IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO E-013 OF 2000

BETWEEN	EVANSCOURT ESTATE COMPANY LIMITED (By Original Action)	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED (By Original Action)	DEFENDANT

AND

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	CLAIMANT
AND	EVANSCOURT ESTATE COMPANY LIMITED	1st DEFENDANT
AND	DESIGN MATRIX LIMITED (By way of Counterclaim and Set Off)	2nd DEFENDANT

Paul Beswick instructed by Beswick and Ballentyne for the Claimant in the original action and for the 1st Defendant in the second action

Sandra Minott Phillips instructed by Myers Fletcher and Gordon for the Defendant in the original action and for the Claimant in the second action

Charles Piper for the 2nd Defendant by way of Counterclaim and Set Off.

HEARD: October 26, and November 1, 2007

REASONS FOR DECISION

JONES J:

[1] On November 1, 2007, I refused leave to appeal the cost sanction orders in this case. I promised to put my reasons in writing; I now do so. By Amended Notice of Application for Court Orders dated October 23, 2007, the Claimant in this matter has applied for leave to appeal the cost sanction imposed by this court on September 25, 2007. The Claimant has also asked that the Defendant in the original action be ordered to withdraw the formal order filed on September 25, 2007, and amend it to read "Trial adjourned to May 18th 2009, for five days". The six grounds on which the Claimant relies are set out hereunder:

i) The order of the court in relation to cost is excessive and unreasonable having regard to the guidance provided by Part 65 of the Civil Procedure Rules 2002 in relation to trials in open court.

ii) That the order of the court is unreasonable having regard to the current acceptance endorsed by Practice Directions that cost are to be paid for time actually spent in Court and are not to be granted merely on the basis of entire days because of an appearance in court for a limited period.

iii) That the order of the court amounts to a penal sanction imposed by the court which is excessive and unwarranted in the circumstances of the case and is likely to prevent the Claimant from proceeding with an action which it has a good chance of success.

iv) That the time period within which the order for payment has been made is unreasonably short and is in effect a deprivation of the Claimant's rights to proceed with the action as by demanding the payment of an amount so excessive in such a short period of time, the Court is almost guaranteeing that the action will not proceed

to trial.

v) That counsel appearing for the Claimant did not make an application for leave to appeal at the time the order was made because he was stunned by the magnitude of the order and was unable to collect his thoughts sufficiently to make the application.

vi) That counsel appearing for the Claimant made no application for adjournment on the Claimant's behalf and Order (i) described in the order filed by the Defendant by original action is irregular and does not represent the basis on which the trial of the action was adjourned.

[2] The order filed by the Defendant in the original action and signed by me on September 25, 2007, correctly represents the order of the court. It is set out hereunder:

i) On the Claimant's application the trial is adjourned to May 18, 2009, for five days.

ii) Cost to National Commercial Bank Jamaica Limited in the sum of $180,000.00 (being $60,000.00 per day for three days with certificate for (2) two counsel)

iii) Cost to Design Matrix Limited in the sum of $120,000.00 (being $40,000.00 per day for three days (3)).

iv) The said cost to be paid by the Claimant by 25th October, 2007, failing which the Claimant's Statement of Case is struck out.

v) National Commercial Bank Jamaica Limited's Attorneys at Law to file and serve this Order.

Was the Formal Order setting out the Cost Sanction Irregular?

[3] In the affidavit of Terrence Ballentyne sworn to on October 23, 2007, he sets out the basis for the ground contained in (vi) above. It states as follows:

> (3)"...I have perused the Order filed by Messrs Myers Fletcher and Gordon and have discovered that the order is irregular as it claims that the matter was adjourned on the claimant's application when in fact I made no such application to the court.
>
> (4)That the Defendant by original action and the 2nd Defendant through their representatives advised the court that it was their view that the action could not continue because the bundle of agreed documents had not been completed. That I agreed that there would be a difficulty in proceeding without the bundle but at no time did I make any application for adjournment and the action was not adjourned because of an application for an adjournment made by me.
>
> (5)That in fact, at one stage during the application for cost made by the Defendant by the original action and the 2nd Defendant, the court enquired of me whether I would consent to the proposed order and I declined to offer such consent, whereupon the court made to the order for cost."

[4] Mr Ballentyne's affidavit is incomplete. He agrees that there was a difficulty in proceeding in the absence of the bundles. The sole responsibility for the provision of the bundles was on the Claimant not on the Defendants. What he has not said is that the court was ready, willing and in a position to proceed with the trial on both September 24, and 25, 2007, at 10:00 am. What he has not said is that the court told the parties in open court that it would not adjourn the case. What he has not said is that on September 25, 2007, the court instructed him to begin the Claimant's case. Mr. Ballentyne then informed the court that he was not in a position to do so in the absence of the bundles. The court enquired of Mr. Ballentyne as to when he would be in a position to complete the bundles and open his case. He told the court that the earliest would be Thursday, September 27, 2007, some four days later in a matter set for five days. Counsel for the Defendant in the original action and the 2nd Defendant made it clear that the

Claimant's non-compliance compromised the trial and it could not be completed in two days even if they agreed all the documents. They both insisted on cost from the Claimant for the adjournment. Mr. Ballentyne was not in a position to insist of proceeding with the Claimant's case.

