[2017] JMSC Civ. 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV03670

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**CLAIMANT**
AND	**THE ADMINISTRATOR GENERAL OF JAMAICA (Administrator Ad Litem for the Estate of Yowo Morle)**	**1ST RESPONDENT**
AND	**HAZEL ELAINE CLARKE**	**2ND RESPONDENT**
AND	**THE ESTATE OF LINTON LLOYD CLARKE (discontinued on the 18th of December 2012)**	**3RD RESPONDENT**
AND	**NOMORA MORLE**	**4TH RESPONDENT**

CONSOLIDATED WITH:

CLAIM NO. 2008HCV04971

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**CLAIMANT**
AND	**YOWO SENHI MORLE**	**1ST DEFENDANT**
AND	**HAZEL ELAINE CLARKE**	**2ND DEFENDANT**
AND	**LINTON LLOYD CLARKE**	**3RD DEFENDANT**

Mrs. Susan Watson Bonner on behalf of the Assets Recovery Agency for the Claimant

Ms. Geraldine Bradford on behalf of the Administrator General for the 1st Respondent

Mr. Clive Mullings for the 2nd Respondent

Heard: 18th and 25th of October, 2017

CIVIL PROCEDURE – APPLICATION FOR RELIEF FROM SANCTION – CIVIL PROCEDURE RULES (CPR) 2002 – RULE 26.8

McDONALD J

Introduction

[1] The claims were consolidated on the 26th of March, 2012 by order of my brother Campbell J. Since that time there have been no less than three trial dates, all of which have been vacated.

[2] On the 25th of July 2017, my brother K. Anderson J, made the following orders:

> 1. *The parties are granted extensions of time for compliance with all Case Management Orders that were made by this Court of July 18, 2016, and in that regard, time is extended until September 1, 2017, for the Claimant/Applicant to so comply and until September 21, 2017, for each of the Defendants to so comply.*
>
> 2. *If there is any party who fails to comply with any of those orders in any respect, save and except, for the estate of the 1st Defendant as represented by the Administrator General, which shall not be required to file and or serve any other document than it has already filed and or served; then in respect of any such party in default of compliance, that party's statement of case shall stand as being struck out, without the need for any further court order.*
>
> 3. *The parties shall file and serve a bundle of submissions and authorities and shall do so by or before October 5, 2017, failing which in respect of any party in default of compliance, that party's statement of case shall stand as struck out without the need for any further court order.*
>
> 4. *The Claimant/Applicant shall file a Judge's Bundle, comprise [sic] of all documents pertinent to this Claim, save and except for the Bundle of Submissions and Authorities and shall do so by or before October 5, 2017, and shall by or before the same date file and serve an index to Judge's Bundle.*
>
> 5. *…*
>
> 6. *…*

[3] When the matter came for trial before me on the 9th of October 2017, both the claimant and the 2nd respondent were in breach of one the unless orders. The claimant filed its submissions and authorities one day out of time, i.e. on the 6th of

October 2017. The 2nd respondent duly filed its submissions within time but filed its witness statement on the 6th of October 2017, i.e. 15 days out of time. Accordingly, their statements of case stood struck out without the need for any further order from this court.

Applications for relief from sanctions

[4] Counsel for the claimant, Mrs. Watson Bonner, duly filed a notice of application for court orders seeking relief from sanctions and supporting affidavit on the 9th of October 2017. A further supplemental affidavit was filed on the 18th of October 2017.

[5] Similarly, counsel for the 2nd respondent, Mr. Mullings, filed a notice of application for court orders seeking relief from sanctions and supporting affidavit on the 10th of October 2017. A further supplemental affidavit was filed on the 18th of October 2017.

