[2021] JMCC COMM. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00187

BETWEEN	**LORENZ REDLEFSEN**	**CLAIMANT**
AND	**SILVER SANDS ESTATES LIMITED**	**1st DEFENDANT**
AND	**DEVELOPMENT BANK OF JAMAICA**	**2nd DEFENDANT**
AND	**SAGICOR PROPERTY SERVICES LIMITED**	**3rd DEFENDANT**

IN CHAMBERS

Mr Marc I Williams and Mr Duncan L Roye instructed by Williams, McKoy & Palmer, Attorneys-at-law for the Claimant

Mrs Tana'ania Small-Davis QC and Mrs Kerri-Ann Allen-Morgan instructed by Livingston, Alexander & Levy, Attorneys-at-law for the 1st and 2nd Defendants

Ms Carlene Larmond QC, instructed by Patterson Mair Hamilton, Attorneys-at-Law for the 3rd Defendant (absent and indicated no objection to hearing proceeding)

Heard: 30th July 2021 and 17th September 2021.

Order for security for costs in the form of an unless order – Whether order in that form is permitted by the Civil Procedure Rules - Judgment entered after non-compliance with order

Application for relief from sanction - Principles to be applied

LAING, J

Background

[1] A more detailed summary of the genesis of this claim, if needed, may be located in the Court's judgment on a previous interlocutory application between the same parties with a similar heading and bearing the citation 2021 JMCC COMM 11. In these reasons, having regard to the fact that there was a previous interlocutory application, in an effort to avoid confusion, I will for convenience use the terms "Claimant" and "1st Defendant" and "2nd Defendants" to refer to "the Applicant", "1st Respondent" and "2nd Respondent" respectively.

[2] The 1st Defendant is a limited liability company duly registered and incorporated under the laws of Jamaica and was at all material times the registered owner of 16 lots of land in the parish of Trelawny (hereinafter referred to collectively as the Properties). The 2nd Defendant is a limited liability company duly registered and incorporated under the laws of Jamaica and at all material times operated as a financial institution wholly owned by the Government of Jamaica.

[3] In July 2019, the 1st and 2nd Defendants commenced the process of selling the Properties. The sale process was by way of sealed bids and was and managed by the 3rd Defendant which was retained to provide real estate brokerage services.

[4] The Claimant was dissatisfied with the process by which a number of his bids were not accepted and he filed the claim herein.

[5] The Claimant resides in the United States of America. As a consequence of this fact, by Notice of Application filed the 22nd June 2020 the 1st and 2nd Defendants applied for an order that the Claimant be required to provide security for their costs in the sum of JM$2,500,000.00 within 21 days of the date of such order. The Notice of Application was heard on the 15th March 2021 and the Court made the following orders on the same day ("the Order"):

2. *The security for costs are to be paid into the United States Dollar denominated interest-bearing account to be opened in the joint names of the representatives of the parties and the sum is to be converted to United States Dollars on the day the funds are deposited.*

3. *Unless security is given as ordered:*

   a. *The claim is struck out without further order; and*

   b. *Failing production of evidence by the Claimant of evidence of deposit, there be judgment for the 1st and 2nd Defendants without further order with costs of the claim.*

4. *In the meantime all further proceedings herein are stayed.*

5. *Costs of this application to be costs in the cause.*

[6] The Claimant did not comply with the Order and on 19th April 2021 judgment was filed by the 1st and 2nd Defendants against the Claimant. Judgment was entered by the Registrar on 26th April 2021.

[7] By Notice of Application filed on 28th April 2021, ("the Application") the Claimant seeks orders:

(a) For relief from sanctions and specifically the Order; and

(b)That the judgment entered in favour of the 1st and 2nd Defendants against the Claimant be set aside.

The Application was made pursuant to rule 26.8 of the Civil Procedure Rules ("CPR") which provides as follows:

Relief from sanctions

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.

(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.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[8] The Claimant filed an affidavit on 7th June 2021 in support of the Application. He averred that the Order was served on his Attorneys-at-Law on the 14th April 2021 and prior to service of the Order, he had already begun to make arrangements to break investments so that he could comply with the Order. He further averred that shortly after he was able to break an investment, he transferred the sum of US$11,000.00 to his Attorneys-at-Law. They confirmed that they received that sum on the 14th April 2021. The Claimant exhibited a letter dated the 19th April 2021 from his Attorneys-at-Law addressed to Messrs. Livingston Alexander & Levy, Attorneys-at-Law for the 1st and 2nd Defendants, confirming the receipt of US$10,000.00 (being the approximate sum of JM$1,500,000.00 that was ordered to be provided) and indicating that they looked forward to having further dialogue about the opening of the interest-bearing account to which the money is to be lodged.

