IN THE SUPREME COURT OF JUDICTURE OF JAMAICA

CLAIM NO. 2004 HCV 00421

BETWEEN	ALBERTHA DEWDNEY OLIVE KNIGHT MARICA DEWDNEY ALTHEA DEWDNEY GLORIA DEWDNEY ORRETT DEWDNEY LORNA DEWDNEY-ELLIS NORMA DEWDNEY VINCENT DEWDNEY OWEN DEWDNEY DOROTHY DEWDNEY-BROWN VIVIENNE DEWDNEY ROY DEWDNEY DAVIS ICYLIN DEWDNEY GOLDING (Members of the family of Florence Dewdney)	CLAIMANTS
AND	ENID LOUISE BROWN-PARSONS	1ST DEFENDANT
AND	CLIVE NEWMAN	2nd DEFENDANT

Mr. Dale Staple instructed by Kinghorn and Kinghorn for the Claimants

Ms. Jacqueline Cummings instructed by Archer & Cummings for the first Defendant

Heard: July 16, 2009

Failure to attend trial
Whether Judgment should be set aside
Whether Applicant has satisfied the requirements for relief from sanction
Whether act of fencing is sufficient to acquire possessory title
Dealing with residuary estate

Sinclair-Haynes J

The parties in this matter are relatives of the late Florence Dewdney. By her last will and testament, she devised half acre out of the five (5) acres and two (2) squares of land which she owed in fee simple to be used as a family burial plot. The remaining portion, over which there is no dispute, was bequeathed to various family members. The dispute concerns the ownership of the family burial plot which Enid Brown-Parsons (the applicant) claims she acquired by virtue of an agreement with Albertha Dewdney (first claimant), the executor and herself.

The matter was fixed for trial on the 21st January 2008. The applicant failed to attend. Evidence was adduced and judgment was entered against the applicant.

The applicant now applies to set aside the judgment and for relief from sanction of the Order of King J which was made on 24th October 2008 that the defendants' Statement of Case should be struck out unless they complied with the Case Management Conference (CMC) orders. The CMC orders were not complied with. The applicant further applies to have the documents which were to be filed in compliance with CMC Orders and which were filed out of time be allowed to stand. She blames the delay on her previous attorney whom she avers failed to communicate with her and failed to take the necessary steps to defend the action on her behalf.

The applicant avers that she and her previous attorney were present at the CMC which was held on 21st September 2007. However, she expected her attorney to liaise with her in the preparation of all other documents, but unknown to her that was not done. She was prepared to defend the matter but she expected her attorney to guide her as to what to do and to remind her of the dates to return to court. She was in contact with the attorney's secretary who never reminded her of the date.

The said attorney she complains, also waited too late to advise her to seek alternative representation. On the 23rd December 2008, her attorney informed her via telephone that she would no longer represent her because she owed her money. She retained the services of her present attorney in January 2009 and she has since complied with all the CMC Orders. She was informed by her present attorney-at-law that judgment was obtained against her in the claimant's favour. Her present attorney also informed her that on the 24th October 2008, King J had made an Unless Order. She was unaware of that Order. Her previous attorney did not attend court and failed to remind her of the court date and their obligations.

She further asserts that the claimant's action is statute barred because she has been in possession of the land for over 31 years and she obtained a Certificate of Title 14 years ago.

The application is, however, trenchantly resisted by the claimants who contend that the applicant's conduct of the matter has been deplorable. They contend that the defendants never displayed interest in vigorously defending the matter. They failed to attend either of the two Pre-trial Reviews although they were served with the dates. They failed to attend the trial of the matter although the applicant was present at CMC when the trial date was given. Further, they contend that the defendants' defence is without merit.

Submissions by Mr. Dale Staple for the Claimant

Mr. Staple submits that the procedure adopted by the applicant is incorrect. He submits that the claimants did not obtain a Judgment in Default. Pusey J conducted a trial in the absence of the defendant/applicant and entered judgment. The defence was

struck out because of her non-compliance with King J's Unless Order which was made on the 24th October 2008. An application was made by the claimants to enter judgment but it was not pursued.