[6] While both sides may have been amenable, the court was unable to entertain the suggestion made by counsel that the matter could be resolved by way of consent. Rule 26.7(3) makes it clear that *'Where a rule, practice direction or order- (a) requires a party to do something by a specified date; and (b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement.'*

The Relevant Principles

[7] The rules relating to relief from sanctions are found at rule 26.8 of **the Civil Procedure Rules**, 2002, as amended ('CPR'). For convenience rule 26.8 has been set out in full:

> *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 approach that a court ought to have was clearly set out by Edwards JA (Ag.) at paragraph [57] in the recent decision of **Jamaica Public Service Company Limited v Charles Vernon Francis et al** [2017] JMCA Civ 2 (hereinafter the 'JPS case'),

> *[57] … In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b) all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance. Taking all that into consideration, the approach to the application of the rule should be that taken in* ***H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another****.*

[9] In my view, both applicants (the claimant and 2nd respondent) placed greater emphasis on the considerations at rule 26.8 (3) than on the cumulative threshold requirements at rule 26.8(2). In particular, strenuous submissions were made in

reliance on rule 26.8(3)(a), that the court in considering whether to grant relief should have regard to the interests of the administration of justice.

[10] To this end, Mrs. Watson Bonner even submitted that the approach the court should adopt is to consider the matter as a whole and in the administration of justice, the case should be heard on its merits. She noted that the matter was concerned with allegations that a victim lost over USD$600,000.00 and that the spirit in which the Proceeds of Crime Act ('POCA') was enacted was not only to ensure that persons guilty of financial crimes would face criminal sanctions but that they also be deprived of the benefits derived from any such conduct. She further submitted that in the interest of the administration of justice, the striking out of the claimant's case would be a disproportionate sanction for the failure to file submissions and authorities within time. She referred the court to paragraph [175] of the judgment of McDonald-Bishop J (as she then was) in **Branch Developments Ltd (trading as Iberostar Rose Hall Beach Hotel) v The Bank of Nova Scotia Jamaica Ltd.** [2014] JMSC Civ 003, wherein it was opined that *'The punishment must fit the crime.'*

[11] Counsel for the 2nd respondent, Mr. Mullings, similarly submitted that the 2nd respondent's breach was not flagrant and that it would be in the interest of the administration of justice for her case not to be struck out, particularly since she remedied the breach and had complied with the order for submissions and authorities to be filed. He also submitted that the claimant was not prejudiced by the failure to file the witness statement within time. Whereas the 2nd respondent was prejudiced by the claimant's failure to file its submissions and authorities within time, as it deprived the 2nd respondent of the time required to prepare and meet the case for the trial date of the 9th of October 2017.

[12] Mr. Mullings relied on the overriding objective and commended to the court paragraph [31] of the judgment of Morrison JA (as he then was) from **Morris Astley v the Attorney General of Jamaica and the Board of Management of the Thompson Town High School** [2012] JMCA Civ 64, which spoke to rule 1.2 and

giving effect to the overriding objective when interpreting the CPR or exercising any power thereunder. Morrison JA opined:

> *[31] … The core principle of the CPR is that the court "must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules" (rule 1.2). As Mr Stuart Sime observes in his work, 'A Practical Approach to Civil Procedure' (10th edn, para. 3.28), "[s]hutting a litigant out through a technical breach of the rules will not often be consistent with... [this objective], because the primary purpose of the civil courts is to decide cases on their merits" …*

[13] While Mr. Mullings' submission in relation to the application of the overriding objective (rule 1.2) is unobjectionable, I do not regard either of the authorities cited by counsel to be particularly helpful in the instant case. **Morris Astley**, was primarily concerned with whether a relief from sanction application (pursuant to rule 26.8) could have been entertained by the court where the correct application would have been an application to set aside (pursuant to rules 27.8(6) and 39.6). In **Branch Developments Ltd**, McDonald-Bishop J (as she then was) did not consider relief from sanctions pursuant to rule 26.8 at all. In fact, it was held that the party had complied by virtue of filing its witness summary, and as such the unless order was of no effect in the face of such compliance (see: paragraph [138]). I am also unable to agree with the holistic approach commended to me by Mrs. Watson Bonner, which may very well be appropriate in circumstances where an application is being made for striking out pursuant to rule 26.3(1)(a), as was also the case before McDonald-Bishop J.

