

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 1994/D130

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| BETWEEN | ALEXANDER DRYSDALE | 1 ST CLAIMANT |
| AND | WINSTON CLARKE | 2 ND CLAIMANT |
| AND | HERMAN FARQUHARSON | 1 ST DEFENDANT |
| AND | ENRICH GILMORE ALEXANDER GREEN (Executors of the Estate of Phillip Powell, Deceased) | 2 ND DEFENDANT |

Mrs. Denise Kitson instructed by Grant, Stewart & Phillips for the Claimants

Mr. Sheldon Codner instructed by Lightbourne & Hamilton for the Defendants

Heard: April 4 and 16, 2008

Application for Relief from Sanctions. Part 26.8 Civil Procedure Rules

Straw J.

The claimants/applicants in this matter are seeking an order, *inter alia*, for specific performance of an Agreement of Sale entered into with one Phillip Powell on July 15, 1982. Mr. Powell died May 12, 1984.

They sought to purchase one acre of 19 Norbrook Drive, Kingston. The deposit was paid as required by the said agreement. The defendants were the executors of Mr. Powell's estate. It would appear that both executors are now deceased and by way of Notice of Application filed on January 26, 2008, the claimants obtained an order on February 4, 2008

appointing Mr. Enrico Powell and Mr. Sean Alistair Powell as the personal representatives of the deceased, for the purpose of the proceedings.

By that date, however, the claimants' case had been struck out as a result of the following order by Campbell J on November 7, 2007:

1. Time for compliance with the case management conference orders extended to January 15, 2008 failing which the case of the defaulting party stands stuck out.

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This is an application by the claimants for relief from these sanctions pursuant to Part 26.8 of the Civil Procedure Rules (CPR).

Needless to say, they had failed to comply with any of the case management orders by the relevant date.

Relevant Provisions of the Civil Procedure Rules

Rules 26.8 (1) of the CPR sets out the provisions in relation to an application for relief.

26.8(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.

This is the first hurdle the applicant must surmount.

The sanction would have come into effect on January 15, 2008 as a result of the order made by Campbell J. At that time, the pre-trial review date was set for January 24, 2008.

On January 24, 2008, both parties attended before King J. The minute sheet reflects that, as neither party had complied with all case management orders by January 15, 2008, the statements of cases were struck out as of that date.

The application by the claimant for relief from sanctions was filed on January 25, 2008. It was accompanied by an affidavit of Mr. Kevin Williams.

The claimants have therefore successfully mounted the first hurdle. However, there are other conditions to be satisfied.

Section 26.8 (2) and (3) lists conditions to be considered by the court in order to determine whether there should be any relief.

- (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 interest of the administration or 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.

In considering this application, therefore, the court would have to be satisfied in relation to the conditions listed under subsection (2). This is, however, to be considered while taking into account the issues numbered in subsection (3).

I agree with my brother, Sykes J, in his analysis of this section in SCCA CL F 045/94 **Findlay vs. Francis** (unreported) delivered on January 28, 2005 which was cited by counsel for the applicant. Sykes J was of the opinion that paragraph (3) was not exhaustive of the matters to be taken into account, but included Rule 1.1(2) which describes the overriding objective of the court to deal with matters justly. He concluded that the court must have regard to any other relevant consideration which would facilitate the overriding objective.

Counsel for the applicant also cited the case of **Gallaher International Ltd. v Tlais Enterprises Ltd.** [2007] EWHC 527. The court considered Rule 3.9 CPR (UK) which is the English equivalent to our rule. The (UK) rule contains all the factors listed in our rules.

Aikins J noted as follows (at para. 60):

“Having considered each of the separate paragraphs under CPR 3.9 (1), I have to stand back and take an overall view to see whether it is in accordance with the overriding objective in the CPR to lift the sanction.”

This is the overall approach which this court intends to take.

Application to Case

The factors under Rule 26.8(3) will now be considered:

1. The Interests of the Administration of Justice

It is in the interest of the administration of justice that the orders of the court be carried out, that where unless orders are made, parties must realize the importance of complying with the orders. The court must also manage efficiently the use of its resources.

