[2023] **JMSC Civ. 207**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2016 HCV 00768

BETWEEN	**KAREEN DALEY**	**CLAIMANT**
A N D	**JASMINE CHIN**	**DEFENDANT**

IN CHAMBERS

No Counsel for the Claimant Appeared

Ms. Lesley Ann Stewart ins by Mayhew Law for the Defendant/Applicant

HEARD: October 25, 2023

Civil Practice & Procedure – Application for Relief from Sanction – Whether Application Made Promptly – Whether Issues of Instructions and Retainer Between Counsel and Client is to be considered as part of the question of the promptness of an Application for Relief from Sanction – Whether or not Counsel's Failure to Comply with Case Management Orders Due to Issues with their Client Shows that the Failure to Comply was Unintentional – Whether Issues of Instruction and Retainer Between Counsel and Client is a Good Explanation for Non-Compliance.

STAPLE J (Ag)

BACKGROUND

[1] The Claimant's claim is in a world of peril and her Attorneys-at-Law have launched a desperate bid to save the claim from oblivion.

[2] The Claim was filed on the 24th February 2016 and is founded in Negligence arising from an incident in which the Claimant is alleged to have fallen from the motor vehicle owned by the Defendant but operated by her servant and/or agent due to the alleged negligence of the said servant and/or agent of the Defendant.

[3] The Claim was duly served and Defended by the Defence filed on the 7th June 2016. Two years of inactivity passed until the Claimant applied to Dispense with

Mediation on the 12th September 2018. The matter was put before the Court on the 27th January 2020 and Master Hart-Hines (as she then was) refused the application and ordered the parties to proceed to mediation and complete same by the 8th May 2020.

[4] There is no record of that order being complied with by the parties and no Report of Mediator was ever filed. Eventually, thanks to the initiative of my sister Judge Orr J (Ag), the matter was revived and placed before the Court on the 26th October 2022.

[5] On that date, it was eventually revealed that the mediation had in fact taken place and Orr J (Ag) made Case Management Conference Orders. Among the orders made was that the Mediator's Report was to be filed by November 11, 2022 by the Claimant.

[6] The Pre-Trial Review was set down for the 16th March 2023. In the event, neither party fully complied with the Case Management Conference Orders and at the Pre-Trial Review, on March 16, 2023, it was adjourned to the 30th May 2023. The Defendant had filed an application for Relief from Sanction on the 10th March 2023 and this application was deferred to the 30th May 2023.

[7] The Claimant did not file an application for Relief from Sanction until March 23, 2023. On the 30th May 2023, the Court granted the Defendant's application for relief from sanction, but adjourned the Claimant's Application. The Claimant was ordered to file a supplemental affidavit in Support on or before the 16th June 2023. This was not done.

[8] When the matter came before the Court for adjourned Pre-Trial Review on the 11th October 2023, this Court granted the Claimant an extension of time to file the said Further Affidavit and adjourned the matter to the 25th October 2023.

[9] The Claimant did indeed file the Further Affidavit as ordered on the 13th October 2023. Counsel for the Defendant also confirmed that the costs order was complied with.

APPLICATIONS FOR RELIEF FROM SANCTION (THE LEGAL BASIS)

[10] To err is human. In recognition of this the drafters of the Civil Procedure Rules copied from the English Civil Procedure Rules a codification of a mechanism to allow for the divine forgiveness for error – the relief from sanctions imposed by the Rules, Orders of the Court or Practice Directions when we run afoul of those rules, orders or practice directions.

[11] Rule 26.8 sets out the mechanism for obtaining the Court's relief. The most critical aspect of this rule, for the purposes of this ruling, is the requirement under Rule 26.8(1) that applications for relief from sanctions must be made **promptly** (emphasis mine) and supported by affidavit evidence. If this initial threshold is not met, the Court is not required to and really should not proceed to examine the other conditions that are to be met for it to exercise its discretion to grant relief.

[12] That this is so, was long ago confirmed in the case of *Morris Astley v AG*[1] when Morrison JA (as he then was) stated that, "…rule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. **Once these preconditions are met** (emphasis mine) rule *26.8(2)* permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction…'

[13] The decisions of ***H.B. Ramsay & Associates Limited et al v Jamaica Redevelopment Foundation et al***[2], and Sykes J (as he then was) in the case of ***Quintin Sullivan v Ricks Café Holdings Inc T/A Ricks Café*** (No. 2)[3] give

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[1] [2012] JMCA Civ 64 at para 26 per Morrison JA (as he then was)
[2] [2013] JMCA Civ 1 per Brooks JA at para 10
[3] Unreported 2007 HCV 03502, Sykes J (as he then was)

guidance as to what is meant by prompt. Sykes J (as he then was) said that, "In assessing promptitude, the Court must consider all the circumstances of the particular case. What may be prompt in certain situations may not be so in others and vice versa."