[5] The default by the Claimant was sufficiently serious to warrant striking out the Claimant's Statement of Case. However, in lieu of striking out the matter and giving judgment to the Defendant on the original action and the 2nd Defendant on the counterclaim, the court enquired of Mr. Ballentyne whether he was prepared to pay cost for the failure to comply with the pre-trial orders and of the resulting adjournment. He told the court that having regard to the situation in which he found himself, he was not in a position to resist an application for cost against him. This is consistent with the position taken in Mr. Ballentyne's first affidavit sworn to on October 16, 2007, where his complaint there is not about the award of cost against him, but that it was unreasonable and excessive.

[6] From the exchange in court which I have cited and Mr Ballentyne's concession to pay cost demanded by the Defendant in the original action and the 2nd Defendant, it is clear that Mr Ballentyne was the person requesting the adjournment. An application for an adjournment in court can be expressed, implied or by conduct. There is no requirement for a special form of words to be used. When you see it you know it. As the old saying goes, if it walks like a duck, talks like a duck, looks like a duck, it is a duck.

[7] In this case, the Claimant was in breach of the court's orders which rendered the trial date obsolete and was the only beneficiary of the adjournment given as the alternative was a judgment against them. The parties were sent to obtain a date from the Registrar of the

Supreme Court and attend on the judge in chambers for a summary assessment of cost.

[8] As a result of the background given above, the court took the view that the Minutes of Order signed on September 25, 2007, did not fully describe what transpired in court as it did not designate responsibility for the adjournment by omitting "On the Claimant's application" before the words "Matter adjourned". This defect was corrected hours later on the same day when the Formal Order was prepared and sent by the Defendant in the original action for signature, sealing and filing. **Rule 42.10 (1) CPR 2002** gives the court the authority to make corrections. It provides that:

> "The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission".

[9] In any event, a judgment or order can be changed before it is final and sealed. In **Bird v Fernsby [2004] WTLR 257** the trial judge gave a draft judgment where he awarded the Claimant £60,000. Counsel for the Defendant wrote to the judge contending that the draft judgment failed to address the two stage test required under the Act, following which the judge withdrew the draft and invited further submissions from counsel. He thereafter issued a second draft judgment, and an ultimately handed down judgment dismissing the claim.

[10]The Claimant appealed on the ground, inter alia, that the judge had made a serious procedural error by withdrawing the draft first judgment and substituting for it a judgment which produced a different result. The Claimant contended that (1) the judge should have done so only in exceptional circumstances (which did not exist) and/or that he should have asked only for requests for further clarification of his reasoning, and (2) that he should not have handed down his judgment in its altered form without giving the Claimant the opportunity to make

further submissions.

[11]It was held on appeal that the judge did not make a serious procedural error. The judge had an obligation to alter his first draft if he decided it was wrong (even though that decision was prompted by counsel's letter). The court said that it would be contrary to the judge's judicial oath not to do so. They said that the judge must retain the ability to recall a draft order until it was sealed. He had the jurisdiction to alter the draft and circumstances existed in which he could do so. They also said that the judge was not wrong, as a matter of judicial procedure, not to invite further oral submissions on behalf of the Claimant. The appeal was dismissed.

Was the Cost Sanction imposed by the Court unreasonable in the circumstances?

[12]The cost sanction imposed by the court was for the failure of the Claimant to comply with pre-trial orders, which resulted in the adjournment of the case set for trial over five days. The trial date was set for September 24, 2007, for five days. On September 24, 2007, Mr. Beswick lead counsel for the Claimant appeared and informed the court that he was having a difficulty with the preparation of the bundles and requested that the matter be adjourned until the following day to complete the preparations. He assured the court that he would be ready by the following day. Contrary to the protestations in the affidavit of Mr. Ballentyne who appeared the following day in place of Mr. Beswick, the matter could not be proceeded with again as the preparations of the bundles were incomplete. What is clear is that the Claimant had the responsibility for filing the core bundle prior to the trial date to ensure that the trial judge can read the papers in advance of the trial. The pre-trial orders which are relevant are set out hereunder:

i) Claimant's Attorney to file Core Bundle of documents by September 7, 2007.