He submits that the application ought to have been made pursuant to Rule 39.6(1) of the Civil Procedure Rules (CPR). He further submits that even if the application was made under the correct rule, the applicant would fail to satisfy the requirements of the rule 39.6 3(a) and (b) for the following reasons:

(a) She has wholly failed to provide the court with evidence to convince it that she had a good reason for not attending the trial of this matter. He submits that she was not sick, disabled, illiterate or incapable of ascertaining the trial date from her lawyer. He relies on **Brazil v Brazil** (2003) CPRep7, Estate Acquisition and Development Limited Wiltshire (2006) CPRep32, **St. Ermin's Property Co. Ltd v Draper** (2004) EWHC697

(b) Litigation in the Supreme Court is a serious affair. It is costly and time consuming. Further, the resources of the court are finite and must be apportioned equitably among litigants. It should therefore not be taken lightly. A litigant with an action in the Supreme Court must be prepared to devote the necessary time and attention to the conducting of his case. It is no longer the sole responsibility of the attorney to conduct litigation on behalf of the client. The client has responsibility for his case. The attorney assists the client in the conduct of the case and offers professional advice and training. The responsibility for remembering dates, especially trial dates remains with the litigant. The court ought to impress upon the applicant the importance of conducting the case by denying this application.

(c) A judgment of the Supreme Court, especially at trial is valuable and should not be lightly taken away from the litigant who has complied with all the rules and orders of the court. He relies on the observations made by Sir Swinton Thomas and Brooks LJ in the case of **R. C. Residuals Limited v Linton Fuels Oils Ltd.,** [2002) 1WLR 2782 regarding the importance of strict compliance with Court Orders, particularly Unless Orders.

(d) The cumulative effect of the applicant's behaviour, he submits is unacceptable. She failed to file her Defence within a reasonable time and got permission of the court to file it out of time. She attended the CMC and was made aware of the PTR and trial dates but failed to attend the PTR, the adjourned PTR and the trial. She did not have trial conference with her attorney. She only spoke with the secretary. She offered no excuse except that her attorney did not advise her.

(e) Costs would not be an appropriate remedy because the applicant has not refuted her previous attorney's claim that her fees are outstanding. The court therefore cannot be certain that the applicant would be capable of meeting an Order for costs should the court be minded to so order.

(f) Even if the court finds that the applicant has provided good reasons for failing to attend the trial, she is unable to satisfy Rule 39.6 (3) (b) as her Defence discloses no real prospect of success which is a material consideration as to whether or not she should have relief from sanctions.

It is his further submission that if the court is minded to set aside the judgment of Pusey J, it must consider whether or not to grant relief from the sanctions imposed by

King J. He submits that in order to obtain relief from sanctions, the applicant must apply under Rule 26.8 of the CPR. It is his submission that although the rules do not state a specific time, the application for relief ought to be made as soon as Notice of Non-compliance with the rule, practice direction, or order comes to the attention of the defaulting party.

The applicant received Notice of the Unless Order of King J on the 31st October 2008 shortly after the PTR. The Notice was received through her attorney-at-law. He relies on the statement of Sykes J in **Gloria Findlay v Gladstone Francis** that once the applicant's attorney-at-law received Notice of the Non-compliance and the Unless Order, the applicant is also deemed to have received Notice. He further submits that although the applicant had an opportunity to be relieved from sanctions for a period of over a month she did nothing.

At the second PTR, the applicant's attorney was contacted by the judge. At that point also the applicant would have known about the default. However, no application for relief was made until 29th January 2009 which was eight (8) days after the judgment of Pusey J was made; four (4) months after the applicant received the Notice of the Unless Order and three (3) months after she received the Notice of the Sanction. In the circumstances, the application was not promptly made, as it was not made in a timely manner after the Notice of Default came to the attention of the defendants.

He also submits that although the application is supported by affidavit evidence, there is no evidence from the previous attorney explaining the default on her part. In the case of **Findley v Francis**, the attorney in that case gave an affidavit in which he took full responsibility for the defaults.

Mr. Staple also contends that the applicant's failure to comply was intentional. The entire conduct of the case by the applicant suggests a deliberate disregard for the conducting of her case in court as the applicant. Her attempts to follow up with her attorney were paltry. She has not demonstrated an attitude of vigilance in the conduct of her case. At the very least, her conduct amounts to recklessness as to the outcome and conduct of her case.

He further submits that she has not given a good explanation for her non-compliance with the CMC Orders, the Unless Order and her absence from the trial. Her excuse of non-communication with her by her attorney-at-law, is not a sufficient explanation for her failure to comply with the Orders of the court. She has therefore not satisfied that ground.

