[2015] JMSC Civ. 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014CD00023

BETWEEN	**SHERINE BLAKE**	**CLAIMANT**
AND	**LDCOSTA LOANS AND FINANCIAL MANAGEMENT LIMITED**	**1ST DEFENDANT**
AND	**LINCOLN BROWN**	**2ND DEFENDANT**

Application for Relief from Sanctions - Unless Order - Attorneys to blame - Whether administrative inefficiency a good explanation - Late compliance - Whether relief to be granted.

Mr. Barrington Frankson, Ms. Meikle John instructed by Frankson and Richmond for Claimant.

Ms. Michele Smith, Ms. Kathlyn Lewis instructed by Lewis Smith & Co. for Defendants.

Heard: 20th April 2015.

In Chambers

Cor: Batts J.

[1] On the 20th day of April 2015, I made the following Orders:

a) Application for relief from sanctions granted.
b) Trial date of 22nd to 26th June 2015 to stand.
c) Inspection of documents on or before the 24th April 2015.
d) Time extended to the 22nd May 2015 for Defendants to file and serve witness statements.

e) Parties are to agree if possible and file a bundle of agreed documents on or before the 5th June 2015.
f) Parties are to file and serve notices under the Evidence Act and or Notices to Produce on or before the 5th June 2015 filing and
g) Time abridged for the service of counter notices to the 10th June 2015.
h) Pretrial review set for the 11th June 2015 at 10:00 am for ½ hour.
i) Parties are to agree if possible and file a statement of facts and issues on or before the 10th June 2015 and if not agreed each party is to file a statement of facts and issues on or before the 10th June 2015.
j) Listing Questionnaire is to be filed and served on or before the 10th June 2015.
k) Costs of today to the Defendant to be taxed if not agreed.
l) Formal Order is to be prepared filed and served by the Claimant's Attorney at Law.
m) Leave, to appeal is granted.

[2] I promised then to put my reasons for granting Relief from Sanctions in writing. This judgment is the fulfillment of that promise.

[3] Claimant's counsel relied upon written and oral submissions in opposition to the Claimants application for Relief from Sanctions. The sanction in question had been imposed in consequence of an Order of this Court made on the 2nd February 2015. The material portion of that Order stated in paragraph (3).

> **"Unless the Claimant makes standard disclosure of documents on or before the 16th February 2015 the Claimants statement of case shall be struck out".**

[4] The Claimants provided standard disclosure on or about the 23rd February 2015 and was therefore 7 days late. The Order be it noted provided for inspection of documents on or before the 27th February 2015. This application for Relief from Sanctions was filed on the 24th February 2015.

[5] The Claimant's attorney by Affidavit dated 24th February 2015 stated,

> **"3. Despite our best endeavours we were unable to comply with the aforesaid orders owing to the massive volume of documents with which we had to examine, label, log and subsequently compile a list thereof.**
>
> **4. That save and except for standard disclosure the Claimant has complied with all the Case Management Conference Orders and is in a ready position to proceed with the trial which is fixed for hearing on June 22, 2015 to June 26, 2015."**

[6] The Defendant contends that the application ought to be refused because:

a) It was not made promptly.
b) There is no good explanation given by the Claimant's attorneys.
c) The Claimant has not generally complied with all orders and rules of the court.
d) The interest of justice will not be served if relief from sanctions is granted.
e) The trial date cannot likely be guaranteed if relief from sanction is granted.
f) The effect on the Defendant will be prejudicial if relief is granted.

[7] Rule 26.7 (2) of the Civil Procedure Rules provides,

> **"Where a party has failed to comply with any of these Rules, a direction or any Order, any sanction for non-compliance imposed by the rule direction or order takes effect unless the party in default**

applies for and obtains relief from the sanction and rule 20.9 shall not apply."

[8] Rule 26.8 of the Civil Procedure Rules treats with the procedure and prerequisites for relief from sanctions Defendants' counsel correctly submits that the mandatory prerequisites for relief are that:

a) The application is promptly made.
b) It is supported by affidavit evidence
c) Failure to comply was not intentional
d) There is a good explanation for the failure
e) There has been a general compliance with all other rules and orders.

[9] Whether or not each of these mandatory prerequisites are satisfied can only be assessed with reference to the context and facts before the tribunal considering the application for relief. "Promptness" for example is a function of the nature of the duty imposed, the or any other pertinent time periods for example the trial date and how far away it is, and the reason for the failure to comply. This must be so for otherwise the drafter of the rules would have stipulated a fixed time period within which the application is to be made. There is very good reason why that was not done. This is because, in the fog of litigation, there are a great many and unpredictable circumstances and situations that may occur. A just cause ought not to be defeated by mere technicalities. Litigation is not, as a great judge once said, a game of "snap" in which a party wins because the other has "tripped" over a rule.