ii) Claimant's Attorney to file agreed bundle of documents by August 31, 2007

[13] In addition, the Claimant failed to file its list of documents up to the date of the pre-trial review and was given an extension until September 17, 2007, to do so. In the end, and as a result of the Claimant's cavalier attitude towards the case management orders, the trial could not proceed as scheduled. The court insisted that it was not prepared to adjourn the case. Mr. Ballentyne made it clear to the court that he was unable to proceed and could not resist an order for cost in light of the Claimant's failure to comply with the pre-trial orders regarding the preparation of the bundles for trial. The court invited the parties into chambers to make representations in respect to a summary assessment of cost under **Part 65.9 of the CPR 2002**. The parties were invited to make submissions in respect to cost. Mr. Ballentyne for the Claimant declined to make any submissions. He, however, challenged counsel for National Commercial Bank, Mrs. Minott-Phillips as to whether she could properly submit rates for senior counsel and also whether cost awarded should be for two counsel. Counsel for National Commercial Bank and Design Matrix Limited made submissions in relation to the complexity of the issues in the case, and the time spent preparing for and attending the hearing. The court considered the application and the submission by all concerned including the reservations of Mr Ballentyne, and made orders that it considered to be reasonable given the breaches by the Claimant and the circumstances of the Defendants.

[14]The new Civil Procedure Rules 2002 have given courts certain coercive powers to ensure compliance with its case management orders. **Rule 26.3 (1) (a)** provides for the ultimate sanction of striking out a party's Statement of Case where the case management directions and orders are not complied with. In **UCB Corporate Services Limited v Halifax (SW) Limited 1999 CPLR 691** the court took the view that striking out a party's statement of case

should be reserved for the most serious, or repeated breaches or defaults. In less serious cases of default the court may be prepared to look a sanction that "fits the crime".

[15]In order to ensure that trial dates are not lost with the resultant backlog of cases, courts have now taken an uncompromising position on breaches or defaults which prejudices the timely hearing of cases. These are considered amongst the more serious of the defaults. In **Biguzzi v Rank Leisure plc [1999] 1 WLR 1926** Lord Woolf in dealing with the provisions of the English CPR at page 1932 said:

> "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under CPR Rule 3.4...Under CPR Rule 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. Under the court's duty to manage cases, delays such as has occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises its powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant. There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened to the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates..."

[16]In this case, the court adopting the views of Lord Woolf in **Biguzzi**, took the view that the

non-compliance with the pre-trial orders of the court by the Claimant, which resulted in an adjournment of the case listed for five days was sufficiently serious to warrant the striking out of the Claimant's Statement of Case. However, in applying the overriding objective of dealing with the case justly, the court took the view that an alternative sanction involving cost would be sufficient to bring home the seriousness of the matter to the Claimant. Accordingly, a cost sanction involving compensation for a portion of the Defendants' time in preparing for the case and time set aside was summarily assessed after inviting submissions.

[17]In **Parnall v Hurst [2003] WTLR 997** a cost sanction was applied as an alternative to striking out the Statement of Case. The Defendants made an application to the court to strike out the claim as a result of breaches of the rules and practice directions. The Claimant on the other hand sought relief from sanctions. The breach was in relation to the rule requiring the Claimant to serve his evidence with the claim form. The court held that the Claimant should pay the Defendants' cost from the start of the case to the date of the publication of the judgment in any event.

[18]The sting in the tail, in this case, was the condition added to the cost sanction which provided that the cost was to be paid by October 25, 2007, with the consequence of failure to comply being the striking out of the Claimant's Statement of Case: see **CPR 2002 Part 26.1 (3) (a) and (b).** As Lord Woolf said in **Biguzzi**, the Claimant's attorney has now to explain to his client the reason for the cost order against him, which should result in bringing home to them the consequences of default. Sadly, though, the Claimant's attorney in this application has chosen to engage in unnecessary brinkmanship in response to the cost sanctions imposed by the court. They have failed to comply with the cost sanction ordered by the court; failed to apply to have the order revoked, varied, time for compliance extended or even to seek relief

from sanctions.

[19] **Rule 26.7 (2)** provides that:

> "where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction..."

[20] As it is, the Claimant's Statement of Case stands struck out until such time as it has been relieved on his application. In **Marcan Shipping (London) Limited v George Kefalas [2007] EWCA Civ 463** Lord Justice Moore-Bick speaking about the effect of non compliance with an unless order made it clear that:

> "The scheme of the Rules relating to conditional orders is in my view both clear and salutary in its effect, namely, that such orders mean what they say, that the consequences of non-compliance take effect in accordance with the terms of the order, but that the court has ample power to do justice under rule 3.8 on the application of the party in default, or, in an exceptional case, acting on its own initiative"

[21] The Claimant and their attorney must now come face to face with the results of their choice. It appears that they have staked everything on a long-odds bet that they didn't need to make. In the exercise of its undoubted discretion to sanction the Claimant for its failure to comply with the pre-trial orders made by Justice Christine McDonald (Ag.) (as she then was) on July 17, 2006, this court imposed the cost sanctions outlined above. The application for leave to appeal has no prospect of success.