This is the second time that case management orders were not complied with by the claimants. Case management conference orders were first made on February 22, 2005. At the time, the trial date was fixed for the 18th – 20th February 2008. Pre-trial review was set for October 31, 2007 before Campbell J. The court adjourned the review to November 7, 2007 and, on that date, extended the time for compliance to January 15, 2008, failing which the case of the defaulting party would be struck out. By that time, both parties had only filed their respective list of documents.

On the face of it, it would appear that the claimants have failed to make proper use of the court's limited resources. However, a proper analysis under this head will only be appropriate after all the relevant factors have been examined. It is also of some importance to note that at the pre-trial review, the attorney for the defendants advised that both defendants were deceased and they (the attorneys) had no information whether there was someone to act in their stead. The claimants filed applications on February 4, 2008 and February 19, 2008 in relation to the appointment of and service on the beneficiaries as personal representatives for the purpose of the proceedings.

2. Whether the failure to comply was due to the party or that party's Attorney-at-law

The affidavit of Mr. Kevin Williams was submitted on behalf of the applicants. He states that on February 22 2005, at the first case management conference, an order was made for the admissibility of the affidavit of Perciss Elaine Powell (apparently the sole witness for the defendants up to the time) to be

determined on July 26, 2005. Skeletal arguments and authorities in respect of that hearing were to be submitted by July 19, 2005.

This hearing took place on 26th July and 17th August 2005 before Reid J. The ruling of the court was not delivered until October 2007.

Counsel for the claimants has stated that this was the reason for the initial non-compliance with the first case management conference orders.

They were of the view that, if substantial portions of Ms. Powell's affidavit were ruled to be inadmissible, judgment ought to be entered for the claimants. It would appear, therefore, that the initial delay between 2005-2007 was based on the perception of the claimant's attorneys relative to the trial of the matter.

Counsel for the defendants have submitted that although judgment had been obtained in favour of the claimants on that issue, the stance taken by the claimants were erroneous or at the least premature as there was no reference to the claimants obtaining judgment and at all material times the CMC orders were to be complied with. At any rate on November 7, 2007, the defendants indicated that they would be obtaining a witness statement from Sonia Jones. The case management order number three states that 'the defendant is to produce a statement of Sonia Jones and/or relevant documentary evidence to support their defence on or before January 15, 2008, failing which their statement of case shall stand stuck out.'

In relation to the failure to comply after the Pre-trial Review in November 2007 and before February 15, 2008, the affidavit of Mr. Williams reveals that

he met with the applicant (first claimant) immediately after November 7, 2007. He received certain instructions and commenced preparation of the statement. However, certain confirmatory details were needed from the Commissioner Land Surveyor.

Mr. Williams states that the first claimant informed him in the last week of the term in December 2007 that contact had been made (with the land surveyor) but that it was not sure whether papers relating to the matter still existed as the work had been done over 25 years ago.

Mr. Williams further states that in the week of January 6, 2008, he received further instructions from the claimant which allowed for the completion of the statement. That the statement was duly completed and awaited execution but the first claimant/applicant became ill and was admitted to hospital until January 16, 2008 when he was sent home on bed rest for two weeks. That this is the explanation for the failure to meet the deadline of January 15, 2008. The affidavit of the first claimant/applicant supports the evidence of Mr. Williams on these issues.

Counsel for the defendants has submitted that this is not a genuine or satisfactory reason for the delay, as nothing precluded the claimants from exercising the option under Rule 29.6 which provides for a witness summary to be submitted if the party is unable to provide a witness statement.

The court is of the view that there is some cogency to this submission. Having received an unless order, one would have expected strenuous efforts on the part of Counsel for the applicant to effect full compliance.

The reasons advanced reflect an element of carelessness and lack of due regard for the administration of justice. However, I am satisfied that there was no intentional default.

In considering whether there is a good explanation for the failure, I balance the reasons submitted by Counsel for the claimants (which are less than compelling) with the history of the matter.