[10] In the case before me I have little hesitation in finding the mandatory requirements satisfied. The application was filed one day after disclosure was made and 8 days after disclosure ought to have been made. This is not a case in which the party was unaware of the order or only became aware of it at some later date. The assessment of "promptness" therefore can be made with regard to the date on which

the act ought to have been done. The Defendants' counsel suggested that the application for relief ought to have been done on or before the date the list of documents was due that is the 23rd February 2015. I disagree. In the first place the Claimants counsel in all likelihood had every hope or expectation of making the deadline and indeed according to the evidence was endeavouring to do so. In the second place pausing to prepare such an application, so as to be prompt making it, would in all likelihood increase the possibility of the deadline not being met. It is an artificial or unrealistic expectation that parties trying to make a disclosure deadline should pre-empt the failure to make the deadline with an application for relief before the sanction has taken effect. I hold that the application coming 8 days after the sanction took effect and 1 day after the list was in fact filed was prompt. The application is supported by evidence on affidavit. This I already adverted to in paragraph 5 above. There is no suggestion and on the evidence before me it could not credibly be suggested, that the breach of the Order for discovery was intentional.

[11] It was however, strongly urged that no good explanation for the failure to comply has been provided. It was submitted that the Judicial Committee of the Privy Council decided, in **Attorney General of Trinidad and Tobago v Universal Projects Ltd.** [2011] UKPC 37 at paragraph 23 that administrative inefficiency was not a good or proper explanation. The Judicial Committee has made no such decision. The court observed in passing that

> **"Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency"**

[12] That dictum clearly acknowledges the possibility of excusable oversight, which is an example, if you will, of administrative inefficiency. Their Lordships are saying that inexcusable oversight or "inexcusable" administrative inefficiencies are never a good explanation.

[13] In any event the explanation in this case is not oversight or administrative inefficiency. The explanation has to do with the volume of documents contained in boxes and counsel's misjudgment of the time necessary to complete discovery. At the time of the Unless Order when the time was stipulated, it was underestimated by counsel. This to my mind is a perfectly understandable and acceptable explanation. The list of documents in fact runs into several pages and references a great volume of material. It must be remembered that counsel will have had to go though the documentation to determine the relevant ones and then to carefully list them.

[14] I make reference to the following quotations:

(i) **"It has not been said that a fair trial is impossible or vey difficult. This is a significant consideration because as far possible litigants should have their matters determined by properly constituted courts. This is indeed a constitutional right. It is not absolute."** Per Sykes J **Reid et al v Pinchas et al** Claim CL2000/R031 unreported judgment 27th February 2009 paragraph 66, in which relief from sanction was refused as there was no explanation for the failure.

(ii) Justice McDonald-Bishop has quoted the President of the Caribbean Court of Justice as follows:

> **"(1) – (4)**
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> **(5) While the general purpose of a Strike-out Order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence but as a necessary and to some extent symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorized as contumelious or contumaclous.**

(6) What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognized that, even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance.

(7) The fact that what has been breached is an 'Unless' Order has a special significance, as such an order is framed in peremptory terms which makes it clear to the party to whom it is directed that he is being given a last chance.

(8) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance was total or partial.

(9) Normally it will not assist the party in default to show that the non compliance was due to the fault of his lawyer since the consequences of his lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(10 – 11)"

Per McDonald-Bishop J **Branch Developments Ltd. T/A Iberostar Rose Hall Beach Hotel v the Bank of Nova Scotia Jamaica Ltd.** [2014] JMSC Civ. 003 delivered 24th January 2014 applying, **Barbados Redifussion Service Ltd. v Asha Mirchandeni & Others (no.2)** (2006) 69 WIR 52.

(iii) In the matter of **Matthews v University Hospital Board of Management** [2015] JMSC Civ. 40 unreported 27th January 2015, I said the following:

> **"19. The Court of Appeal in Villa Mora Cottages v Monica Cummings et al SCCA 49/2006 unreported judgment dated 14th December 2007 adopted a more enlightened approach on this question of relief from sanctions. In this regard the following quotation will suffice:**
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> > **"It cannot be disputed that orders and rules of the court must be obeyed. A party's non-compliance with a Rule or an Order of the court may preclude him from continuing litigation. This however must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence a litigant ought not to be deprived of the right to pursue his case."**
> >
> > **The function of the court is to do justice. "The law is not a game nor is the court an arena. It is... the function and duty of a judge to see that justice is done as far as may be according to the merits." Per Wooding CJ in Baptiste v Supersad (1967) 12 WIR 140 at 144. In its dispensation of justice, the court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the CPR. A court in the performance of such exercise may rectify any mischief created by the non-compliance with any of its rules or orders."**

[15] The authorities establish that there is no rule that administrative errors can never be a lawful explanation. On the contrary even a contumelious fault in a rare circumstance may be properly explained. Each case depends on its peculiar facts. In the case at bar it is manifest that the breach was not deliberate. The documentation was bulky and the time available to peruse collate and list insufficient. Further it was done

albeit a few days late. I therefore find that the explanation for the breach is a good one within the meaning of the rules.

[16] As regards consideration of the matters listed in rule 26.8 (3) I say as follows:

a) Excluding the Claimant from litigating her case may well undermine confidence in the administration of justice. It will deprive her unreasonably of the opportunity to have her case heard.
b) It was the attorney's failure not the litigant's as she had delivered to her lawyers the material to be considered for disclosure. This is an ameliorating circumstance.
c) The breach has in fact been corrected as the list was filed and served.
d) The trial date can still be met and I will make Orders accordingly.
e) The grant of relief will have no detrimental effect on the Defendant or its case.

[17] It is for the reasons stated above that on the 20th April 2015 I made the Orders outlined in paragraph 1 above.

David Batts
Puisne Judge
17th July 2015

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