He further submits that the applicant has not generally complied with all the relevant rules - Practice Directions, Orders and Directions. She has not filed a Pre-trial Memorandum pursuant to rule 38.5 of the CPR. She had to get permission from the court to file her Defence and Counter Claim out of time.

The documents filed by the applicant out of time are irrelevant to those proceedings as permission for the documents to stand as filed out of time has not been granted. He submits that the practical effect of this is that there is no document filed by the applicant before the court. Therefore in all material respects, the applicant has not satisfied the mandatory requirements of Rule 268(2) of the CPR.

He also submits that even if the defendant overcomes the mandatory hurdles, the trial judge must show that he took into account all the factors as set out in the rules. He relies on **R.C Residuals Limited v Linton Samuels**. He submits that it would be

difficult to conclude that he conscientiously considered all the factors listed bearing in mind the overriding objectives.

He also submits that it cannot be in the best interest of the administration of justice for a litigant to sit idly by whilst his matter is before the court and not play an active role in enquiring whether his matter is being pursued with vigilance by his attorney. Nor can it be in the best interest of the administration of justice for a litigant who has vigorously and vigilantly pursued his case to be deprived of his hard earned judgment by a litigant who has been lax in conducting his own case.

He also submits that it cannot be in the best interest of justice for this particular case to consume so much of the court's resources because already there have been several applications by the defendants. There have been applications for injunctions, for relief to file their Defence out of time, an application for a stay of execution and now a further application by the applicant. There have been a CMC, two Pre-trial Reviews and a trial. He submits that it is unfair to other litigants who have to use the court's finite resources especially in Jamaica where judicial time is precious and limited.

He submits further that the defendants' failure to comply has not been nor can be remedied within a reasonable time. There has already been a trial in this matter so there can be no remedying to be done.

Mr. Staple contends that if the defendants were present at the trial or granted relief from sanction, their case would not have any reasonable prospect of succeeding. He submits that any agreement between the first claimant, first defendant and the executor for the first defendant/applicant to have the burial plot was invalid as the rules

of Intestacy would apply in the circumstances. He relies on Sections 2 and 4 of the Intestate Estate and Property Charges Act (I E and PC act).

Mr. Staple further submits that it would be unfair to allow the applicant to rely on the issue of the matter being statute barred because that issue was not raised in her defence and the defendants were in default of complying with the court's order. Further, he submits that the point cannot succeed because adverse possession requires:

a. that the applicant must be in actual possession of the property;

b. clear evidence of an intention on his part to dispossess the registered proprietor and assert actual ownership rights over the property;

c. affirmative and unequivocal discontinuance of ownership by the registered proprietor.

Ruling

Was a Default Judgment obtained?

Rule 12.7 states that a claimant applies for default judgment by filing a request in form 8. The claimants in this matter have not applied for Default Judgment. Moreover, the defence was filed and a CMC was held on the 21st September 2007. In fact Pre-trial Reviews were held and the matter proceeded to trial. The defendants did not attend. Evidence was adduced from the claimant and judgment was entered against the defendants/applicant. In the circumstances, the applicant's application to set aside a Default Judgment is misconceived. The applicant ought to have applied pursuant to Rule 39.6 to set aside the judgment given in her absence.

Rule 39.6 (1) states:

> A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

2. The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

3. The application to set aside the judgment or 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 judgment or order might have been given or made.

The defendant has satisfied Rule 39.6(2). The issue is whether she has satisfied rule 39.6(3) (a) and (b).

Has she given a good reason for failing to attend the hearing?

Mummery LJ in **Brazil v Brazil** at page 4 explained the accepted approach to be taken when considering whether a good reason for failing to attend has been advanced.

> *"There has been some debate before us, as there was before the judge, about what is or is not capable of being a "good reason". In my opinion the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason". The court has to examine all the evidence relevant to the defendants non- attendance; ascertain from the evidence what, as a matter of fact, was the true "reason" for non- attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the over riding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR.39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance."*

The reasons given by the defendant for failing to attend is that she expected her attorney to liaise with her in the preparation of the documents for the action but she did not know that that was never done. She expected her attorney to guide her as to what to do and remind her of the date to return to court but the attorney did not remind her even though she was in contact with the secretary.