Although I agree with Counsel for the defendant that the arguments put forward for the failure since 2005 to comply were ill-formed, it is clear that there was a live issue concerning the ability of the defendants to mount a defence through the affidavit of Perciss Powell. Counsel for the claimants/applicants was vigorously pursuing the determination of this matter.

It is unfortunate that the judgment of Reid J. was not handed down until October 2007. Campbell J's order in relation to the filing of statement of defence witness, Sonia Jones, is suggestive of the fact that the defence may not have been standing on all four legs at this time and adds some slight support to the reasons advanced by the applicant.

3. Whether the failure to comply has been or can be remedied within a reasonable time

The witness statement is prepared and can be filed immediately. The court notes that the other case management orders relate to the filing of the listing questionnaires, agreement re expert reports or separate expert

reports to be filed. There is no evidence that these have been complied with. However, the court could order that these be effected on a timely basis.

4. Whether the trial date or any likely trial date can still be met if relief is granted

The trial date was vacated. A new trial date will have to be set if the application is granted. This is not a desirable course of action in light of the limited resources of the court. However, this factor would have to be balanced against the overriding objective of the CPR to deal with cases justly. The court notes that the claimants had been pursuing this matter. Two trial dates were previously set.

The matter came up for trial on the February 15, 2001. This trial date was vacated. Counsel for the claimants submitted that it was vacated on the joint request of the parties due to medical reasons which caused Counsel for the defendants to be off the island.

The second trial date was set for June 2002. This was also vacated. Again, Counsel for the claimants states that the first claimant was present, the defendants were absent and by agreement, the trial was adjourned for a date to be fixed by the Registrar as the defendants were not well or available.

Neither of these reasons advanced were disputed by Counsel for the defendants. The case management conference was then set for February 22, 2005. At that time, the first set of orders were made.

It would appear that the claimants had been in general compliance with all other directions and rules up to the first case management conference date.

Between 2005 and 2007, they pursued an application in relation to the

admissibility of various paragraphs in the affidavit of defence witness,

Perciss Powell.

Between January and February 2008, they pursued applications in relation to the appointment of personal representatives. The court is satisfied that they complied with all other relevant rules and directions after the unless order was made.

5. The effect which the granting of relief or not would have on each party

If the relief were not granted, the claimants would lose their right to pursue a claim for specific performance of an Agreement for Sale affected in 1983. They paid a deposit towards the purchase of the land and apparently expended other money in relation to subdivision approval etc.

The court also bears in mind that the value of the said land today would be in excess of its value in 1983.

If the relief were granted, the defendants would have to face a trial at some future date and continue to incur legal costs. Although no representation has been made to this effect, the court has to take judicial notice of the death of Sonia Jones, the potential defence witness named in the case management orders of Campbell J. She died after the order was made.

The court, however, notes that the order spoke to the filing of the witness statement of Sonia Jones and/or relevant documentary evidence. The deceased witness Sonia Jones is mentioned in the exhibited witness statement of the first claimant, Mr. Drysdale, as one of the attorneys-at-law that represented both the vendor and the purchasers in the transaction. One would expect that

any relevant documentation would still exist. At any rate, the defendants have not advanced any evidence before this court as to any potential prejudice that they may face in the future.

The court weighs all the above circumstances, including the fact that there was a delay in a judgment by the court between 2005 – 2007 which, in the opinion of this court, contributed to the careless behaviour on the part of the claimants' attorneys-at-law.

The court therefore concludes that it is:

- 1 In accordance with the overriding objectives of the CPR to grant relief from the sanction ordered for failure to comply with the unless order imposed by Campbell J.

The relief is, however, on the following conditions:

1. In the interests of justice, the court will also grant relief to the defendants from sanctions.
2. The claimants must pay the costs of the application for relief from sanctions on behalf of the defendants.
3. The trial date is set for February 23, 2009.
4. All case management orders are now to be complied with on or before June 16, 2008
Defendants to respond to notice to produce filed on June 14, 2008 on or before June 16, 2008.
5. Pre-trial Review date is now set for October 2, 2008 at 11:00 a.m. for two hours.

6. Claimants' attorney-at-law is to draft, file and serve above-mentioned orders.