[2016] JMCC COMM 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2004CD00008

BETWEEN	**HDX 9000 INC**	**CLAIMANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**DEFENDANT**

IN CHAMBERS

Franz Jobson, Georgia Buckley and Kereene Smith instructed by G Anthony Levy for the claimant

Tana'ania Small Davis and Adam Jones instructed by Livingston Alexander and Levy for the defendant

October 19 and 20, 2016

CIVIL PROCEDURE – APPLICATION FOR RELIEF FROM SANCTIONS – WHETHER APPLICATION FOR RELIEF FROM SANCTIONS THE CORRECT APPLICATION

SYKES J

The final fall

[1] This claim began in 1996. It was transferred to the Commercial Division in 2004. It has seen several unless orders and extension of at least one unless order. There was even a trip to the Court of Appeal. After a decade of litigation, the matter has come to an

end on a procedural point because HDX 9000 Inc's ('HDX') application for relief from sanctions is refused. There was a point about whether the application should really have been one under rule 26.6, that is, an application for judgment to be set aside on the ground that the right to enter judgment had not arisen. This is addressed later.

[2] HDX has found itself in this predicament because of rules 26.5 (1) and (2) of the Civil Procedure Rules ('CPR'). These rules say as follows:

> *(1) This rule applies where the court makes an order which includes a term that the state of case of a party be struck out if the party does not comply with the "unless order" by the specified date.*
>
> *(2) Where the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and costs.*
>
> *(3) A party may obtain judgment under this rule by filing a request for judgment.*

[3] In this case, based on HDX's breach of a court order the defence to the counter claim was struck out. Price Waterhouse applied for judgment which was granted by the Registrar. The judgment was served. HDX applied for relief from sanction and as indicated earlier, the application failed.

[4] The basic history of this unhappy tale of missed deadlines and non-compliance with orders has already been summarised by Brooks JA in **Price Waterhouse (A Firm) v HDX 9000 INC** [2016] JMCA Civ 18. The irony here is that this present application and the judgment of Brooks JA involves the same parties and regrettably, HDX has lost again because of non-compliance with procedural rules and court orders.

[5] What has brought about this final fall is an order made on April 25, 2016 in which the court ordered that the security for costs in the sum of JA$1.7m was to be converted to United States currency and placed in an account in the joint names of counsel for the claimant and the defendant. The order also said that the exchange rate for this purpose was to be that which prevailed on February 19, 2014. In addition, it was also ordered that the sum converted should include all the interest accruing on the principal sum from

February 19, 2014 to the date the money was deposited in the account. The April 25 order stated that all this should be done by midday May 16, 2016. The court should mention that the April 25 order, in part, was an amendment to Sinclair-Haynes J's (now Justice of Appeal) order made on January 27, 2014. Her Ladyship's order increased the security for costs by JA$1.7m. The reference to conversion to United States currency in the April 25 order arose because concern was expressed by Price Waterhouse that the constant devaluation of the Jamaican dollar was undermining the value of the security for costs.

[6] Her Ladyship had originally ordered that the money was to be placed in the relevant account within 30 days of the date of the order. The April 25 order imposed a new deadline and a sanction for non-compliance. The relevant part of the April 25 order read:

> *The claimant must comply with order made not later than 12 noon May 16, 2016 failing which the defence to the counter claim is struck out and judgment be entered for the defendant on the counter claim without further order, with damages to be assessed.*

[7] In purported compliance with the April 25 order, counsel for HDX 9000 Inc ('HDX') intimated to counsel for Price Waterhouse that the money was deposited in the relevant account on May 12, 2016, four days before the deadline of May 16, 2016. Price Waterhouse's lawyers, by letter dated May 12, 2016, wrote to HDX's lawyers pointing out that there was a breach of the order. No response came from HDX's lawyers by May 16, 2016. Price Waterhouse's lawyers' letter deserves quoting because it pointed to the specific breach. It reads:

> *We refer to the letter dated 12 May 2016 addressed to the Bank of Nova Scotia Jamaica Ltd and to your e-mail of the same date.*
>
> *By letter dated 30 July 2014 we were informed by Gordon McGrath that the sum held as at 30 April 2014 was $US15, 930.74 (sic). This is practically the same sum that you have indicated to us you are instructed to deposit in the joint names G Anthony Levy and Livingston Alexander & Levy in compliance with the order.*

> *Paragraph 1 (d) of the order states that the interest on the United States Dollars held since 19 February 2014 should be deposited in the joint names of the attorneys-at-law for the parties. Your client is therefore to make the deposit of the sum representing interest accrued between 30 April 2014 and today.*

[8] This meant that if Price Waterhouse's lawyers were correct in their interpretation, HDX was in breach of the April 25 order. As it has turned out, HDX's lawyers said nothing for the rest of May, June and into July.

