[2023] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 01579

BETWEEN	**BOBETTE JAMES**	**CLAIMANT**
A N D	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Ian Davis ins by Davis, Robb & Co for the Claimant/Respondent
Ms. Georgia Hamilton ins by Georgia Hamilton & Co. for the Defendant/Applicant

HEARD: October 11, 2023

Civil Practice & Procedure – Application for Relief from Sanction – Whether Application Made Promptly – Whether Attorney Being Unwell is to be considered as part of the question of the promptness of an Application for Relief from Sanction.

STAPLE J (Ag)

[1] On the 10th October 2014 there was an incident involving the Claimant, a conductor on the Defendant's motor vehicle, wherein he alleged that due to the negligent driving of the motor vehicle by the Defendant's driver, he, the Claimant, was injured.

[2] To this end, he filed the present claim in the Court on the 19th April 2016. The Claim was served on the Defendant on the 22nd April 2016, but no defence was filed until the 13th July 2016. Quite late.

[3] The Claimant was able to obtain a Judgment in Default of Defence and an Assessment of Damages hearing was set down for the 29th September 2017. That hearing was adjourned to the 27th April 2018.

[4] On the 29th September 2017 the Defendant's present Attorneys-at-Law filed a Notice of Change of Attorney and entered into the matter on their behalf. They filed an Application for the Judgment to be set Aside on the 26th April 2018 and this Application was eventually granted on the 25th September 2018 and the parties sent to mediation with the Case Management Conference adjourned to the 13th December 2018.

[5] The Defence was filed on the 1st October 2018. For whatever reason, the Case Management Conference set for the 13th December 2018 did not take place and it was rescheduled to the 27th March 2019 whereat the Case Management Conference Orders were made by Master Mott Tulloch-Reid (as she then was).

[6] It is important to note that by this stage the Claimant had already been compliant with the orders for disclosure and Witness Statements to be filed and served as these had been done in advance of the Assessment of Damages. So these orders were largely for the purposes of the Defendant.

[7] The Defendant did not comply with the Order for Disclosure and then proceeded to file an Application for an extension of time to comply with the said order on the 28th April 2022.

[8] Nothing happened thereafter until the 25th July 2022 when the application dated the 28th April 2022 was adjourned for hearing to today's date by Master Ms. S. Reid (Ag).

[9] Over a year later, the Defendant Amended the Application filed on the 28th April 2022 by filing an Amended Application on the 27th September 2023 in which she was asking for (among other things) relief from sanction for failing to serve its list of documents and witness statement within the time stipulated by the Court.

[10] The Application was supported by an Affidavit of Ms. Tanyalee Williams sworn on the 27th September 2023 and filed on the same date. There were also submissions filed on the 5th October 2023.

APPLICATIONS FOR RELIEF FROM SANCTION (THE LEGAL BASIS)

[11] 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.

[12] 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.

[13] 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

[1] [2012] JMCA Civ 64 at para 26 per Morrison JA (as he then was)

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…'

[14] Counsel argued in her submissions, quite forcefully, that what is meant by prompt depends on the circumstances of each case and gives the Court a level of flexibility in its considerations of whether an application was promptly made.

[15] She cited as authority 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], wherein he 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."

[16] 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"*

[17] 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

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[2] [2013] JMCA Civ 1 per Brooks JA at para 10
[3] Unreported 2007 HCV 03502, Sykes J (as he then was)
[4] [2020] JMCA Civ 7
[5] [2023] JMCA Civ 45

offending party. But I find that in this case, the time would run from the date of breach.

[18] Further guidance was had from the case of *Norman Washington Burton v The Director of Public Prosecutions*[6]. In that case, the Office of the Director of Public Prosecutions (ODPP) had filed a Fixed Date Claim seeking certain relief to support a Foreign Restraint Order bearing Claim No. 2010 HCV 06164. The orders sought were granted. Subsequently, there was a Confiscation Order was made in the UK against the Appellant and the DPP was again pressed into service to register that order locally and to vary the previously obtained Foreign Restraint Order. This variation became necessary consequent upon a variation of the same order in the UK.