The applicant has placed all responsibility for remembering the dates and liaising with her attorney at the feet of her attorney. She avers that she was in contact with the secretary, who failed to remind her. Could she not of her own initiative have enquired of the secretary or is it entirely the responsibility of the attorney to remind her? The pertinent question is whether the applicant should be absolved of the responsibility of remembering the dates?

At page 6 in **Brazil v Brazil,** Mummery LJ applied the following test:

> *"The reason for his non-attendance was that he did not know that the trial was taking place on that day. The matter does not, however, stop there. In order to determine whether that was a good reason it is necessary to consider why he did not know of the trial date. The fact that at the time he was acting in person, that he is illiterate and he did not receive the order of the 19th March are clearly relevant factors."*

Mrs. Brown Parsons is a literate litigant. She was present at the CMC when the PTR and trial dates were fixed. It is unacceptable to expect that the responsibility of liaising with her, remembering and reminding her of dates which are important to her should be wholly on the shoulders of the attorney.

If she forgot the dates it must surely be her responsibility to contact her attorney. She could even have checked with the court's office if she was truly interested in her

matter. I therefore find that the applicant has failed to advance a good reason for not attending the trial.

Would some other Judgment or Order been made if the Applicant had attended?

The applicant avers that upon surveying the property devised in the last will and testament of Florence Dewdney it was discovered that there were six (6) acres of land owned by the said Florence Dewdney and not five (5) as mentioned in the will. As a result of the discovery, one acre was unaccounted for in the said will. The surveyor suggested that the additional acre of land had to be distributed.

Consequently, the executor, the first claimant and she agreed among themselves that the one acre should be divided equally between the applicant and the first claimant as they were the main beneficiaries. There was no named residuary legatee in the will.

The parties further agreed by reason of expediency that the first claimant should receive the additional one acre as it was contiguous to the two (2) acres of land which were devised to her in will. The burial plot was contiguous to the two (2) acres devised to the applicant in the will.

In consideration for the applicant relinquishing her half one (½) share in the additional one (1) acre, it was agreed that the applicant would receive instead the one half (½) acre devised in the will to be used as a family burial plot. It was also agreed between the three (3) parties that the first claimant and the applicant would bury their dead on their respective properties. It is her case that at the time the property under the will was distributed by the executor, the additional half (½) acre which was devised in the will to be used as a burial plot had ten (10) old flat graves on it.

Prior to 1972, the burial plot was not separate and distinct or undivided from the two (2) acres of land which were devised to the applicant. In 1972 she fenced the half (½) acre containing the burial plot and her two (2) said acres from the surrounding lands.

Assuming that a court accepts her version of the facts that there was indeed one acre of land which was unaccounted for in the will, that is, the residuary estate, the law requires that the said one acre must be distributed among the children of Florence Dewdney (the estate) in accordance with Section 4 of the Act.

The Law

Section 2 (1) of the Intestate Estate and Property Charges Act states

In this Act-

> *"(a) 'residuary estate' means every beneficiary interest (including rights of entry and reverter) of the intestate in real and personal estate, after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable there out, which (otherwise than in right of a power of appointment) he could, if of full age and capacity, have disposed of by his will;*
> *(b) 'intestate' includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate;*

Section 4(1) states:

> *The residuary estate of an intestate shall be distributed in the manner or held on the trusts specified in the following Table of Distribution."*

In light of the clear provisions of the Act, any agreement made with the executor, first claimant and applicant is invalid. The applicant had no right to a half (½) acre and therefore she had nothing to relinquish.

Has the applicant acquired a possessory title?

Section 3 of the Limitations Act states:

> *"No person shall make an entry or bring an action or suit to recover any land or rent, but within 12 years next after the time at which the right to make such entry or to bring such action or suit, shall have first accrued to some persons through whom he claims or, if such right shall have not accrued to any person through whom he claims, then within 12 years next after the time at which the right to make such entry, or to bring such action or suit shall have first accrued to the person making or bringing the same."*

Section 4 of the Act provides:

> *"When the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were to be received."*

If the applicant had participated in the trial and was able to establish that she was in exclusive possession of the plot for the requisite twelve years, Pusey J would have arrived at a decision in her favour. The crucial question is whether there is a period of 12 years during which Mrs. Dewdney was in exclusive possession of the disputed land.