[14] Fortunately, the law in this area has been clearly expounded on by the Court of Appeal. As such, I must adopt the correct approach as set out in **H B Ramsay and Associates Ltd and another v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1, which was followed very recently by Edwards JA (Ag.) in the **JPS case** and set out at paragraph [8] herein. I am therefore guided by paragraph [31] of Brooks JA:

> *[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**.* (emphasis added)

[15] For clarity and ease of comprehension, I will first deal with the claimant's application and then go on the consider the 2nd respondent's application.

The Application on behalf of the Assets Recovery Agency

[16] Mrs. Watson Bonner submitted that there was compliance with rule 26.8(1) insofar that the application for relief from sanction was (a) made promptly; and (b) supported by evidence on affidavit.

[17] I am satisfied that the requirements of rule 26.8(1) have been met. The application was made promptly, a notice of application was filed on the 9th of October 2017, which was the next business day after the failure to comply. With regards to the requirement at rule 26.8(1)(b), it should be noted that Mrs. Watson Bonner swore to two affidavits the first was filed on the 9th of October 2017 and a supplemental affidavit was filed on the 18th of October 2017.

[18] In relation to rule 26.8(2), it was submitted that (a) the failure to comply was not intentional; (b) there is good explanation for the failure; and (c) there was general compliance.

[19] In relation to the 'good explanation', Mrs. Watson Bonner gave evidence to the effect that on the 5th of September 2017, she was unwell and had also been engaged in other proceedings. Her evidence was as follows:

> *4. On September 5, 2017, I was unwell and had also been engaged in other proceedings at the Supreme Court of Judicature in the matter of Claim 2016 HCV 00313.*

[20] There are two issues with this evidence. Firstly, regarding the date (the 5th of September 2017) this was apparently an error which was corrected in the supplemental affidavit. Mrs. Watson Bonner stated:

> *4. The claimant's Attorney-at-Law with conduct of these proceedings was engaged in a two days [sic] hearing in the Supreme Court of Judicature on October 5 and 6, 2017. Whilst the matter did not go on, on October 5, 2017, the Judge with conduct of the matter indicated to Counsel for the Claimant in those proceedings that he would not wish to continue the proceedings on October 6, 2017, by virtue of fact [sic] that both of us, that is, his Lordship and I, were exhibiting signs of being unwell, that is his Lordship and I.*

It is apparent that what was meant was that counsel was engaged in a two-day matter which was supposed to commence on the 5th of October 2017, the same day that the bundle of submissions was to be filed and not a month earlier on the 5th of September 2017.

[21] The second issue with Mrs. Watson Bonner's evidence is the matter which she claims that she was engaged in. Based on the court's records, the claim number which counsel cited, namely 2016HCV00313 relates to ***Donovan Reid v Maureen Spaulding***. This is a personal injury matter filed on the 27th of January 2016, which counsel Mrs. Watson Bonner does not appear at any time to be on record for, nor does the Assets Recovery Agency appear to be an interested party. Unlike the issue of the date, there is no correction made by virtue of the supplemental affidavit.

[22] In any event, even if counsel were able to properly substantiate her assertion by providing a different/correct claim number, I would not *ipso facto* regard the fact that counsel was engaged in another matter as a good explanation for the failure to comply with K. Anderson J's unless order. I will therefore go on to consider the other part of the explanation provided, namely that counsel was unwell on the 5th of October 2017.