[9] Even after the letter of May 12, HDX was presented with another opportunity to address the allegation of non-compliance. The matter came back before the court on May 30, 2016 and on that date, Price Waterhouse's lawyers repeated their assertion that HDX was in breach of the April 25 order. HDX did nothing. The consequence of this was that Price Waterhouse relied on the striking out sanction that was imposed by the court in the April 25 order and on May 31, 2016, Price Waterhouse applied for judgment in terms of the sanction that was imposed. The judgment was granted. It was served on HDX's lawyers on June 27, 2016.

[10] It was not until July 10, 2016 that HDX's lawyers wrote a letter of even date to Price Waterhouse's lawyers taking issue with their interpretation of the order. In that letter it stated that the exchange rate on February 19, 2014 was JA$122.75 and therefore the United States currency equivalent of JA$1.7m was US$13,849.29. The significance of this assertion is now stated.

[11] In order to assess the strength of this assertion, more background is needed. After Sinclair-Haynes J made her order January 27, 2014, the then attorneys for HDX, wrote to Price Waterhouse's lawyers, by letter dated July 30, 2014, telling them the following:

> *We refer to earlier correspondence concerning the orders 1 and 2 of the formal order dated January 27, 2014.*
>
> *We had confirmed to you in February that we had been placed in funds to satisfy our client's obligation.*

> ….
>
> *For our part, we have kept the deposit amount in the US dollar equivalent and it has been accruing interest. We enclose a statement of account requested by you.*
>
> …

[12] The accompanying statement of account indicated that on February 19, 2014, the amount of US$15,821.30 had arrived by wire transfer. The document actually stated that the United States dollar amount was the equivalent of JA$1.7m. The document showed interest being paid on a monthly basis commencing on February 28, 2014, then March 31, 2014 and April 30, 2014. On the basis of this statement from HDX's then lawyers the exchange rate would be JA$107.45 and not JA$122.75 as now put forward by HDX's present attorneys.

[13] Price Waterhouse has put forward evidence from the Bank of Jamaica, the Central Bank, that the exchange rate on February 19, 2014 was JA$107.99. What is clear is that until the July 10, 2016 letter from HDX's present attorneys no one, not even the Central Bank, thought of an exchange rate of JA$122.75.

[14] Based on the JA$122.75 exchange rate, the case theory of HDX was that not only was it in full compliance with the April 25 order but also that it had overpaid by more than US$2,000.00 when the money was paid into the account on May 12, 2016. HDX's lawyers made the rather bold statement (which was in bold in their letter) that '**[m]y firm is due a refund of US$2,050.21**.' On this present application, counsel for HDX went so far as to say that what HDX lawyers had indicated in 2014, namely that the US$15,821.30 was to regarded as the United States currency equivalent of the additional J$1.7m, was completely wrong. In effect, this was an assertion that there was no basis for securing judgment because there was compliance with the order. This conclusion raises the issue of whether this ought not to have been an application under rule 26.6 of the CPR. That will be addressed later in this judgment.

[15] The July 10 letter from HDX's lawyers after rebuking Price Waterhouse's lawyers closed with solemn promise that '[they were] about to file an application for relief from sanctions' and urged that Price Waterhouse's lawyers join in correcting 'this injustice.'

[16] Not to be outdone, Price Waterhouse's lawyer's responded in kind and characterised the assertions in the July 10 letter as 'spurious' and then proceeded to set out their understanding of 'the facts.' The letter pointed out that HDX's previous lawyers, Gordon McGrath, had stated that they had received the United States currency equivalent of JA$1.7m and that as of April 30, 2014, the amount was US$15,930.74, inclusive of interest. This was the sum which HDX's lawyers stated that it lodged to the relevant account on May 12, 2016. The letter repudiated the suggestion that the exchange rate was JA$122.75. The letter closed by noting that '[y]our malignment … is unacceptable and deplorable.' Deplorable had no 's' and neither was there reference to a basket.

[17] HDX's lawyers followed through on their promise to file an application for relief from sanction which was supported by an affidavit from Mr G Anthony Levy, attorney at law. Price Waterhouse opposed the application and relied on the affidavit of Mr Leighton McKnight who described himself as the Territory Leader of Price Waterhouse.

