[2015] JMSC Civ 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV04442

BETWEEN	**CHARLES VERNON FRANCIS**	**Claimant**
AND	**COLUMBUS COMMUNICATIONS JAMAICA LIMITED (trading as FLOW)**	**First Defendant**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**Second Defendant**

Richard R Reitzin instructed by Messrs Reitzin & Hernandez for the Claimant/Respondent

Arlene Williams and Munroe Wisdom instructed by Nunes, Scholefield, DeLeon & Co for the First Defendant

Tana'ania Small Davis and Joshua Sherman instructed by Livingston, Alexander & Levy for the Second Defendant

Case Management Orders – Failure to file Witness Statements on time – Relief from Sanctions – Whether a good explanation given for failure – CPR 29.11 & 26.8

Heard: July 16, 2015, August 18, 2015

Cor: Rattray, J.

[1] The Claimant Charles Vernon Francis, an employee of the First Defendant, Columbus Communications Jamaica Limited (t/a Flow) was on the 28th August, 2007 exposed to massive electric shock while attempting to run steel wire and cable between certain utility poles under the control of the Jamaica Public Service Company Ltd (JPS).

He sustained severe personal injuries and instituted legal proceedings against both Flow and the JPS.

[2] At the Case Management Conference held on the 30th July 2014, orders were made for the parties inter alia to file and exchange Witness Statements on or before the 9th May, 2015. A trial date was set for the 16th November, 2015 for ten (10) days, and a Pre-Trial Review hearing fixed for the 16th July, 2015.

[3] On the 26th May, 2015, the Second Defendant filed a Notice of Application for Court Orders seeking Orders for the grant of relief from sanctions for its failure to file its Witness Statements on or before the 9th May 2015 and for an extension of time to file those Statements. In the Affidavit of David Fleming, the Legal Officer of the Second Defendant sworn to on the 21st day of May, 2015 and filed five (5) days later, Mr Fleming advised that the Company was unable to file its Witness Statement within the prescribed time, but would be able to do so by the 8th June, 2015. He viewed the period of delay as neither protracted nor inordinate in the circumstances.

[4] Mr Fleming went on to state that the failure of the JPS to file its Witness Statements was not intentional as "its intended witnesses are currently travelling outside the parish as well as the island for an extended period of time due to work related commitments." He further stated that "as soon as the intended witnesses are available, the Second Defendant's Attorneys-at-Law will be instructed so that the Witness Statements can be filed." A Witness Statement of Tex Knight on behalf of the Second Defendant was in fact filed on the 16th July, 2015.

[5] Further, Mr Fleming in his Affidavit stated that the Company has generally been compliant with all the other Orders of the Court. He therefore believed that the Claimant would suffer no prejudice if the Witness Statement filed on behalf of the Second Defendant, although filed late, is allowed to stand. If however the Claimant were to be prejudiced by the late filing he suggested that compensation by way of an Order for costs would be sufficient.

[6] In any event, he contended in his Affidavit that the late filing of the Witness Statement would not affect the trial date set for the 16th to 27th November, 2015. On the other hand, Mr Fleming pointed out that if the Court did not grant the relief from sanctions sought, the Company would suffer severe prejudice as it would have no witnesses on which it could rely to adequately defend the case brought against it.

[7] Counsel for the Second Defendant/ Applicant, Mrs Small-Davis referred to and relied on Rules 26.8(1),(2) and (3) of the Civil Procedure Rules (CPR) in support of the application, which read as follows

> S26.8 (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.
>
> (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.

[8] She submitted that her client had complied with Rule 26.8 as the Application for Relief from Sanctions was filed on the 26th May 2015, a little over two (2) weeks after the date for compliance with the Case Management Conference orders. The requirement for the application to be made promptly and to be supported by affidavit evidence was therefore satisfied. Further, she submitted that the affidavit evidence of Mr Fleming had also satisfied the requirement of Rule 26.8(2), in that the failure to comply was not intentional, a good explanation was given for non-compliance and that her client has generally complied with all other rules, orders and directions.

[9] Mrs Small-Davis also pointed out that were the Order sought to be granted, no detriment would be occasioned to the Claimant, as sufficient time is still available to prepare for the trial in November, 2015. If the application were to be refused however, her client would be severely and detrimentally affected, as it would be unable to call any witnesses at the trial. She therefore urged the Court to conclude that a proper exercise of the Court's discretion would be to grant the Order for relief from sanctions and extend the time for the filing of the Witness Statement on behalf of the Second Defendant to the 16th July, 2015.

