NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 45 OF 2005

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN PETER CROSSWELL APPELLANT

AND FINANCIAL INSTITUTIONS SERVICES LIMITED RESPONDENT
(Substituted Pursuant to the Order of the Hon. Ms. Justice G. Smith made on the 24th June 1998)

David Henry, instructed by Mrs. Winsome Marsh for the Appellant.

John Vassell, Q.C. and Courtney Bailey, instructed by DunnCox for the Respondent.

July 2, 3, 31, and September 28, 2007

PANTON, P.

On July 31, 2007 we made the following order in this matter:

> "Appeal allowed. Order of Campbell J made on April 25, 2005, set aside.
>
> Respondent's claim struck out. Costs of the action and of the proceedings both in this Court and below to be the appellant's such costs to be agreed or taxed."

We promised then to put our reasons in writing. The reasons that have been written by Cooke, J.A. and Harris, J.A., are in fulfilment of that promise. I agree with them and have nothing to add thereto.

COOKE, J.A.

1. The original dispute between the parties pertains to a claim by the respondent that the appellants are indebted to it in the sum of $2,700,000.00. The resolution of this appeal requires no further amplification as the issues before this Court are quite separate from the contending positions which have been adopted by the litigants as regards the claimed debt.

2. A convenient starting point is the orders which were made by Rattray, J. on the 5th February, 2004. It is necessary to set out these orders in extenso.

> "UPON Case Management Conference herein coming up for hearing on this day, AND UPON hearing Mr. W. John Vassell, Q.C. and Ms. Shena Stubbs, instructed by Messrs. DunnCox, Attorneys-at-Law for the Claimant, AND UPON hearing Mr. Gordon Robinson, instructed by Ms. Winsome Marsh, Attorney-at-Law for the First Defendant, IT IS HEREBY ORDERED that:–
>
> 1. The First Defendant's application to dismiss the action for want of prosecution is denied.
>
> 2. Standard Disclosure be on or before April 15, 2004 by 4:00 o'clock in the afternoon.
>
> 3. Inspection of documents be on or before April 30, 2004.
>
> 4. *Witness Statements to be filed and exchanged on or before June 30, 2004 by 4:00 o'clock in the afternoon. (emphasis mine)*
>
> 5. The Agreed Statement of Facts and Issues be filed on or before July 30, 2004 by 3:00 o'clock in the afternoon.

6. The Listing Questionnaire be filed by the Claimant and First Defendant on or before September 16, 2004 by 3:00 o'clock in the forenoon.

7. Pre-trial Revue [sic] is set for October 26, 2004 at 11:00 o'clock in the forenoon.

8. Order on Case Management Conference be filed by the Claimant's Attorneys.

9. Number of witnesses to be determined at Pre-trial Review.

10. Trial by Judge alone.

11. The trial hereof be set for two days on April 25 and 26, 2005.

12. Costs be costs in the claim."

It is order 4 which is central to this appeal. It is to be noted that the attorneys-at-law representing the respondents were present at this case management conference and therefore had been long forewarned of the pre-trial review which was scheduled for 26th October, 2004.

3. At the Pre-trial Review before Campbell, J. the respondent's claim was struck out and:

> "The costs of the action including the costs of and incidental to this application to be the 1st Defendant's to be agreed or taxed."

The learned judge had found favour with the application made by the 1st appellant pursuant to Rule 26.3 (1) (a) of the Civil Procedure Rules, 2002 (the Rules) that there had been a failure to comply with order 4 of the case

management orders – this particular Rule will be subsequently set out. For now it is to be observed that the respondent was unrepresented at the pre-trial review.

4. On the 8th November, 2004 the respondent filed an application to set aside the orders made by Campbell, J. at the pre-trial review (see par. 3 supra). Further, the significance of which, will appear shortly, there was a request that the applicant (respondent) be:

> "granted leave to file its Witness Statement(s), Listing Questionnaire and Statement of Facts and Issues within 14 days of the date hereof."

The grounds on which the application was based were:

> "The Respondent was absent from the hearing.
>
> The Notice and Application relied on by the Applicants were short-served
>
> The Listing Questionnaire filed by the Applicant on the 20th of October, 2004 materially misled the court.
>
> Had the Respondent been at the hearing, an alternate ruling would have been very likely
>
> The order violates the Overriding Objective of Justice set out in Part 1 of the Rules.
>
> The 1st Defendant does not stand to be prejudiced by the Claimant filing its Witness Statement etc. out of time and especially with trial, set for April 25 and 26 2005."