[23] It is further noted that at paragraphs 5 and 6 of the supplemental affidavit, Mrs. Watson Bonner stated:

> *5. The claimant's Attorney-at-Law has pre-existing conditions which she does not seek to use as an excuse for her failure to comply with the orders of the court but to say such conditions from time to time impact her agility and are exacerbated by changes in weather condition.*
>
> *6. The act of preparing and filing documents at court in proceedings in which the claimant is engaged is engaged is the sole responsibility of the claimant's Attorney-at-Law.*

[24] The court is sympathetic to counsel's condition and its attendant challenges. The court is also mindful that the fact that counsel had over two months within which to file the submissions and authorities, should not be held against her. Such an approach may be too restrictive as it would seek to punish a party for not complying at an earlier stage and fail to take into account the fact that compliance was possible up until the last day, the 5th of October 2017. I would note the reasoning of Edwards JA at paragraph [45] of the **JPS case**:

> *[45] In my view, the essence of the explanation, in the instant case, was that the appellant's witnesses were not available to give witness statements before the period expired. The learned judge ought to have understood and accepted it to mean just that. His restrictive approach sought to punish the appellant for not complying at the earlier stage of the period limited for doing so. This approach fails to take into account the fact that the appellant could have complied on the last day of the period specified and there would be no need for an explanation as to why there was no earlier compliance.* ***Certainly, a litigant who acts in this way does so at his own peril, if for some reason he misses that deadline. There may be a good explanation for missing the deadline but there may be an even better explanation for not being able to meet it earlier in the period. However, in my view, the fact that the explanation for missing the deadline did not cover the earlier period, important though it may be, by itself should not automatically result in the explanation which was in fact proffered, being dismissed out of hand.*** (emphasis added).

[25] Notwithstanding the unfortunate position Mrs. Watson Bonner found herself in on the 5th of October 2017, i.e. being unwell which she contends was exacerbated by changes in the weather condition, the court is unable to overlook a number of factors. Firstly, the court cannot overlook that despite being unwell, it is her evidence that she attended court and was able to appear in another matter on the same day. Secondly, since as early as the 26th of March 2012 when the matter came up for case management conference, Mrs. Watson Bonner has routinely appeared with counsel from the Assets Recovery Agency, namely Mrs. Charmaine Newsome. Both Attorneys-at-Law appeared on the 25th of July 2017 when the

unless orders were made by my brother K. Anderson J and such was also the case when the matter came up for trial on the 9th of October 2017.

[26] While this court is by no means endeavouring to scrutinise or dictate the internal operations of the Assets Recovery Agency and how tasks are assigned amongst its Legal Officers in its Legal Department, it is difficult to accept that the act of preparing and filing documents at court in proceedings in which the claimant (ARA) is engaged is the sole responsibility of Mrs. Watson Bonner (as contended in paragraph 6 of the supplemental affidavit). It stands to reason that if Mrs. Watson Bonner was engaged in another matter and/or unwell on the day that the submissions and authorities were to be filed, then arrangements could have been made for same to be done by someone else, like Mrs. Charmaine Newsome who presumably would have been fully briefed in the matter. As such, I do not regard the explanation proffered by Mrs. Watson Bonner to be a good one.

[27] In the circumstances, while I accept that the failure to comply was not intentional and that there has been general compliance, save for the case management orders for which an extension of time was given, the failure to give a good explanation is fatal to the claimant's application. As such I am unable to properly go on to consider the rule 26.8 (3) considerations and thereby grant relief.

The Application on behalf of the 2nd respondent

[28] As previously stated the 2nd respondent failed to filed her witness statement by the 21st of September 2017, this was instead filed 15 days out of time on the 6th of October 2017. The relevant notice of application for court orders seeking relief from sanctions and supporting affidavit were filed on the 10th of October 2017, 19 days after the breach occurred. A further supplemental affidavit was filed on the 18th of October 2017.

[29] While the application was duly supported by evidence on affidavit, sworn to by Mr. Mullings (in accordance with rule 26.8(1)(b)), it is debatable whether the

application itself was made promptly. No issue was taken in relation to this by Mrs. Watson Bonner. I am however mindful that the requirement for promptness is mandatory, or as Brooks JA put it, *'Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance … the context of rule 26.8(1) does suggest a mandatory element.'* (see: paragraph 10 of **HB Ramsay**). It is to be noted that if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. The word 'promptly' does however have some measure of flexibility in its application and whether something has been promptly done or not, depends on the circumstances of the case (see: paragraph 11 of **HB Ramsay**).

