

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. C.L. S. 224 OF 1999**

<b>BETWEEN</b>	<b>ADELE SHTERN</b>	<b>CLAIMANT/ REPODENT</b>
<b>AND</b>	<b>VILLA MORA COTTAGES LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT/ APPLICANT</b>
<b>AND</b>	<b>MONICA CUMMINGS</b>	<b>2<sup>ND</sup> DEFENDANT/ APPLICANT</b>
<b>AND</b>	<b>KEITH BLACK</b>	<b>3<sup>RD</sup> DEFENDANT/ APPLICANT</b>

***Miss Carol Davis for Claimant/Respondent***

***Mr. Eric Frater and Miss Latoya Stephenson for  
1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants***

**Heard: May 9 and June 9, 2006**

**McDonald J. Ag.**

On April 20, 2006, the Applicants issued a Notice of Application for Court orders seeking:-

- i) an extension of time to file witness statements out of time
- ii) that their Defence be restored and trial proceed on the merit

**Chronology of Facts**

The Claimant filed a Writ of Summons and Statement of Claim on October 26, 1999.

The Defendants filed a Defence on March 20, 2000 (claimants' consent obtained to file out of time).

Claimant's reply to Defence filed on May 11, 2000

(Defendants' consent obtained to file out of time)

Summons for Directions filed on June 27, 2000 and consent order on Summons for Directions granted on September 26, 2000. Matter came up for trial on July 22, 2002 and November 25, 2002 respectively and on each occasion adjourned sine die.

Case Management Conference held on July 9, 2004. Amended Statement of Claim filed July 9, 2004.

Amended Defence filed July 13, 2004

Pretrial Review held on June 6, 2005 and adjourned to December 6, 2005.

Defence struck out at adjourned Pre-Trial review on December 6, 2005.

Judgment entered for the Claimant on December 13, 2005 with damages to be assessed on May 3, 2006.

Assessment of Damages set for May 3, 2006 adjourned to June 13, 2006 pending the application to set aside fixed for hearing on May 9, 2006.

### **Case Management Conference**

Jones, J made a number of orders at the Case Management Conference on July 9, 2004, the most relevant being:-

- i) All expert reports to be filed and served on the Defendants on or before 14<sup>th</sup> July, 2004
- ii) The Defendant to be given permission to file and serve an amended Defence on or before 14<sup>th</sup> July, 2004.
- iii) That both parties give to the other Standard Disclosure of documents on or before 16<sup>th</sup> September, 2004; Inspection of documents by 23<sup>rd</sup> September, 2004.
- iv) Witness statements to be exchanged by each witness that the parties intend to call by 30<sup>th</sup> November 2004.
- v) Trial to be set for three (3) days – 26<sup>th</sup>, 27<sup>th</sup>, and 28<sup>th</sup> February, 2007.

### **Pre-Trial Review**

I will only list orders made by Mangatal J on June 6, 2005 which I deem relevant. They are as follows:-

- 1) Permission is granted to the Claimant to call and put into evidence the report of Mr. Levi Somerville, Professional Engineer at the trial.

- 2) The Defendants to file and serve a list of Documents by July 29, 2005 failing which the Defence stands struck out.
- 3) Time for exchange of witness statements be extended to November 25, 2005.

On December 6, 2005 the Defence was struck out by Gayle J. (Ag.) and on December 13, 2006 Judgment entered for the claimant with assessment of damages set for hearing on May 3, 2006.

There is no contest that the Defence was struck out pursuant to orders of June 6, 2006 and December 6, 2005; and that the right to enter judgment had arisen because the Defendants failed to comply with the "unless" order of June 6, 2005.

In summary there is no dispute.

1. that the Defence was properly struck out
2. that judgment was properly entered under rule 26.5
3. that the claimant can apply to set aside the judgment under rule 26.6 CPR 2002.

Rule 26.6 states that:-

- (1). A party against whom the Court has entered judgment under rule 26.5 when the right to enter judgment has 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 has not arisen at the time when judgment was entered, the Court must set aside judgment.
- (4) When the application to set aside is made for any other reason, rule 26.8 (relief from sanctions) applies.

In the present case, the right to judgment has properly arisen under rule 26.5, therefore this application is to be considered under rule 26.6(4). This rule points the Court to rule 26.8. It is evident that rule 26.6(1) and (2) are not applicable to the instant case.

### **Relief from Sanctions**

Rule 26.8 states: -

- “(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.

**Was the application made promptly and supported by affidavit**

Judgment was entered on December 13, 2005 and served on the Applicant's Attorneys -at -Law on February 3, 2006. Notice of Application for Court orders dated December 7, 2005 was filed on April 20, 2006, some 2 months after the Default Judgment had been served.

However Affidavit in support of application to set aside order dated the December 13, 2005 was filed on the said date.

The fact that the affidavit in support of application to set aside was filed the same day the Default Judgment was entered and before the perfected Default Judgment was served, indicates in my view that the Defendants intended to have it set aside promptly.

The fact that the Application was not filed until April 20, 2006 and there is no evidence that any other Notice of Application filed exists, the 20<sup>th</sup> April 2006 must be taken as the true date of filing.

It appears that there was inadvertence in filing the Notice of Application before or at the same time that the affidavit was filed.

I am therefore of the view that the application could in the circumstances be considered to have been made promptly and I so find.