On the 25th April, 2005 Campbell, J. set aside the orders which he had previously made on the 26th October, 2004. It is that decision that has occasioned this appeal.

5. At the heart of this appeal is a debate as to the correct procedural regime which should be employed in setting aside the orders of Campbell, J. made on the 26th October, 2004 which, inter alia, had struck out the respondent claim. The appellants submitted that the order striking out the respondent's claim was a sanction. Reliance was placed on Part 26 and in particular Rule 26.3 (1) (a). This section of the Rule is now set out below:

> **"Sanctions – striking out statement of case**
>
> 26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> (b) ...
>
> (c) ...
>
> (d) ..."

If that submission is correct the appellant continued, then there is a specified procedure mandated by the Rules for a party who seeks relief from such a sanction. This is to be found in Rule 26.8 which is now reproduced.

"**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) ..."

6. The respondent's stance was that Rule 11.18 provided the relevant procedure to be utilized in seeking to set aside the order made by Campbell, J. on the 26th October 2004. This is now reproduced:

"**Application to set aside or vary order made in the absence of party**

11.18 (1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made."

7. The respondent sought to argue that sanctions are only permissible if the order of the court specified that such sanctions would be exercised for failure to comply with the orders which had been made. The Court's attention was directed to Rule 26.1 (3) which states:

> **"The Court's general powers of management**
>
> 26.1 (3) When the court makes an order or gives a direction, it may
>
> (a) make it subject to conditions; and
>
> (b) specify the consequence of failure to comply with the order or condition."

and to Rule 26.4 (1) and (2) which states as follows:

> **"Court's general power to strike out statement of case**
>
> 26.4 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".
>
> (2) Such an application may be made without notice but must be accompanied by –
>
> (a) evidence on affidavit which –
>
> (i) identifies the rule or order which has not been complied with;
>
> (ii) states the nature of the breach; and

(iii) certifies that the other party is in default; and

(b) a draft order."

as well as Rule 26.7 (1) and (2) which states:

"Sanctions have effect unless defaulting party obtains relief

26.7 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) 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 the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

8. The determination as to the correct procedure to be followed in the challenge to the orders of Campbell, J. will have a telling effect on the outcome of this appeal, as the evidential requirements to ground the respective applications are directly different. Under Rule 26.8 (2) the applicant seeking relief must do so promptly and demonstrate inter alia that the failure to comply (i.e with order 4) was unintentional and that there was a good explanation for such failure. Under Rule 11.18 (3) there is the stipulation that the applicant tenders evidence showing a good reason for failing to attend and that it was likely that attendance might have resulted in some other order being made.

9. In striking out the respondent's claim on the 26th October, 2004 Campbell, J. was purporting to exercise the power stipulated in Rule 26.3 (1) (a) – because of the failure of the respondent to comply with order 4 of the orders given at the case management conference. Accordingly as Mr. Henry submitted the Court had applied the sanction of striking out the respondent's case. The Rules to which Mr. Vassell, Q.C. adverted (see par. 7 supra) pertain to the issue as to whether in these circumstances a sanction should have been imposed. The pith of his submission in this regard was that no sanction for non-compliance with order 4 of the case management orders had been imposed (see 26.4 (1)) and therefore this was not a "sanction case". These are quite interesting submissions but in my view the learned trial judge on the 26th October, 2004 acceded to the appellants' application to strike out founded on Rule 26.3 (1) (a). The battle ground had been closely and specifically delineated. By placing reliance on Rule 11.18 the respondent has sought to create a different arena for the contest. It is clear to me that on the 26th October, 2004, the striking out of the respondent's claim, whether rightly or wrongly, was a sanction. I accept as correct Mr. Henry's submission that there is a specific regime established by Rule 26.8 as to the procedure to be engaged in seeking relief. However, although not specifically provided for in Rule 26.8, it was not impermissible for the respondent to have mounted a challenge as to whether the application for the sanction imposed should have been entertained. The respondent embarked on a course, mapped

by Rule 11.18, which could not lead to its desired destination – setting aside the order of Campbell, J. made on the 26th October, 2004.

