofold namely an ignorance of the rules that this should be done as well as a belief that this wasn't necessary given that there were no documents to be disclosed. It was the view of the Court at paragraph 25 of the Judgment that '*Counsel's statement that he did not think the documents were necessary and his submission that the failure to comply with the Court's order was unintentional cannot be reconciled'* and a similar observation can be made herein. In light of the circumstances outlined above I am unable to accept Counsel's submission that the failure was unintentional.

**Is there a good explanation for the failure?**

**[28]** The affidavits of the Claimant as well as her Counsel indicate that the failure to comply with the Case Management Orders was as a result of the administrative challenges which had been experienced by Counsel. In considering this explanation, the Court is mindful of the dicta of Simmons J (as she then was) in **Corey Jackson v Annmarie Phillips** where she stated '*where delay is caused by inadvertence or administrative difficulties the general rule is that that is not a sufficient explanation*' (emphasis supplied). This position was also adopted in ***Elenard Reid*** *supra* as well as ***The Attorney General v Universal Projects Lts [2011] UKPC 37*** where Lord Dyson stated as follows:-

> *"if the explanation for the breach ...connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency". [My emphasis]*

**[29]** A closer examination of the explanation provided reveals an additional difficulty as it is lacking in specifics as to when this hard drive failure occurred and when it was remedied. In outlining the position Mr Kandekore only stated that his hard drive had crashed and a new one was purchased in October, which the Court notes was subsequent to the documents filed on behalf of the Claimant. In the absence of details, the Court is unable to determine whether this failure was before or after the date given for compliance and whether it impacted the production of documents within the specific timeframe. The situation is not improved when one considers that the order herein was filed on the 25th of March 2019 and served on the Defendant's attorneys on the 18th of July 2019 with no indication of challenges being experienced. In addition to this several documents were filed by the Claimant between the 31st of July through to the 30th of September all before the offending hard drive had been replaced.

**[30]** In treating with this requirement, consideration was also given to the question of whether the Claimant should bear the sanction of having her claim struck out due to her Attorney's 'challenges'. In examining this issue in ***Corey Jackson v Annmarie Phillips*** Simmons J stated as follows;

> *"The court does not usually distinguish between an attorney and his client. This is encapsulated in the definition of a party in rule 2.4 of the CPR as including "both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only".*

In examining the approach taken by other Court's on this issue she continued thus: -

'The position of counsel vis- a- vis his client was addressed by the court in **Hytec Information Systems v Coventry City Council(supra)**

> *"Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for*

> *the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis supplied]*

**[31]** A similar approach was adopted by Sykes J (as he then was) in ***Kristin Sullivan v Rick's Café Holdings Inc. T/A Rick's Café 2007 HCV 03502 delivered 15th April 2011*** where the action was struck out as a result of counsel's failure to file the core bundle on time. The court found that counsel's explanation that his failure to comply with the "unless' order was due to his heavy workload was not a good one. In outlining his reasons for Judgment, the learned Judge made the following observations: -

> *"The explanation of counsel and the entreaty not to visit her counsel's omissions on her client would make policing of the new rules impossible. Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief. Surely this is not the new culture being promoted by the CPR. If that were the case then [the] CPR would not be worth the paper that it is written on".*

**[32]** While the failing in these decided cases was that of the Attorney, the Courts have make it clear that the actions and omissions of Counsel will generally be attributable to his client.

**[33]** The situation which exists in the instant case is markedly different from that which obtained in ***University Hospital Board of Management v Hyacinth Matthews [2015] JMCA Civ 49*** as not only had that applicant been absent from the hearing in which the unless order was made but she had not been informed by Counsel of same or the next date for her appearance. Additionally, as soon as she was informed she attended Court arriving but a few minutes after the order had been made. It was in those circumstances that the Court upheld the decision of the lower Court to grant relief from sanctions on the basis that '*there was no evidence to suggest tardiness or lack of due diligence on the part of the respondent herself'.*

**[34]** In this matter, both the Claimant and her Attorney had been present when the unless order had been made as such they would have been fully aware of the need to comply with the timelines or suffer the consequences.

**[35]** In concluding my examination on this point, the Court takes note of the following, not only is the explanation advanced vague and/or lacking in specifics but the skeleton arguments and legal submissions could have been produced on another device and the trial bundle compiled from documents already filed at the Registry within the required timeframe. These were options which had been open to Counsel who would have been fully aware that time was running out and there was an urgent requirement to be compliant. The fact that these documents were all filed prior to the time of replacement of the hard drive in October 2019 confirms that this could have been done. In light of the foregoing reasons I am unable to accept Counsel's explanation as a good one and the application fails on this ground as well.

**Has the Applicant/Claimant generally complied with all other rules, practice directions, orders and directions?**

**[36]** In coming to a conclusion on whether there has been general compliance on the part of the Claimant, I have noted that the original case management orders had required the Claimant to file skeleton submissions and list of authorities by the 19th of February 2019 and all additional affidavits by the 18th of July 2018. On the 14th of March 2019 the date initially scheduled for trial, the Claimant had failed to comply with both of these orders as well as the requirement to file the trial bundle. The failure of the Claimant to comply with the extended orders was simply a continuation of the dilatory approach which had been taken in complying with the timelines set out in the orders made at the first hearing and not an aberration. The answer to this question would then be in the negative as the Claimant has consistently failed to act with a sense of urgency in meeting Court ordered timelines.

**CONCLUSION**

**[37]** On a review of the circumstances which exists in this matter, as well as the submissions made by Counsel on both sides, it is clear that the Claimant has failed to satisfy the requirements of Rule 26.8(1) and (2). On the authority of ***HB Ramsay et.al*** the Court does not need to go on to consider whether the provisions in 26.8(3) would apply. The Claimant has failed to act promptly and this failure has not been ameliorated in anyway by any of the other requirements outlined in 26.8(2) being met. Accordingly, it is the ruling of this Court that the Claimant's application for court orders filed on the 20th of September 2019 for relief of sanctions and other orders is refused and Judgment is entered for the Defendant herein. Costs of the claim to the Defendant to be taxed if not agreed.

**[38]** I have been handed written submissions which were filed on behalf of the Claimant this morning. These submissions had not been requested by the Court, neither had I granted permission for additional submissions to be made. Out of an abundance of caution, I have reviewed the contents of same and I am not persuaded that a different conclusion ought to be arrived at than that which has been outlined above.