The application

[18] The actual application before the court is an application for relief from sanctions under rule 26.8 of the Civil Procedure Rules ('CPR'). As the application progressed, based on HDX's case theory, it became apparent that this should really have been an application under rule 26.6 (1) and (2) which states:

> *(1) A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.*
>
> *(2) An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application.*

(3) Where the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside the judgment.

(4) Where the application to set aside is made for any reason, rule 26.8 (relief from sanctions) applies.

[19] The first thing to determine is whether HDX can succeed on this ground even though it was not relied on in the written application. A crucial fact to decide is the exchange rate on February 19, 2014. From the narrative given above, it is clear that HDX's lawyers and Price Waterhouse's lawyers were operating on the premise that the exchange rate was JA$107, give or take a few cents, when the sum of US$15,831.30 first arrived in Jamaica by wire transfer. No one, back them and now, contemplated JA$122.75 until this was raised by HDX's lawyers in their July 10, 2016 letter. The evidence from the Bank of Jamaica did not contemplate an exchange rate of JA$122.75. At all times in 2014 before the change in HDX's attorneys, the exchange rate was always understood to be in the vicinity of at least JA$107.

[20] HDX's lawyers sought to explain how they arrived at the JA$122.75 to arrive at the overpayment theory. They say that a manager of the Bank of Nova Scotia, Oxford Road Branch, where HDX's lawyers say that they keep their trust account, told them that 'the selling rate of United States dollars on the 19th February 2014 was 122.75 (sic).' This led to the conclusion that '[a]t this rate J$1,700,000.00 amounted to US$13,849.29.' In response to Price Waterhouse's complaint that the interest was not accounted for, HDX's lawyers say that the interest rate paid 'on [their] Trust Account was 0.05 per centum per annum.

[21] All this led HDX's lawyers to say in their July 10 letter:

> *Interest on the sum of US$13,865.29 at the rate of 0.05% per annum for the period 19th February 2014 to the 12th May 2016 (2 years and 73 days) amounts to US$15.23.*

[22] There is no rational basis for this court to conclude that the exchange was JA$122.75 on February 19, 2014. That may have been the Bank of Nova Scotia's exchange rate but it is well known that in civil litigation in Jamaica when one speaks of

the exchange rate one is referring to the exchange rate stated by the Bank of Jamaica which is usually an average of the selling rate of the commercial banks for any particular day. This explains why no court order refers explicitly to the exchange rate of any particular bank.

[23] The consequence of not accepting the exchange rate now being advanced by HDX for the first time in two years is that there is no basis to conclude that the sum that ought to have been deposited by May 16, 2016 was US$13,865.29. It follows that HDX's case theory that the right to enter judgment had not arisen is not plausible. There is, equally, no rational basis to accept the consequential submission that there was an overpayment by over US$2,000.00.

[24] The internal logic of HDX's case breaks down further. Mr McKnight indicated in his affidavit that the present attorneys at law for HDX have not stated when they received the money from HDX's former attorneys. It has been established that the first set of lawyers had the money from February 2014 and the evidence shows that it was under their control up to April 30, 2014. The money might have been under their control right up to July 2014 when they wrote the Price Waterhouse's lawyers. Reference was made to this fact earlier in this judgment.

[25] This last point is important for this reason. In the normal course of things, barring negative interest rates or zero interest rate, the total amount of money increases as interest is calculated and added. In this case there is uncontradicted evidence that on April 30, 2014 Gordon McGrath had US$15,940.74. This was the amount that Mr Levy said he received. He says in his affidavit that he became the attorney on record on April 20, 2016. On this basis, barring negative or zero interest rate how can it be that he received the same sum in 2016 as that which existed on April 30, 2014? If Gordon McGrath had the money from 2014 to 2016 what has happened to the interest that one normally expects to accrue? Why no interest payment in two years? No explanation has been forthcoming other than the exchange rate theory which this court has not accepted.

[26] In the absence of a clear explanation this court does not accept that no interest was paid for over two years on the sum of money. The affidavit of Mr Anthony Levy on this point is quite vague. It says:

> *(2) On the 20th April 2016 my firm became the attorneys of record for the claimant taking over from Jobson Wadsworth Thompson Fontaine.*
>
> *(3) Gordon McGrath (which earlier appeared for the claimant) transferred monies to my firm in US$ which Gordon McGrath had then been holding on behalf of the claimant. This transfer included moneys which they had been holding in order to comply with the order made on the 27th January 2014 by Justice Sinclair-Haynes.*

[27] If HDX's present attorneys only received the amount that HDX's previous attorney had as of April 30, 2014, then some explanation is required. The expected interest has not been accounted for and prima facie there is a breach of the court order.