[14] The Court also examined the more recent decisions of ***Meeks v Meeks***[4] and ***Deputy Supt. John Morris et al v AG of Jamaica et al***[5]. Again, at paragraph 67 of the Judgment of the Court in the *John Morris* appeal, P. Williams JA had this to say,

> ***"It is accepted that what amounts to promptness significantly depends upon the circumstances of the particular case (see*** *Meeks v Meeks****). In this case, I find that the question of promptness was relative to the time the breach had taken place with the consequential sanction taking effect"***

[15] So while there may be some flexibility in the approach, the time from which one counts will generally be from the time the breach occurs. There may be cases when the time counts from the date the breach came to the attention of the offending party. But I find that in this case, the time would run from the date of breach.

[16] I am prepared to apply this time in this case as there was clear knowledge on the part of Counsel for the Claimant that breaches had consequences and one should seek time to remedy them. This is evident from their application filed on the 23rd March 2023.

Was the Application for Relief from Sanction Made Promptly in this Case?

[17] It is my finding that time would start to run from the date of breach of the Case Management Orders. In the case of the List of Documents, time would have started

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[4] [2020] JMCA Civ 7
[5] [2023] JMCA Civ 45

to run from the 12th November 2022 and in the case of the Witness Statement, time started to run from the 14th January 2023.

[18] The context to this is a situation where the parties were already far behind the time for the disposition of the matter and there had been considerable delays in the prosecution of the Claim. But for the Court's own initiative in bringing the matter back, it would have likely continued to languish. So both parties were already under a tremendous amount of time pressure to ready themselves for trial. That much is also evident from the short timelines imposed by the learned Judge at case management.

[19] In an Affidavit by Mr. Nicholas Ranger sworn on the 28th February 2023 and filed on the 23rd March 2023, in support of the Application initially filed on the 23rd March 2023, he deponed as follows (among other things):

> 4. Unfortunately, those said orders were not complied with in time to meet the deadline ordered by the Court and were complied with on the 23rd March 2023 due to a clerical/administrative oversight.
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> 5. The Applicant has a good explanation for his failure to comply with the said orders. In that the member of staff tasked with the responsibility of ensuring the orders were complied with, failed to act within the Court's deadline. However, since then the relevant documents have been filed and served and the member of staff responsible for the delay was subsequently dismissed.

[20] Clearly, that was a grossly insufficient affidavit to support an application for relief from Sanction. Bearing that in mind, it was small wonder then why my learned sister, on the 30th May 2023, granted the Claimant time to put in a supplemental affidavit. Yet there was still no compliance with this Order of the 30th May 2023.

[21] The Further Affidavit filed on the 13th October 2023, in compliance with the Order of this Court, highlighted the following:

(1) There seemed to have been a breakdown in the lawyer/client relationship between the Claimant and her lawyers.

(2) There was a concern on the part of counsel for the Claimant about the whereabouts of the Claimant and whether she was desirous of proceeding with the Claim.
(3) The paralegal was still being blamed.
(4) Eventually (date unknown) contact was made with the Claimant and the relationship between lawyer and client was mended (date unknown).

[22] To the Court's mind none of this indicates any promptness in the time for making the Application for Relief from Sanction and does not, respectfully, adequately, explain the delay in the filing of the application for Relief from Sanction.

[23] The missing dates are fatal. The Court does not know when exactly this relationship between the Claimant and her lawyers was mended so that they would be in a position to comply. Hypothetically, if it was mended in February 2023, why wasn't the Application filed then? Interestingly, in his Affidavit filed on March 23, 2023, Mr. Ranger did not depone to any issues with the Claimant as being a reason for the failure to comply. Clearly this issue must have been known to him at the time of swearing the first Affidavit on the 28th February 2023, yet it is not alluded to as a reason for the non-filing of the Application for Relief sooner after the breach.

[24] What is also curious is that Mr. Ranger swore the Affidavit in Support on the 28th February 2023. Why then was the **Application** (emphasis mine) not filed until nearly a month later? A clue may be obtained from the 2nd Affidavit of Mr. Ranger filed on the 13th October 2023 as there seems to have been, from that Affidavit, some confusion and miscommunication as to what Counsel for the Claimant wanted to do in relation to the conduct of the claim. This is a matter for them internally.

[25] Applications for Relief (whether relief from sanction, setting aside default judgment, setting aside orders or judgments made in the absence of a party etc) require a level of alacrity in their execution, especially when one is dealing with a tight timeline. The two affidavits together, in my view, do not demonstrate that the Application was made with any promptness.