10. The learned trial judge in setting aside the order of 26th October, 2004 erroneously acceded to the contention of the respondent that it was entitled to make the application based on 11.18 (1) of the Rules. The evidence to ground that application was contained in the affidavit of Shena P. Stubbs, an attorney-at-law and an associate of the firm of Messrs. DunnCox. To meet the requirement of Rule 11.18 (3) (a) (par. 6 supra) she stated as follows:

> "On the 26th of October I was involved in day 2 of a four day trial but intended to slip out of the trial to attend the Pre-trial Review herein which was scheduled for 11 am. I was, however, so engrossed in the trial at hand that through inadvertence, I overlooked the time I was to be in Chambers. When I realized the error in the afternoon, it was too late."

To satisfy 11.18 (3)(b) (par. 6 supra) it was contended in that affidavit that:

> "The most gracious description of the Listing Questionnaire filed by the 1st Defendant's Attorney-at-Law is that it tends to mislead the court..."

Thereafter the affidavit lists:

> "Areas of discrepancies noted in the Listing Questionnaire are as follows:"

These I do not find necessary to reproduce as that evidence was of no probative value in the determination of the only relevant issue i.e whether or not the order imposing the sanction should be set aside. I have made reference to the Stubbs' affidavit merely to demonstrate the incorrect approach of the respondent.

11. The appellant filed a number of grounds of appeal. However, based on the preceding discussion, I need say no more than that ground c (e) succeeds. This was framed as follows:

> "The learned Judge failed to have any or any due regard to the relevant Law [sic] in exercising his discretion in granting the Orders made."

Further, since the judgment of Campbell, J. was based on irrelevant considerations, there is no need for me to advert to it.

12. In view of the aforementioned reasons, I would allow the appeal, set aside the order of April 25, 2007 and award costs to the appellants both here and in the Court below.

HARRIS, J.A:

This appeal challenges an order made by Campbell, J on April 25, 2005 in favour of the respondent, restoring a claim filed by it against the appellant and granting it relief from sanctions.

In 1995, the appellant operated a joint current account with Century National Bank ('the bank'). On July 22 1997, the respondent commenced action against the appellant and a joint holder on the account claiming the sum of $2,700,000.00. The statement of claim alleges that on October 6, 1995 a cheque for the sum of $300,000.00, drawn in favour of Mary Croswell, was presented to the bank for lodgment to the account. It was further alleged that by

mistake the account was credited with $3,000,000.00 instead of $300,000.00. There was also an allegation that in January 1997 the bank discovered that the sum of $2,700,000.00 had been withdrawn from the appellant's account. A demand by the bank for the recovery of the $2,700,000.00 did not meet with success.

On October 21, 1997 an order was made vesting the assets of Century National Bank, including the present cause of action in the respondent.

On January 20, 1998 the appellant filed a defence and counterclaim. He averred that the $3,000,000.00 was correctly credited to his account. It was his further averment, in the alternative, that if the crediting of the sum to his account had been erroneous then such error emanated from the respondent's gross negligence resulting in loss and damage to him.

In February 2004, the following orders were made at a Case Management Conference:

> "UPON Case Management Conference herein coming up for hearing on this day, AND UPON hearing Mr. W. John Vassell, Q.C. and Ms. Shena Stubbs, instructed by Messrs. DunnCox, Attorneys-at-Law for the Claimant, AND UPON hearing Mr. Gordon Robinson, instructed by Ms. Winsome Marsh, Attorney-at-Law for the First Defendant, IT IS HEREBY ORDERED that:—
>
> 1. The first Defendant's application to dismiss the action for want of prosecution is denied.
>
> 2. Standard Disclosure be on or before April 15, 2004 by 4:00 o'clock in the afternoon.

3. Inspection of documents be on or before April 30, 2004.

4. Witness Statements to be filed and exchanged on or before June 30, 2004 by 4:00 o'clock in the afternoon.

5. The Agreed Statement of Facts and Issues be filed on or before July 30, 2004 by 3:00 o'clock in the afternoon.

6. The Listing Questionnaire be filed by the Claimant and First Defendant on or before September 16, 2004 by 3:00 o'clock in the afternoon.

7. Pre-trial Revue (sic) is set for October 26, 2004 at 11:00 o'clock in the forenoon.

8. Order on Case Management Conference be filed by the Claimant's Attorneys.
9. Number of witnesses to be determined at Pre-Trial Review.