[9] The Claimant confirmed that on the 27th April 2021, his Attorneys-at-Law were served with the judgment. He has asserted that his non-compliance with the Order was not intentional and at all material times he was proactively trying to comply with the Order. He explained that during this period he had to face the painful and traumatic experience of losing his father who died suddenly on 8th March 2021 in Germany and that his death left the family scrambling to figure out funeral arrangements in the middle of a pandemic. Among the issues they had to address, was whether there could be travel to Germany, the borders of which were closed, to attend the funeral which was planned for 26th March 2021. The Claimant stated that a significant portion of his attention at that time was diverted to trying to obtain an exemption to enter Germany.

[10] On 20th July 2021, the Application first came on for hearing. I was concerned that on a *prima facie* assessment of the Claimant's affidavit in support of the Application, it lacked the evidential detail which would have provided the Court with the information necessary to properly determine the Application. Having regard to the importance of the Application, in the interest of fairness and despite the objection of Counsel for the 1st and 2nd Defendants, I adjourned the hearing of the Application until 30th July 2021. I gave the Claimant liberty to file and serve an additional affidavit exhibiting any documentary evidence to support the position advanced in his affidavit in support of the Application, particularly as it related to the steps he had taken to obtain the required funds to comply with the Order. I formed the opinion that any prejudice to the 1st and 2nd Defendants could have been adequately compensated by an order of costs and accordingly costs of the adjournment were awarded to the 1st and 2nd Defendants in any event, to be taxed if not agreed.

[11] The Claimant filed a supplemental Affidavit on 27th July 2021 in which he averred that on 16th March 2021, the day after the hearing of the security for cost Application, he reached out to one of his investment advisors who manages his investment in a particular fund and explained to her his need for an important immediate disbursement (which he stated was an unusual request for him). She

reminded him that a request for a redemption must be made at the end of a calendar month, with 30 days' notice and accordingly a request made in March 2021 would ordinarily have been honoured at the end of April 2021. The Claimant averred that this was a surprise to him due to the fact that he did not usually make *ad hoc* requests for disbursements. The advisor indicated to him that she would have to discuss it internally before any decision could be taken.

[12] The Claimant concedes that he lost track of time over the course of the next week leading up to his father's funeral on 26th March 2021. However, he was advised by his advisors around this date, that they would facilitate his request for the disbursement. This would be made together with another prearranged disbursement of US$25,000.00, in or around the middle of April 2021. The Claimant averred that at this point he was a bit overwhelmed by all that had transpired over that week and the fact that he could not physically attend his father's funeral. As a consequence, he did not recall the exact deadline by which he had to pay the security for costs pursuant to the Order. He stated that he received the disbursements from his investment on 9th April 2021 and 13th April 2021. He thereafter made the wire transfer of funds to his Attorneys-at-Law.

The Claimant's submissions

[13] Mr. Williams submitted that the Application was filed on 28th July 2021 which was within 24 hours of the service of the judgment on 27th of July 2021 and in that sense, was a prompt reaction. Mr. Williams conceded that the filing of the Application was 21 days after the breach of the Order. Counsel acknowledged that in the case of **Marlon Brown v Iola Brown and others** [2020] JMSC Civ 178, the Court held that the filing of an application 18 days after the breach was not considered to be prompt. Counsel also referred to the case of **HB Ramsay & Associates Limited and others v Jamaica Redevelopment Foundation Inc and another**, [2013] JMCA Civ 1, in which the Court found that 27 days was not prompt. It was submitted by Mr. Williams that having regard to the difficulties faced by the Claimant, 21 days should be considered prompt in this case. Counsel asked

the Court to take into consideration the disruption caused by the death of the Claimant's father which caused him to be overwhelmed. The fact that there was a 30-day requirement for a disbursement from the particular fund involved was also highlighted by Mr. Williams. It was submitted that, in light of these facts, the breach by the Claimant was not intentional in the circumstances but was a function of the manner in which he arranged his assets, structured with a low level of liquidity.