In light of my finding that the judgment was properly entered under 26.5, this application falls for consideration under rule 26.6(4) and that rule directs the Court to rule 26.8.

The Court can only exercise its discretion under rule 26.8 (2) to set aside if subparagraphs 2(a) (b) and (c) are all complied with.

In his affidavit, Mr. Frater stated that the delay and non-compliance with the orders, was not intentional and was due to a number of circumstances:-

- (i) The orders fell in a period when he was in the process of transferring his practice to another Attorney-at-law with a certain amount of dislocation attendant.
- (ii) The 3<sup>rd</sup> Defendant who is the person from whom he received instructions and is in possession of relevant documents was ill for sometime and died. The 2<sup>nd</sup> Defendant is based overseas.
- (iii) He had some difficulty in getting the witness statements signed, as some of the witnesses have changed addresses.
- (iv) Upon receipt of an expert witness statement, he sought to find an expert to counter it, and although he made contact with one, it was not possible in the time frame to get him to visit the locus, taking his equipment with him, and to prepare an expert report for use in the case.
- (v) He seeks relief from sanctions (26.8) as compliance with the orders will be made by the 2<sup>nd</sup> January 2006 and will not affect the trial date.
- (vi) That no party will be prejudiced by permitting the judgment to be set aside and permitting the Defence to file the documents.



(vii) That the Claimant has not complied with all the orders on Case Management Conference.

Mr. Frater conceded that the Claimant has since complied with the Case Management Orders.

**Was the failure to comply intentional?**

The Court finds that failure to comply was not intentional in light of the fact that the affidavit was filed speedily which suggests an intention to get on with the matter.

**Is there a good explanation for failure?**

It has not been contradicted that Mr. Frater was in the process of transferring his practice to another Attorney-at-law and that this would result in some dislocation, but the fact is that he has remained the Attorney-at-Law in this particular matter as well as the law firm Frater, Ennis and Gordon.

The Defendants have failed to provide a list of Documents and this was the express matter for which the defence had been struck out.

Mr. Frater explained that the 3<sup>rd</sup> Defendant who is the person from whom he took instructions and who was in possession of relevant documents was ill for sometime and has died.

The order for disclosure of documents was made on 9<sup>th</sup> July 2004 for compliance to take place on or before 16<sup>th</sup> September 2004 and this was further extended to 29<sup>th</sup> July, 2005.

The Court has not been informed of the dates, nature and duration of the 3<sup>rd</sup> Defendants' illness nor of the date of his death.

There is no evidence before the Court that the period of his illness and subsequent death coincides with the period for the filing and serving of the list of Documents.

The Defendants could have complied with this order by revealing that the documents exist or had existed. At the stage of disclosure physical possession of the documents was not required.

Mr. Frater has not disclosed what steps if any he took to inform the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant of the court orders.

In the event that Counsel was experiencing difficulty in obtaining instructions from the 3<sup>rd</sup> Defendant, no explanation has been given as to why the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not produced their List of Documents.

In my view, the fact that the 2<sup>nd</sup> Defendant resides abroad is of no moment. The 2<sup>nd</sup> Defendant and the Directors of the 1<sup>st</sup> Defendant have a duty and responsibility to communicate and give proper instructions to their

Attorney-at-Law and to ensure that the matter is being actively pursued in a timely fashion.

Another reason put forward by Mr. Frater for non-compliance with the order for exchange of witness statements is that he had some difficulty in getting the witness statements signed as some of the witnesses had changed address.

It is evident that only some witnesses have changed addresses, yet the Defendants have filed no witness statements whatsoever.

Furthermore, if Counsel was unable to find the witnesses for the purposes of signing the prepared statements, witness summaries could have been filed instead pursuant to rule 29.6 CPR 2002.

In his affidavit Mr. Frater made reference to the absence of an expert report to counter the claimants' expert witness statement and the reasons therefor. In my view this issue does not arise as the Defendant did not apply to the Court for permission to call an expert witness or to put in his statement at the trial. There is no order in place requiring compliance.

Paragraph (v) of Mr. Fraters' affidavit seeks relief from sanctions as compliance with the orders will be made by the 2<sup>nd</sup> January 2006. This deadline date has passed and to date no list of Documents has been filed nor have any draft witness statements been exchanged.

The burden is on the Applicants/Defendants on a balance of probabilities to satisfy the Court as to the adequacy of the reasons for the delay and failure to comply. The Court has to examine the nature and quality of the explanation.

I find that no good explanation has been given for the failure to comply with the orders.

**Has the defaulting party generally complied with all other relevant rules, practice directions, orders and directions?**

Before the failure to comply with the Case Management Conference Orders and Pre-trial Review orders, the only failure on the part of the Defendants was in respect of the filing of the defence within the stipulated time. This was remedied and the Defendants were ready to proceed to trial under the old Rules.

I am of the view that there has been general compliance with the rules, order and directions save and except some of the orders made on the 9<sup>th</sup> July 2004 and 6<sup>th</sup> June 2005.

In light of the Court's finding that no good explanation has been given, the applicants would not have satisfied all three requirements of rule 26.8(2) CPR 2002.

All three requirements must be satisfied before the discretion to grant relief can be exercised.

Application for court orders filed on 20<sup>th</sup> April 2006 refused. Costs  
of the Application to the Claimant/Respondent to be agreed or taxed.