[26] In the decision of *Deputy Supt John Morris*, the Court of Appeal found as follows[6]:

> ***"On 10 July 2020, the court ordered that the witness statements were to be filed and served on or before 8 January 2021. The sanction took effect on that date. The respondents did not file and serve the statements until 17 September 2021. The application for relief from sanction was made on 2 December 2021, only after they had been served with the appellants' application that the statements be struck out. It bears repeating that it was a significant admission by Miss Campbell that "the application [was] being made at this stage as [the respondents] are now aware that the [appellants] are unwilling to settle the matter". The respondents were not purporting to say that they were unaware of the fact that they were in breach of the court's order. They accepted that the witness statements had been filed late, they, however, did not accept the need to apply for relief from sanction for so doing, until three months later, when it was clear that the settlement they were anticipating would not be realised. In these circumstances, although the application can be viewed as having been made promptly in response to the application to strike out, to my mind, there was an inordinate delay in relation to when the breach had occurred. Thus, I find that the application for relief from sanction was not made promptly."***

[27] In the circumstances, I am satisfied in my ruling that the application for relief from sanction, could not be said to be anything other than late.

If the Court is Wrong on Promptness – What of the Fulfilments of the Conditions Under 26.8(2)?

[28] If it is that I am found to have been wrong in my view that the near 2 month delay in applying for relief from sanction in the circumstances of this case was not prompt, then I would give my views on whether the conditions required under 26.8(2) were met. As Dunbar-Green JA (Ag) (as she then was) said in the case of

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[6] N5 (supra) at para 67 per P. Williams JA

National Workers Union v Shirley Cooper[7], the requirements are cumulative. That means all of the conditions must be satisfied before relief can be granted.

Was the Failure to Comply Intentional?

[29] It would be hard for the Court to say that the failure to comply was intentional. There seemed to be, from the Affidavit of Mr. Ranger filed on the 13th October 2023, that there were issues of client/lawyer relationship breakdown and miscommunication with the Client and internally in counsel's chambers.

[30] So whilst I did comment about the absence of those complaints from his Affidavit sworn on the 28th February 2023, I am prepared to accept as true that there were these internal issues which gave rise to the failure to comply with the Orders of the Court in the time stipulated and that the failure was not deliberate.

Is there, however, a good explanation for the failure?

[31] This is a separate issue. Despite the fact that the reasons proffered for the non-compliance reveal that the non-compliance was not intentional, it does not mean that it provides a good explanation.

[32] In this Court's view, the reasons advanced by the Claimant are not a good reason for the failure to comply. What it reveals is a rather unfortunate breakdown in lawyer/client communication and internal mismanagement at Counsel's office. As Dunbar-Green JA (Ag) (as she then was) said in the ***National Workers Union*** case above[8], "As sympathetic as this court might be to the argument that clients should have some cover from the consequences of inappropriate conduct by counsel, ***Hytec Systems Ltd v Coventry City Council*** has made it plain that there will be no blanket absolution."

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[7] [2020] JMCA Civ 62 at para 70
[8] Id at para 75

[33] In this Court's view, there was no evidence from Counsel as to their sufficient efforts to contact the Claimant prior to the dates for compliance with the Case Management orders. There were no letters exhibited, no call log sheets noted, no dates on which calls were made to the Claimant and what transpired. In light of this, the Court is unable to say that sufficient efforts to contact the Claimant were made by her counsel. Neither do we have any affidavit from the Claimant herself explaining her side of the story.

[34] There is also the issue that in the earlier Affidavit of Mr. Ranger, no issue was taken with the communication with the Claimant. The entire blame was placed on a member of staff who was then dismissed. Surely, if there was a genuine issue with the communication with the Claimant to get her instructions to prepare a witness statement, this would have been foremost in his thoughts and reasons for the delay.

Has there been general compliance with the Court Orders?

[35] Even in this regard, the Court is constrained to say that the Claimant has been most dilatory in her conduct of the case. To date, the mediator's report has not been filed as ordered by Orr J (Ag) on the 26th October 2022. There was no compliance with any of the Case Management Orders in the time allotted. There was no compliance with the Order of the Court at the adjourned Pre-Trial Review on the 30th May 2023 for the filing of the further Affidavit by the 16th June 2023. Finally, no counsel appeared at today's hearing on behalf of the Claimant despite the Court diligently waiting for the entire 40 minutes for which this hearing was scheduled and contacting the chambers for the Claimant's counsel.

[36] Such poor conducting of the proceedings by the Claimant does not demonstrate a general compliance with the Court Orders. It shows rather the opposite, that there is a general disregard for Court Orders and rules and the basic decency of appearing before the Court as counsel.

[37] In the circumstances, this condition under rule 26.8(2)(c) was not met either.

CONCLUSION

[38] The Defendant has failed to demonstrate that they acted with any promptitude in applying for relief from sanction. Since they have failed to mee the threshold test set out in rule 26.8(1)(a), the application for Relief from Sanction wholly fails.

DISPOSITION (Of the Application – Other Pre-Trial Review Orders were made)

1 **The Application for Relief from Sanction filed on the 23rd March 2023 is refused as well as all relief sought in the Application filed on the 13th October 2023.**

2 **Costs on both Applications to be the Defendant's in any event.**

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Dale Staple
Puisne Judge (Ag)