10. Trial by Judge alone.

11. The trial hereof be set for two days on April 25 and 26, 2005.

12. Costs be costs in the claim."

The attorneys-at-law for the respondent were present at the Case Management Conference.

On October 26, 2004, the scheduled date for the Pre-trial Review, the respondent's attorneys-at-law were absent. An application filed by the appellant for the striking out of the respondent's claim was granted.

The respondent, on November 8, 2004 made an application in the following terms:

> "The orders made by this Honourable Court on the 26th of October 2004 be set aside. The Claimant be granted leave to file its Witness Statement(s), Listing Questionnaire and Statement of Facts and Issues within 14 days of the date hereof."

The grounds on which the application was based are as follows:

> "The Respondent was absent from the hearing.
>
> The Notice and Application relied on by the Applicants were short-served [sic]
>
> The Listing Questionnaire filed by the Applicant on the 20th of October, 2004 materially misled the court.
>
> Had the Respondent been at the hearing, an alternate ruling would have been very likely [sic]
>
> The order violates the Overriding Objective of Justice set out in Part I of the Rules.
>
> The 1st Defendant does not stand to be prejudiced by the Claimant filing its Witness Statement etc. out of time and especially with trial, set for April 25 and 26 2005."

The application was supported by an affidavit of Miss Shena Stubbs in which she stated that she intended to attend the Pre-trial Review, notwithstanding that she was engaged in a four day trial but by inadvertence, failed so to do. It was also stated by her that a Listing Questionnaire filed by the appellants was rife with inaccuracies and had she been in attendance, a different result would have been procured.

On April 25, 2005 the learned judge made the following orders:

1. "The Orders made by this Honourable Court on the 26th day of October 2004 be set aside.

2. The Claimant must file and serve its Witness Statement, Listing Questionnaire and Statement of Facts and Issues by **Friday, April 8, 2005.**

3. The 1st Defendant is to file and serve his Statement of Facts and Issues on or before **Friday, April 15, 2005.**

4. Costs of the Application and Costs thrown away to be the 1st Defendant's to be taxed if not agreed.

5. Pre-Trial Review to be dispensed with.

6. The 1st Defendant is to let the Claimant know the documents it wishes to be included in the Bundle of Documents for Trial by **Friday**, **April 15**, **2005** and to file the said Bundle of Documents for Trial by **Wednesday, April 20, 2005**.

7. Witnesses limited to two (2) for each party.

8. The Claimant's Attorneys-at-Law to prepare file and serve the Orders made herein.

9. Leave to Appeal granted."

The following grounds of appeal were filed:

> "a. The Learned Judge erred in granting the Respondent's Application for relief from sanctions and permission to restore its Claim against the Appellant in circumstances where the Affidavit evidence failed to disclose any or any proper basis or merit for the orders made.
>
> b. The Learned Judge erred in granting the Respondent's Application for relief from sanctions and permission to restore its Claim against the Appellant in circumstances where no good reason was given by the Respondent for the delay in complying with the various directions given by the Court at the Case Management Conference.

c. The Learned Judge erred in granting the Respondent's Application for relief from sanctions and permission to restore its Claim against the Appellant having regard to the material before him, which disclosed that the Appellant had no real prospect of successfully prosecuting its Claim at Trial.

d. The decision of the learned Judge to grant the Respondent's Application for relief from sanctions and to restore its Claim against the Appellant was unreasonable in light of the evidence.

e. The Learned Judge failed to have any or any due regard to the relevant Law in exercising his discretion in granting the Orders made."

Ground (c) was not pursued.

Mr. Henry argued that the respondent's application was based on rule 11.18 (1) of the Civil Procedure Rules 2002 ("CPR") but ought to have been under rule 26.8 of the Civil Procedure Rules for relief from sanction. The learned judge, he argued, failed to give consideration to rule 26.8.

It was Mr. Vassell's submission that the order for filing witness statement does not specify a sanction for failure to so do. He contended that although under rule 26.3 (1) of the C.P.R. an application may be made for striking out, this rule, does not carry with it a sanction, as a sanction can only be imposed if a rule or an order specifies the consequences. Rule 11.18 (1) must be treated as relevant to the application, he further submitted.

The central issue in this appeal turns on the correct procedural scheme which ought to have been adopted by the learned judge in considering the

application to set aside his order of October 26, 2004. It is therefore necessary to outline those rules which are relevant to the determination of this appeal.