[28] This is not just a technical breach because it is clear that from HDX's perspective it had no intention of handing over any interest accruing on US$15,930.74 because it took the view that interest should really be calculated on US$13,849.29 and not US$15,930.75.

[29] There is another problem with HDX's evidence. Mr Levy has advanced the proposition that the applicable interest rate is 0.05% which would be applicable for the entire period from February 19, 2014 to May 12, 2016. This would mean that Mr Levy is asking this court to accept that a lower interest rate than that which was applied in at least the period February 19, 2014 to April 30, 2014, when it is clear that Gordon McGrath had the money under their control. The interest rate applicable then was 3.5%. What rational basis can there be to substitute 0.05% for the 3.5%?

[30] The judgment arising from the striking out was served on HDX on June 27, 2016. Rule 26.6 (2) states that the application to set aside this judgment is to be made 'not more than 14 days after' service of the judgment. This application (for relief from sanctions) was filed July 29, 2016, well outside the 14 days. This means that HDX needed to have made an application for extension of time. None was made. Thus even

if the court were minded to entertain the application as a rule 26.6 application it is out of time and no application was made to extend time.

[31] The conclusion is that considering this application as a rule 26.6 application it fails on two grounds: (a) the time for judgment has arisen; and (b) this present application was made more than 14 days after the judgment was served and there was no application for an extension of time.

[32] Turning now to whether the result of this application on the basis that it is properly a relief from sanctions. Rule 26.8 (1) provides:

> *(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.*

[33] Having regard to the court's conclusion on this first requirement, there is no need to go on to consider the rest of the rule. The great irony here is that the latest authority from the Court of Appeal supporting this approach is an appeal involving HDX (cited in paragraph 4 above). Brooks JA was quite clear that if the application is not made promptly then that is the end of the matter (**[27]**). Brooks JA emphasised in paragraph 28 that there were previous decisions of the Court of Appeal which held that 'since the application had not been made promptly it [the application for relief from sanctions] should not be considered' (**[28]**). His Lordship expressly referred to decisions from the Eastern Caribbean Court of Appeal which took a more benign interpretation of the their rule which is worded in terms identical to Jamaica's. His Lordship did not see any need to modify Jamaica's position.

[34] Brooks JA was reaffirming his position stated in **H. B. Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1. His Lordship, having reviewed the law, concluded at **[31]**:

> *An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the*

provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8 (2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8 (2), to consider the provisions of rule 26.8 (3) in relation to that applicant.

[35] In the instant case, the sanction took effect once the breach occurred which was May 16, 2016. From that date the defence to the counterclaim was struck out. No application for relief was made until July 29. This cannot be considered prompt. This application was not made promptly. Regrettably for HDX, the court cannot grant relief from the sanction imposed.

[36] In the event that the court is wrong and the application for relief from sanctions was made promptly HDX would fail to meet rule 26.8 (2) which reads:

> *(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.*

[37] In this particular litigation the following are noted:

a) Sinclair-Haynes J had made an order in May 2013 directing HDX to file certain bundles and redact certain documents which had previously been filed. This order was breached;

b) on January 27, 2014, her Ladyship made an unless requiring HDX to comply with paragraphs 2 and 7 of May 9, 2013 order by February 28, 2014 failing which the

claim was would dismissed and judgment entered for Price Waterhouse. This order was breached;

c) on September 25, 2014, HDX filed an application for relief from sanctions imposed by the January 27, 2014 order;

d) even in respect of the September 2014 application HDX failed to comply with rule 26.8 (1) which states that the application must be supported by an affidavit. No affidavit was filed with the September application;

e) HDX filed an amended application on December 10, 2014 and it was the order on this application which was successfully appealed from by Price Waterhouse;

f) in the appellate proceedings HDX failed to meet the timeline for filing a counter notice of appeal;

g) not only had HDX not filed the counter notice in time it did not apply for an extension time to file the counter notice until June 5, 2015 when the deadline was February 23, 2015;

h) earlier in this litigation HDX had applied to strike out the defence and failed and HDX's appeal against that striking out was itself struck out because HDX failed to comply with the Court of Appeal Rules;

i) HDX applied to vacate three previous trial dates;

j) HDX failed to meet the deadlines for filing expert reports in June 2013, February 2014, March 2014 and May 2014;

k) HDX has even failed to pay costs awarded against it which now stands at JA$779, 187.02;

[38] In respect of the third limb of rule 26.8 (2) (c), HDX has not had an outstanding or even moderate record of compliance. It lost an opportunity to appeal the dismissal of its application to strike out the defence because of failure to comply with the rules. It lost is

claim because of failure to comply with the rules. It lost an opportunity to apply for extension of time to file a counter notice in the Court of Appeal because of failure comply with the rules.