[14] It was also submitted that the Claimant had previously complied with all the relevant rules, practice directions and Court orders (save for the Order) and that his failure to honour an earlier request for further information should not be considered a breach for purposes of CPR 26.8 (2)(c). This, Mr. Williams argued, was because CPR 34.2 indicates that a request for information pursuant to CPR 34.1 should be complied with "*within a reasonable time*" and does not specify a period for compliance. For reasons which will later become apparent it is not necessary for me reproduce these rules herein.

[15] Mr. Williams also argued that the Claimant was prejudiced by the framing of the Order as an unless order. It was posited that were this not the case, the Claimant would have had the opportunity to remedy his default without having faced the disadvantage of a judgment being entered by the 1st and 2nd Defendants as the immediate next step in the proceedings.

Submissions of the 1st and 2nd Defendants

[16] Mrs. Small-Davis QC submitted that the Claimant has to overcome the first hurdle of establishing that the Application was made promptly. She argued that the Claimant has given no reasonable explanation for the 23 days delay in filing the Application. Learned Queen's Counsel noted that time begins to run from the date the sanction took effect which was 6th April 2021 and not from the date when judgment was entered.

[17] Mrs. Small-Davis referred to paragraph 3 of the Claimant's Affidavit in which he averred that with access to significant credit, he intentionally minimises his liquidity.

He stated that he strategically arranges, months in advance, to get monthly and sometimes quarterly disbursements from his investment account, transferred into his Bank of America checking accounts. Learned Queen's Counsel submitted that it could reasonably be concluded from the evidence that the Claimant was well aware that the process of breaking his investment, (which was his preferred source of funds), required notice in advance and as a consequence, this would take some time. It was further submitted that the fact that the Claimant made pre-arrangements for various transfers was a recognition and acknowledgement by him of the requirement for advance notice. Accordingly, it was argued that the Claimant was not being truthful when he said that the statement from his investment advisor on 16th March 2021 that a redemption from his investment account required a 30-day notice, came as a surprise to him.

[18] Having regard to the alleged statement by the investment advisor the day after the Order was made, Mrs. Small-Davis submitted that the Claimant would have recognized the difficulty in complying with the Order if funds from that particular investment were to be used. As a consequence, he ought to have communicated this to his Attorneys-at-Law, to allow for an application for extension of time for compliance with the Order to be made. It was suggested that, alternatively, the Claimant ought to have explored the possibility of obtaining the funds from other investments, since, in his Affidavit in response to the security for costs application he asserted that he is a platinum level bank customer and is required to maintain US$50,000.00 in his account. Mrs. Small-Davis noted that the Claimant gave no explanation to the Court as to why his platinum account for example, could not have been utilised.

[19] It was also highlighted to the Court by Mrs. Small-Davis that, notwithstanding the issues having to do with the death of his father to which the Claimant referred, on or about the 2nd April 2021, the Claimant had the presence of mind to send a US$100.00 wire transfer to his Attorneys-at-Law, which he said was done as a test to ensure that there would have been no further delays in making the payment and was also done to ensure that he had worked out all the possible glitches in sending

an international wire transfer to his Attorneys. Learned Queen's Counsel argued that this should have served as a reminder to the Claimant's Attorneys-at-Law of the imminence of the deadline and the need for an application for extension of time, or at the very least, communication to the Attorneys-at-Law for the 1st and 2nd Defendants, advising of the delay and seeking consent to an extension of time.

[20] Mrs. Small-Davis submitted that on the evidence presented by the Claimant, the failure to comply was intentional and he has not given a good explanation for the failure. It was further submitted that he had not generally complied with all other relevant rules, practice directions orders and directions because he had failed to comply with a request for information.

The Court's Analysis

Was the Order unusual?

[21] Mr. Williams has suggested that the Claimant has somehow been prejudiced by the fact that the Court made an unless order on the first occasion that the Order was made. In **Hytec Information Systems v Coventry City Council** [1997] 1 WLR 1666, Ward L.J. made the observation at paragraph 1674, that that an unless order is an order of last resort and is not made unless there is a history of failure to comply with other orders. I accept that an unless order is usually not made in the first instance on most interlocutory applications

[22] While this general approach is accepted, it is instructive to examine the provisions of the CPR specifically relating to security for costs. CPR 24.2 provides as follows:

> *Application for order for security for costs*
>
> *24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.*
>
> *(2) Where practicable such an application must be made at a case management conference or pre-trial review.*

(3) An application for security for costs must be supported by evidence on affidavit.

(4) Where the court makes an order for security for costs, it will -

(a) determine the amount of security; and

(b) direct -

(i) the manner in which; and

(ii) the date by which

the security is to be given.