Rule 11.18 (1) makes provision for a party to seek to vary or set aside an order pronounced in his absence by advancing a good reason for his absence and by showing that if he were present a different order would have been made. The rule reads:

> "11.18 (1) A party who was not present when an order was made may apply to set aside that order.
>
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
>
> (3) The application to set aside the order must be supported by evidence on affidavit showing -
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other order might have been made."

Under Rule 26.3 (1) (a) the court is empowered to strike out a statement of case or part thereof. The rule states:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or

direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."

Rule 26.7 (1) and (2) is also of importance. It reads:

"26.7 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) 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 the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

The machinery authorizing the process by which a party may seek relief from sanction is outlined in Rule 26.8. It provides:

"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."

Although rules 11.18 (1) and 26.8 permit the setting aside of a judgment or an order, the evidential requirements in respect of each rule, in setting aside

an order or judgment, are separate and distinct. It is ordained by Rule 11.18 (1) that an applicant must proffer a good reason for his absence and must demonstrate that his presence would have brought about a different result. Rule 26.8 (3) mandates the submission of evidence to demonstrate: (a) that an applicant's failure to comply with a rule, order, and direction was unintentional; (b) that a good explanation for non-compliance has been advanced, and (c) that there had been a general compliance with all other relevant rules, orders and directions.

It appears to me that the learned judge acceded to the respondent's application on the premise that rule 11.18 (1) was applicable. Did he exercise his discretion on wrong considerations and wrong grounds? The answer is in the affirmative. The learned judge made reference to Miss Stubbs' statement in her affidavit explaining her absence from the Pre-trial Review, namely, inadvertence by reason of her engagement in a trial. He also referred to her averment that the appellant's Listing Questionnaire contained many inaccuracies. This would be evidence to support the respondent's application under rule 11.18 (1). No findings were made by the learned judge with respect to this aspect of the evidence before him. He thereafter proceeded to give consideration to certain extraneous matters. This notwithstanding, the fact that he granted the application on the grounds sought by the respondent implicitly demonstrates that he invoked rule 11.18 (1).

The respondent's breach was firmly fixed on their non-compliance with the Case Management Orders which enjoined them to file Witness Statement(s), Listing Questionnaire and Statement of Facts and Issues within the time prescribed by the orders. This breach was the catalyst prompting the striking out of their statement of case.

The order of October 26, 2004 was granted by virtue of rule 26.3 (1) which empowers the court to strike out a statement of case. The question which arises is whether the striking out amounts to a sanction. The striking out of a claim consequentially bars a claimant from proceeding with his claim. It effectively terminates his right to obtain a judgment. Driving a litigant from the judgment seat by striking out his claim is undoubtedly imposition of a sanction.

In passing, it is of worth to mention that under rule 26.1 (3) the court, in the exercise of its discretion, may specify the consequence of a party's non-compliance with a rule or an order. This is not mandatory. The use of the word 'may' within the context of the rule renders it discretionary as to whether the consequential effect of an order is added as an appendage to that order.

Rule 26.7 (1) would not apply, in that it is merely directory and would only be of relevance in cases where an order does not expressly or effectively carry with it a sanction.

The respondent's breach has its genesis in the non-compliance with certain case management orders. Under rule 26.7 (2) the sanction imposed by the order made on October 26, 2004 remains in force unless, and until the

defaulting party, obtains relief from such sanction. This can only be done by way of recourse to rule 26.8.

A defaulting party, praying in aid rule 26.8 (2), must adduce evidence to show that the non-compliance was unintentional, he has a good explanation for his failure to comply with the order and that he has essentially complied with other relevant orders. It is therefore incumbent on the respondent to have put before the court material to satisfy the requirements of rule 26.8 (2). They did not.

There is nothing in Miss Stubbs' affidavit to account for the respondent's failure to comply with the outstanding orders. Nor is there any evidence to justify their failure to file the requisite documents within the time specified for so doing.

I would allow the appeal and set aside the order of April 25, 2005, with costs to the appellant to be agreed or taxed.

PANTON, P.

ORDER:

"Appeal allowed. Order of Campbell, J. made on April 25, 2005, set aside.

Respondent's claim struck out. Costs of the action and of the proceedings both in this Court and below to be the appellant's, such costs to be agreed or taxed."