[39] The three parts of rule 26.8 (2) are cumulative. This court respectfully adopts the dictum of the Court of Appeal of the Republic of Trinidad and Tobago in the case of **Trincan Oil Limited v Martin** Civil Appeal No 65 of 2009 (unreported) (delivered May 2009). Jamadar JA speaking for the majority said, of the Trinidad rules which are identical to the Jamaica rules, at paragraphs 13 – 20:

> *13. The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre- conditions at 26.7 (3) are not satisfied.*
>
> *14. Three further observations about Rule 26.7 are apposite. First, the rule is significantly different from the corresponding English rule.3 In England there is a general discretion to grant relief against any sanction subject only to the requirement that the court must consider all the circumstances and in particular the nine factors stated at Rule 3.9 (1). In Trinidad and Tobago three of these nine considerations have been recast as conditions precedent; one has been recast as a mandatory requirement of co-equal status with the English Rule 3.9 (2);7 and the others except for two have been placed in the category of particular matters to be considered in considering all the circumstances of the case. In Trinidad and Tobago there is also a particular consideration as to "whether the failure to comply has been or can be remedied within a reasonable time", which does not appear in the corresponding English rule. Finally, there are two particular English considerations11 which do not appear in the Trinidad and Tobago rule. The English learning is*

therefore of limited assistance as an aid to interpretation for Rule 26.7.

15. The second observation is that the differences between the local and English rules are intentional. The English rules were available when the local rules were drafted and agreed upon and they were carefully considered in the process. The differences in Rule 26.7 and the corresponding English rule were intended to effect a particular behavioural change from the way civil litigation was conducted in Trinidad and Tobago under the Rules of the Supreme Court, 1975.12

16. Dick Greenslade, the draftsman of the rules, explained the philosophy underlying his proposed rule for relief from sanctions as follows:

> *I therefore propose that there be a system whereby the defaulter could apply for relief. There would be a 'threshold' test – the court would grant relief only if it is satisfied that –*
>
> *• the party in default has acted promptly in applying for relief; and*
>
> *• the breach of the rule was not intentional; and*
>
> *• there is a good explanation for the breach; and*
>
> *• the party in default has generally complied with all other relevant rules and orders.*
>
> *No relief would be granted if the threshold test were not surmounted.*
>
> *However, passing the threshold test would not be sufficient in itself, it would only give the court a discretion to grant relief. In exercising its discretion the court should take into account*
>
> *• whether the breach was due to the party or his attorney;*

> *• whether the breach has been or can be remedied within a reasonable time;*
>
> *• whether the trial date can still be met if relief is granted.*
>
> *While I do not propose that the rule should specifically say so I would hope that the judiciary's view would be that only in exceptional circumstances should relief be granted if this would entail vacating the trial date.*

17. Clearly this philosophy was adopted as Rule 26.7 follows the proposal except that a fourth factor was added to the matters to be taken into account if the 'threshold' test was surmounted: consideration of "the interests of the administration of justice".

18. The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and will adapt their behaviour accordingly, thus effecting the desired change in culture.

19. Simply put, in the context of compliance with rules, orders and directions, the 'laissez–faire' approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated.

20. Finally, reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions.

[40] This court cannot improve on this reasoning and analysis of his Lordship. His reasoning applies to rule 26.8 (1) and (2) of the Jamaican CPR without modification or

qualification except to note that since 2009, the English rules were adjusted in 2013 (see **HDX** (**[33]**) Brooks JA).

[41] On the question of whether there was any good reason for the failure to comply with the rules. The court concludes that the high exchange rate theory has no proper factual foundation in light of the Bank of Jamaica's intimation of the exchange rate for February 19, 2014. The reason advanced by HDX, based on the higher exchange rate proposition is not a good reason.

Closing remarks

[42] There cannot be too many cases where a claimant has lost his primary claim and his defence to the counter claim for non-compliance with unless orders. This case serves as a timely reminder of the importance of keeping timelines. Thus on the claim and on the counterclaim Price Waterhouse has been successful and has secured judgments on both without a single witness giving evidence after ten years of litigation.

Disposition

[43] The application is dismissed with costs to the defendant to be agreed or taxed.