[23] CPR 24.4 is often overlooked and is in the following terms:

Enforcing order for security for costs

24.4 On making an order for security for costs the court must also order that -

(a) the claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; and/or

(b) that if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out.

It is clear from CPR 24.4 that this provision reflects the seriousness with which orders for security for costs are viewed by the drafters. The presumed intention, evidenced by the use of the term "shall" (and the absence of any indication that it is not used in the mandatory sense), is that a security for costs order should apply as an unless order. Unless orders are to be treated differently from other orders and as described by Ward LJ in **Hytec** (supra), is "*a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.*"

[24] There is therefore nothing unusual in the terms of the Order of which it could be said imposes an unfairly heavy burden on the Claimant or which can obviate the necessity for the Claimant's strict compliance as demanded by the terms of the Order.

Was the Application made promptly?

[25] In **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray,** [2010] JMCA Civ 18, which was an appeal from an order granting relief from sanctions, Harrison JA at paragraph 14 expressed the view that "promptly" was an ordinary English word for which the meaning was plain and obvious. However, the dictionary meaning is "with alacrity" as was pointed out by Arden LJ in **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379. Harrison JA also referred to the statement made by Simon Brown, LJ in that case that:

> *"I would accordingly construe "promptly here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances"*

[26] In **HB Ramsay** (supra), Brooks JA (as he then was) in the judgment at paragraph 9 stated that:

> *"...It is without doubt that the current thinking is that if an application for relief from sanction is not made promptly, the court is unlikely to grant relief. Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance..."*

Brooks JA at paragraph 10 accepted that the word "promptly" does have some measure of flexibility in its application and whether something had been done promptly depends on the circumstances of the case. At paragraph 31 the learned Judge concluded as follows:

> *"[31] An applicant who seeks relief from 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."*

[27] Having considered the guidance provided by these authorities , I note that the Application was filed 23 days after the breach of the Order. I find that this was not prompt in the circumstances of this case, even after allowing for some degree of flexibility. Mr. Williams indicated that the Application was filed within 24 hours of the service of the judgment on 27th of July 2021 and submitted that in that sense it was a prompt reaction. However, the test is not how promptly an application for relief from sanction is filed once one makes a decision to file it, the test is whether the application is filed promptly after the failure to comply with the Order which necessitates the application. Mr. Williams explained that Counsel did not realize that the Order had not been complied with until served with the Judgment. This explanation does not negate the fact that the Application was not filed promptly. It merely proffers a reason as to why it was not filed promptly. Accordingly, this explanation does not avail the Claimant.

[28] The point was well made by Mrs. Small-Davis that when the Claimant's Attorneys-at-Law received his test wire transfer in the sum of US$100.00 on or about 2nd April 2021, this ought to have jogged the Claimant's Counsel's memory of the impending deadline for compliance with the Order. I think it is reasonable to conclude that such a deposit would have been brought to the attention of Counsel in the ordinary course as a matter of prudent internal management of the firm's accounts to ensure compliance with "source of funds" and other requirements. This test wire transfer ought to have triggered an appropriate response by the Claimant's Attorneys-at-Law.

[29] I wish to add by way of comment, that excuses related to administrative inefficiency and in particular, those lapses management which result in Counsel overlooking Court deadlines, are generally frowned upon by the Court. That is not to say such excuses can never amount to a good excuse. However, in addition to the traditional use of physical diaries as *aide memoires*, almost every modern computer and smartphone has the capability to provide alerts and reminders of important dates and deadlines. It ought to be a feature of every modern legal practice that deadlines are entered in whatever electronic system is being used and an

appropriate alert or multiple alerts issued to Counsel identifying items requiring attention.

[30] The Court having found that the Claimant has failed to make the Application promptly, the Court does not need to consider the merits of the Application. In the case of **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA Civ 18 at paragraph 37 Brooks JA (as he then was) arrived at the following conclusion:

> *The learned judge in this case, having found that the application had not been made promptly, was therefore, in error to have continued to consider the other aspect of rule 26.8. He compounded that error when he went on to consider the provisions of rule 26.8(3), despite his finding that HDX had not complied with the provisions of rule 26.8(2).*

I fully accept this conclusion, however, despite my finding as to the lack of promptness, I will nevertheless briefly consider the submissions that were made in respect of rule 26.8 (2), primarily as an academic exercise but also to demonstrate that even if I am wrong on the issue of promptness, the result of this Application would be the same in any event.