[30] While 19 days, *prima facie*, might not seem to be an inordinately long time, the circumstances of the case must be considered. In the instant case, it must be noted that Mr. Mullings did not make his application for relief until the 10th of October 2017 and this would have been not only 19 days after the breach, but one day after the trial was set to commence. It appears to me that this application was not prompt in the circumstances, since even if the 2nd respondent cleared the hurdles of rules 26.8(1) and (2) the trial date of the 9th of October 2017 could not have been met. This is a consideration the court would have regard to under rule 26.8(3)(d). It would have been expected that the application would have been made after the 2nd of October when Mr. Mullings received the files from the 2nd respondent, perhaps on the 5th of October when the skeleton submissions were filed or the 6th of October, the same day that the witness statement was filed, or even the 9th of October, the first day of the trial.

[31] While the 2nd respondent must comply with the provisions of rule 26.8(1) in order to have her application considered and failure to make the application promptly will result in the court not having to consider the merits of the application, I will nonetheless go on to consider the merits as promptitude allows some degree of flexibility (see: paragraph [31] of **HB Ramsay**).

[32] Much like the claimant, there appears to have been general compliance, save for the case management orders for which an extension of time was granted (in accordance with rule 26.8(2)(c)). However, the difficulty lies with determining whether the failure to comply was intentional or whether there was a good explanation for the failure.

[33] I accept that on the part of counsel, Mr. Mullings, the failure was not intentional and that there may even have been a seemingly good explanation. He gave evidence at paragraph 4 of his affidavit that:

> *4. That on or about July 25, 2017 Mr. Kirk Anderson made an "unless order" for the 2nd Defendant to file Witness Statement [sic] by September 21, 2017. That after the Order was made by the said Mr. Justice Anderson the 2nd Defendant/Respondent was in the process of seeking a new Attorney-at-Law to represent her and in the process she took the files from my Chambers. That after, the 2nd Defendant and I agreed on the continued representation I [sic] was after the date on which she was required to comply with Order [sic].*
>
> *5. That efforts were made by the 2nd Defendant and the witness statement was filed on the 6th October 2017.*

[34] In the further affidavit, Mr. Mullings provided further particulars:

> *4. That I now crave leave of this Honourable court to refer to paragraph 4 of my previous affidavit. I wish to say that the 2nd Defendant collected the court documents from my chamber on the 28th July and the said 2nd Defendant came back to my chambers on the 2nd October 2017 and returned the files with the documents. As at that date, the 2nd Defendant was in breach of one order made by Mr. Justice Kirk Anderson.*
>
> *5. That the Order was served on my chambers on the 10th August 2017 but August being my vacation month, I was out of office for almost all of that month in 2017 and as such this order was brought to my attention in September 2017.*
>
> *6. That I must also indicate to the court that to the best of my knowledge, information and belief, the 2nd Defendant was not present in court on the 25th July 2017 when the orders were made and I did not indicate to the court that the 2nd Defendant had taken the files from my office.*

[35] The difficultly with the affidavits sworn to by Mr. Mullings, is that the court is unable to determine whether the 2nd respondent's failure was unintentional (rule 26.8(2)(a)) or critically whether there is a good explanation. Even if it is presumed that the default was not intentional, I am of the view that Mr. Mullings' affidavits do

not provide any explanation for the failure. The most that can be discerned is that the 2nd respondent was seeking a change of representation and that this caused a lapse. While the further affidavit provides a better timeline, it seems however that the explanation could only have been provided by the 2nd respondent herself. In the circumstances, it would have been useful for the application to have been supported by evidence on affidavit, sworn to by the 2nd respondent.

[36] Accordingly, I am similarly unable to properly go on to consider the rule 26.8 (3) considerations and thereby grant relief.

Disposal

[37] It is hereby ordered:

1. The Claimant's and 2nd Respondent's Applications are refused;
2. Judgment for the 1st Respondent;
3. Costs to the 1st Respondent to be agreed or taxed; and
4. Leave to appeal granted to the Claimant and the 2nd Respondent.