[19] On May 26, 2015, the ODPP filed what was a new Claim bearing the old 2010 suit number. So naturally, the Appellant, through his Attorneys-at-Law applied for a declaration for this 2015 to be deemed invalid as it was not served within 1 year. The DPP also applied to the Court for a new suit number to be issued for the 2015 claim. The then Senior Puisne Judge ordered, on the ODPP's application, that (among other things),

> "(4)…the HCV number 06164 of 2010 of the Fixed Date Claim Form dated 26th May 2015 be amended by the Registrar to a 2015 number. The [respondent] DPP must file the fixed date claim form with the amended number and any consequent amendments. The DPP must also refile any documents to which amendments must be made consequent on this order. The amended documents must be served on Mr Norman Burton by the DPP within 7 days of receipt of the amended fixed date claim form from the Supreme Court Registry.

[20] In 2017, the ODPP refiled the suit, but instead of it getting a 2015 number, it received a 2017 number contrary to the Order of the SPJ. Clearly there was a lot of blame to go around in this comedy of errors. Now these documents were duly served on the Appellant. Eventually, the matters went before K. Anderson J, who

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[6] [2023] JMCA Civ 30

made an unless order for the ODPP to comply with Order 4 of the then Senior Puisne Judge failing which the statement of case would stand struck out. There was no compliance with this Order of K. Anderson J until July 2020 when the Registrar of the Supreme Court cancelled the 2017 number and gave the suit a 2015 number. The matter continued along and a date for Hearing of the Fixed Date Claim was set for April 2021. It was only in March 2021 that the ODPP applied for relief from sanction. This application was granted by Shelly-Williams J.

[21] The Appellant appealed against this granting of relief. Among the grounds of appeal was that the learned judge erred in considering the promptness threshold required by rule 26.8(1) as having been met. They argued (among other things) that the learned judge failed to consider that the promptitude required by the rule meant promptness relation to the time the application was relief was made and not in relation to the remedying of the breach.

[22] The D. Fraser JA, in writing the judgment of the court, said as follows,

> *[54] It is thus accepted and beyond doubt that under rule 26.8(1) the establishment of promptitude is a sine qua non, a condition precedent to the court being able to grant relief. That is the clear meaning of paras. [9], [10] and [31] earlier quoted from* ***H B Ramsay and Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al****.*

[23] He then went on to say, at paragraph 55(a) that what may be considered prompt will depend on the circumstances of each case but cautioned that, "…the natural meaning of the word prompt should not be unreasonably strained or elasticised to bring circumstances within its compass."

[24] The Court then went on to conclude that the learned judge erred in granting relief from sanction as **the application was not promptly made.** Made meaning the date it was filed.

[25] In the case at bar, there was clear knowledge on the part of Counsel for the Defendant that breaches had consequences and one should seek time to remedy

them. This is evident from her application filed on the 28th April 2022 where she sought an extension of time to comply with the disclosure order made in 2019. So I am prepared to find that the relevant date is not the discovery of breach date, but the date of breach of the order.

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

[26] It is my finding above 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 to run from the 28th February 2022 and in the case of the Witness Statement, time started to run from the 7th November 2022.

[27] The context to this is a situation where the Defendant had already been liable for breaching the rule for the filing of its Defence. The Claimant had had to give up a valuable thing, a Judgment in Default. The Claimant had already been in a state of readiness for the disposition of their case. So this Defendant was already under scrutiny.

[28] In an Affidavit by Mr. Tahir Thompson sworn on the 28th April 2022 in support of the Application initially filed on the 28th April 2022, he deponed at paragraph 6 that the reason for the delay in compliance was the fact that the deadline for filing of the document was not properly diarized. So, this has to do with the inefficiency of counsel's office. But note well that this application was not made until 2 months after the breach was committed. It should have been made plain to Counsel that what was required was an application for Relief from Sanction. What should also have been equally clear was the timeline for compliance with all the other orders, especially the witness statement order.