Whether the failure to comply was intentional

[31] I do not accept the evidence of the Claimant that he was surprised when he was advised by his financial advisor that thirty days' notice was required in order to redeem funds from his investment account. The Claimant's evidence as it relates to making arrangements for transfers in advance suggests that this was necessary because of the time lag in effecting redemptions. The price for the more advantageous return on fixed period investments (as opposed to depositing money in an ordinary savings account for example), is usually that there is a notice period for redemptions and/or a penalty for redemptions if there is a fixed period. It would be rather strange that the Claimant as an investor who used his account regularly would not have been aware of the requirement of a notice period for redemptions.

[32] In his affidavit opposing the application for security for costs, the Claimant averred that that he is a man of substantial financial means and is required to have a

minimum balance of US$50,000,00 in his Bank of America Account in the Preferred Platinum Rewards category. If this is so, providing security for costs in what in United States Dollars is less than US$11,000.00 in twenty-one days should not prove to be difficult. At paragraph 6 the said affidavit the Claimant indicated that at that time he was not able to pay the amount being requested by the Defendant into court as it would require him to "*break investments at a significant cost*". He did not indicate what would have been the significant financial cost of breaking any such investment or investments. He has not asserted that the only way of him to have complied with the Order was to obtain the funds from this particular investment which had the 30-day notice requirement.

[33] On being reminded of the notice period, the Claimant ought to have taken steps to obtain funds from other sources in order to comply with the Order. Critical to the Court's assessment is the fact that the Claimant offered no explanation as to why he could not have obtained the funds from another source or other sources, such as the Bank of America Account which he stated is required to have a minimum balance of US$50,000.00. In such circumstances, I am impelled to the conclusion on a balance of probabilities that the Claimant's failure to comply with the Order was deliberate.

Whether there is a good explanation for the failure

[34] The Claimant's explanation for his failure to comply with the Order is rooted in, firstly, the delay in obtaining the funds from the particular investment which he desired to utilise. Secondly, in the disruption and destruction caused by the death of his father and scheduled funeral in Germany during the global Covid-19 pandemic and the travel restrictions as a consequence thereof. I have earlier analysed the Claimant's actions as it relates to obtaining funds from the particular investment account with the thirty-day notice for redemptions to the exclusion of other sources of funds which the Claimant had. For similar reasons, I conclude that this element of the Claimant's explanation is wholly without merit.

[35] As it relates to the Claimant's loss of his father, the Court is not insensitive to the disruption and stresses which this may have caused to the Claimant. Nevertheless, the Claimant had to continue with the other essential elements of his life. One of which was this Claim and the Order. The loss of his father ought not to have prevented the Claimant from appreciating the deadline imposed by the Order and the need to ensure that the intended source of funds should be such as would permit him to comply with the operative deadline. The Claimant had the presence of mind to send a test wire transfer on or about 2nd April 2021 which he said was to ensure that there would be no difficulty in transferring the appropriate sum to his Attorneys-at-Law once such funds were received into his account. This act on his part demonstrates that, notwithstanding his loss, he remained fully cognizant of the obligation imposed on him by the Order. The obligation was not simply to provide security for costs but to do so within the stated period of 21 days. It was not to provide it whenever it was received from the Claimant's preferred source.

[36] For the aforementioned reasons, I conclude that there is no good explanation for the Claimant's failure to comply with the Order.

Has the Claimant generally complied with all other relevant rules, practice directions and orders

[37] The main issue in dispute is whether the Claimant did not comply with the request of the 1st and 2nd Defendants for further information. I have previously made reference to the submissions of Counsel on this issue. I do not think it is necessary for the Court to make a ruling on this particular issue because of the Court's finding that the failure to comply was intentional and that there is no good explanation for the failure. Having regard to these findings. the Court may not grant relief from the sanction imposed for the failure to comply with the Order.

Conclusion and disposition

[38] For the reasons given herein, the relief sought by the Claimant is refused. The Application was not made promptly. Even if one were to assume that it was made promptly, this would not make a difference to the result of this Application because on a balance of probabilities, the Court has found that the failure to comply was intentional and that there was no good explanation for the failure.

[39] The Court makes the following orders:

1. The Claimant's Notice of Application filed 28th April 2021 seeking relief from sanctions and other relief is refused.

2. Costs of the Application are awarded to the 1st and 2nd Defendants.

3. The Claimant's Attorneys-at-Law are to file and serve a copy of this order.