[10] Counsel Mr Reitzin in his response submitted firstly, that there was no evidence filed in support of the Application for relief from sanctions. Paragraph 5 of Mr Fleming's Affidavit he argued failed to identify the source of the information which led him to declare that the failure of the Second Defendant "to file its witness statement is not intentional as its intended witnesses are currently travelling outside of the parish as well as the island for an extended period of time due to work related commitments". This failure he stated offended Rule 30.3 of the CPR which reads-

> "Rule 30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and

(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source for any matters of information or belief."

No such source of information or belief having been provided, Mr Reitzin urged the Court to find that paragraph to be inadmissible.

[11] Counsel went on to argue that not only was that paragraph inadmissible, but that it was also irrelevant to the issue before the Court in light of the manner in Paragraph 5 of the affidavit was drafted. That affidavit, sworn to on the 21st May 2015 indicated that the reason for failing to file the Witness Statements at that time, outside the time frame ordered by the Court was that "the witnesses are currently travelling outside of the parish as well as the island..." The use of the word 'currently' he contended spoke to a period in or around the time the affidavit was being sworn. He further contended that no evidence has been provided to explain the failure to comply in the months after the Case Management Orders were made in July 2014. He suggested that the relevant period for which the good explanation would be required for the failure to comply with the Order of the Court, would be the period from the date of the Order leading up to deadline of 9th May, 2015. As such, Mr Reitzin urged the Court to find that no good explanation was provided for the failure to comply with the Order of the Court, as required by Rule 26.8(2) of the CPR.

[12] In her submissions in respect of the Application, Counsel for the Second Defendant relied on the case of **Villa Mora Cottages Limited and Monica Cummings v Adele Shtern,** SCCA No: 49/2006 delivered December 14, 2007. In that case, at the hearing of the Pre-Trial Review on the 6th June, 2005 the Court ordered inter alia, that the Defendants file and serve their List of Documents by the 29th July 2005, failing which their Defence to stand struck out. The Pre-Trial Review was adjourned to the 6th

December, 2005. However on that date, on the failure of the Defendants to comply, their Defence was struck out. Their application for an extension of time and for the restoration of their Defence was refused on the 9th June 2006.

[13] On appeal, Harris JA made the following observations at page 10 of the decision

> "It cannot be disputed that orders and rules of Court must be obeyed. A party's non-compliance with a rule or order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case. The function of the Court is to do justice..... "

The Learned Judge of Appeal went on state that –

> "... In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the CPR a Court in the performance of such exercise may rectify any mischief created by the non-compliance with any of its rules or orders (sic)".

[14] The Learned Judge at first instance in that case was satisfied that the Application for Relief from Sanctions had been made promptly, that their failure to comply with the relevant orders was unintentional and that there had been general compliance except for some of the orders of the Court. However she found that the applicants did not proffer a good explanation for the failure to file the requisite documents. The Application was therefore refused.

[15] In the decision of the Court of Appeal, Harris JA opined that "the critical question arising is whether the learned judge, having found that there was compliance with rules 26.8(2)(a) and 26.8(2)(c), was correct in finding that the appellants had not advanced a plausible explanation for their failure to comply with the orders as required by 26.8(2)(b). The conditions outlined in Rule 26.8(2) are fundamentally interwoven.

They are inherently and intrinsically bound together as a determative (sic) factor as to whether relief from sanction ought to be granted."

[16] At page 14 of her Judgment, Harris JA pointed out that -

> "The discretionary power conferred on the Court under Rule 26.8 renders it obligatory on the part of a judge, in giving consideration to Rule 26.8(2) to pay due regard to the provisions of Rule 26.8(3). In determining whether to grant or refuse an application for relief from sanctions, it is incumbent on the judge to examine all the circumstances of the case bearing in mind the overriding principles of dealing with cases justly. In so doing, he or she must systematically take into account the requisite factors specified in Rule 26.8(3).

[17] The Court of Appeal found that the learned judge at first instance had failed to give consideration to the factors prescribed by Rule 26.8(3) as she was bound to do. Further that a plausible explanation for the delay, had in fact been offered and ought to have been accepted by the learned judge. The appeal was therefore allowed.

[18] Based on the authority of the above cited case, and the submissions made, Counsel for the Second Defendant urged the Court to find that the proper exercise of the Court's discretion would be for the Application for Relief from Sanction to be granted and an Order made to extend time to the 16th July, 2015 to file the Witness Statement.

[19] Counsel Mr Reitzin cited several authorities in his attempt to persuade the Court to refuse the Second Defendant's application. I trust I do no disservice to his industry by not referring to all of them, but instead highlighting the pertinent aspects that may be of assistance in this case. He relied on the Jamaican Court of Appeal decision of **H.B. Ramsay & Associates Ltd & Anor v Jamaica Redevelopment Foundation Inc & the Workers Bank** [2013] JMCA Civ 1 delivered on the 18th January 2013, by Brooks JA. In that case, an Order was made that unless the Appellants paid the costs awarded to the Respondents on or before the 18th June, 2010 by 2 pm, their Statement

of Case would stand struck out. This they failed to do. However, they applied on the 15th July, 2010, pursuant to Rule 26.8 of the CPR for relief from sanctions.