[29] But then I also considered the affidavit of Ms. Tanyalee Williams sworn on the 27th September 2023 in support of the Amended Application for Court Orders filed on the 27th September 2023. At paragraph 5 of that Affidavit, it was stated that the timelines were diarized using the practice management software used by the Firm by counsel who attended the case management conference. It was when that

counsel left that the matter was not reassigned in time to prevent the matter slipping through the cracks. This is a bit inconsistent with what was said by Mr. Thompson.

[30] What is plain is that whatever diary issues that may have caught them unawares for the List of Documents, it should have been rectified for the other orders, especially the Witness Statement order.

[31] It was then said that Ms. Hamilton reassumed conduct of the matter. No date was stated as to when she would have done so. But then Ms. Hamilton contracted Covid-19 in June of 2022. The symptoms of the ailment and further complications continued until September of 2022. In the meantime, there was *other counsel* in the chambers. I do not have any reason to doubt that Ms. Hamilton fell ill.

[32] But counsel was able to return to work in September of 2022. Surely, at this stage, the date for the filing of the Witness Statement in this matter was fast approaching and so counsel ought to have been aware that if she was falling behind, she would need more time to comply. No explanation has been provided as to why there was the delay in filing either (a) an Application for extension of time to comply with the Order for the Witness Statement between September 2022 (when her symptoms abated) and November of 2022 when the time for compliance arose in circumstances where counsel knew she was under pressure.

[33] Ms. Williams deponed at paragraph 7 that between December 2022 and July 2023, Ms. Hamilton contracted the cold and/or flu 5 times. But I have no evidence from any medical expert as to the severity of these ailments or whether or not they prevented counsel from carrying out her functions. Further, even if they did, nothing would have prevented counsel from briefing out work to external counsel or at least contacting her institutional client and advising them of her predicament so they could take steps file an application for relief.

[34] So then we come to September 27, 2023 when the Amended Application was filed. By this time the Claimant had been largely compliant with her Orders and the

Defendant was still scrambling. This application was over 10 months late in relation to the Witness Statement and over 19 months late in relation to the List of Documents.

[35] It is my finding that there was no satisfactory explanation as to why the delay from November 8, 2022 to September 2023.

[36] Having carefully considered the affidavits, I am not satisfied that the circumstances of this case shows that the application was made promptly. In my view the Defendant was quite aware of their previous breaches and should have been alert for them and to avoid them.

[37] I am not satisfied that the explanations provided give a good explanation for a context in which it could be said that the Amended Application filed on the 27th September 2023 was prompt.

[38] In the *Meeks v Meeks* case, the Court of Appeal upheld the decision of the judge below that the Appellant, in filing his application for relief one month after he discovered the breach, was not prompt in the context where he gave no explanation as to why there was the delay in the filing of the application.

[39] In the decision of ***Deputy Supt John Morris***, the Court of Appeal found as follows[7]:

> *"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*

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

> *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."*

[40] I read this paragraph to Ms. Hamilton and she sought to distinguish it from the case at bar by saying that in that case there was the added element of the Respondents filing only when they became aware of the refusal of the Appellants to settle. But the real point of this case is that P. Williams JA said that the delay was inordinate in relation to when the breach occurred (**emphasis mine**). That was a delay of some 10 months, which is quite similar to the delay in this particular case.

[41] In the circumstances, I am satisfied in my ruling that the application for relief from sanction, coming as it did in the Amended Application for Court Orders filed on the 27th September 2023, which was over 10 months after the date for compliance with the Witness Statement Order and more than 19 months after the breach of the List of Documents order could not be said to be anything other than exceedingly and unignorably late.

CONCLUSION

[42] 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 Defendant's Amended Application filed on the 27th September 2023 is refused.**

2 **The Defendants' Application for Leave to Appeal is refused.**

3 **Costs on the Defendant's Application to be the Claimants in any event.**

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Dale Staple
Puisne Judge (Ag)