[20] The learned Judge of Appeal in his decision stated that "The issue of whether a good explanation has been given is one of the three requirements of rule 26.8(2) that an applicant must fulfill before the court will grant relief from sanctions." At paragraph 22 of his decision, Brooks JA further stated "Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. " Brooks JA also made reference to the Privy Council decision in the **Attorney-General v Universal Projects Limited** [2011] UKPC 37, in which a similarly worded rule was used in the Civil Procedure Rules of Trinidad and Tobago. In that case, it was that the absence of a good explanation was fatal to the application. There is therefore no need once any of the three requirements of Rule 26.8(2) was not satisfied, to go on to consider the provisions of Rule 26.8(3).

[21] In the present case, I accept Mr Reitzin's submissions that the first sentence of Mr Fleming's Affidavit is in breach of Rule 30.3 of the CPR. This rule provides for the admissibility of hearsay evidence in an Affidavit only in certain specified instances. The general rule is that a deponent may only give Affidavit evidence as to such facts that he or she is able to prove from his or her knowledge (Rule 30.3(1)). The exception to that general rule arises where the rules allow (Rule 30.3(2)(a)) and where the application is for use in an application for summary judgment under Part 15, or in any procedural or interlocutory application. In the latter mentioned instances, the Affidavit has to indicate which of the statements in it are made from the affiants own knowledge and which are matters of information or belief. In addition that Affidavit must state the source of any matters of information and belief by the deponent.

[22] Mr David Fleming in his Affidavit stated that he is employed to the Second Defendant as its legal officer. He has not stated nor has he provided any details of his job as legal officer which would lead him to be involved with the Second Defendant's linesmen. Nor has he provided any evidence to indicate whether an investigative

process was triggered as a result of this incident and if so, whether, at what time and to what extent he was involved in that process and the scope of this involvement. His mention in Paragraph 2 of his Affidavit as to reviewing relevant documents and information is of no assistance, without there being some specific reference as to when this review occurred and his identifying the documents, files, books and/or internal documentation allegedly reviewed by him. As drafted, Paragraph 2 of Mr Fleming's Affidavit provided no foundation on which any conclusion can be arrived at as to Mr Fleming's knowledge of the intended whereabouts of witnesses as at the time he swore to his Affidavit.

[23] I am of the view on the evidence before this Court that the first sentence of paragraph 5 of the Affidavit of David Fleming being in breach of Rule 30.3 of the CPR is inadmissible. If I am wrong in that regard, and the affidavit of David Fleming is in fact admissible, it is imperative that the spotlight of scrutiny be shone on the Affidavit filed on behalf of the Second Defendant to ascertain whether a good explanation emerges for the failure of the Second Defendant to file that Witness Statement by or before the 6th May 2015.

[24] The Case Management Conference Order was made on the 30th July 2014 directing Witness Statements to be filed and exchanged on or before the 9th May 2015. Two weeks after the date ordered for compliance by the Court, the Affidavit of David Fleming was filed. The explanation for the delay being "its intended witnesses are currently travelling outside of the parish as well as the island for an extended period of time due to work related commitments."

[25] It is important to examine the words utilised in that explanation. I am of the view that the word "currently" can only be interpreted to mean, at the time this Affidavit was sworn, that is, on or about the 21st May, 2015. Of necessity, the question must arise as to what had happened to those witnesses between the time the Order was made and the date the Affidavit was filed in May, 2015. No explanation has been provided in that regard. Surely, if a party has failed to take a step between the time the Order of the Court was made and the time for compliance with that Order, the

explanation for such default over that period, for it to be considered a good explanation, ought to outline the circumstances which triggered or caused the default over the said period.

[26] I am of the view that the use of the word “currently” by the affiant addresses the present situation at the time the affidavit was sworn to. I am therefore satisfied that no good explanation has been put before this Court for the failure to comply with the Order for filing and exchanging witness statements in the time prescribed by the Court.

[27] The decision of the Court of Appeal in the **H.B. Ramsay and Associates Ltd** case is authority for the proposition that the Court may only grant relief from sanctions if satisfied that all three requirements of Rule 28.6(2) have been fulfilled. The Second Defendant has failed to provide a good explanation for the failure to comply with the Order of the Court. Such failure is fatal to Application for Relief from Sanctions. The Second Defendant’s Application is therefore refused.