It is the applicant's evidence that she took possession of the burial plot in 1971. In 1972 she fenced it to her two (2) acres apparently with barbed wire because at

paragraph 13 of her of her affidavit she states that she replaced the existing barbed wire fence with a new fence in 2001. She migrated to the United Kingdom (UK) in 1973.

It is also her evidence that between the years 1983 to 1989 the claimants entered upon the land and dumped garbage. The evidence is that Kenneth Dewdney and Calvin Brown were buried on the plot in 1987 and 1994 respectively. In 2002, the claimants forcibly buried Yolanda Dewdney on the said plot. The evidence (albeit that of the claimants), is that she bodily resisted that burial by sitting over the hole that was dug. She was so determined that the body of Yolanda Dewdney would not be interred there that she placed a chair over the hole which was dug. The chair collapsed and she fell into the hole. At that point, however, she had only returned to Jamaica in 2001, having left the land since 1973. The question is whether at that point she had acquired a possessory title.

Section 12 provides:

> *"No person shall be deemed to have been in possession of any land merely by having made an entry thereon."*

In **Pye (Oxford) Ltd v Graham** (2003)1AC Lord Browne-Wilkinson at para 36 stated:

> *"The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."*

At page 435 he states:

> *"...there are two elements necessary for possession:*
>
> *1. a sufficient degree of physical custody and control ("factual possession").*

2. *An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").*"

There is no issue as to whether she possessed the requisite intention. The issue is whether she exercised a sufficient degree of exclusive physical control over the burial plot.

The salient question therefore is assuming it is accepted that the applicant did indeed fence the burial plot, was that act sufficient to dispossess the owners?

Lord Browne-Wilkinson at page 436 cited with approval the following statement of Slade J in **Powell's** case:

> *"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used for or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."*

Assuming he accepted her evidence that she fenced the land in 1972, the mere act of fencing is not sufficient to dispossess the beneficiaries. In **Wills v Wills** PC Appeal no. 50 of 2002 delivered 1st December 2003 at paragraphs 19 and 20, Walker LJ said:

> *"All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the court carefully considering the extent and character of the land in question, the use to which it*

has been put, and other uses to which it might be put. They also rightly stated that the Court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient as evidence of possession. Nevertheless, the decisions must now be read in the light of the important decision of the Court of Appeal in ***Buckinghamshire County Council v Moran*** *[1990] Ch 623 and the even more important decision of the House of Lords in* ***Pye.***"

"In ***Moran*** *each member of the Court approved the following passage from the dissenting judgment of Stamp LJ in* ***Wallis's*** *case [1975] QB 94, 109-110:*

> *'Reading the judgments in* ***Leigh v Jack*** *5 Ex D 264 and* ***Williams Brothers Direct Supply Limited v Raftery*** *[1958] 1 QB 159, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the wasteland do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession.'"*

The disputed land cannot be considered waste. It is however a burial plot. Given the nature of the use of the land, it would not ordinarily be used with the usual regularity of some other lands. In any event the use of the land in 1983 by the claimant to dump

garbage was prior to the expiration of twelve years. It is therefore evidence that the claimants did not discontinue the use of the land.

At page 37 Muloch CJ. Ex pointed out:

> *"Mere fencing or payment of taxes unaccompanied by actual, visible, and continuous possession could not give title."*

The applicant migrated to the UK from 1973 to 2002; she was therefore away from the property for twenty (20) years. There is no evidence that she asserted any right to the property for twelve years continuously. No evidence that she cleaned the lot or performed any other act that might demonstrate ownership. Indeed she was absent from the property from 1973 to 2000. Apart from the isolated act of fencing in 1972, there is no evidence of any further act which could constitute a sufficient degree of exclusive physical control in light of her absence from the property. There is no affirmative evidence of any attempt to exclude the beneficiaries from possession. Indeed during her absence from Jamaica there is no evidence that she was aware of what was happening to the land.

I hold that she will therefore be unable to satisfy the criterion that she has had factual possession of the plot for 12 years.

Should the Applicant be granted Relief from Sanctions?

If the judgment of Pusey J is set aside, the applicant would require relief from sanctions. Rule 26.8 (1) 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, order and directions.

3. In considering whether to grant relief, the court must have regard to –

(d) the interests of the administration of justice;

(e) whether the failure to comply was due to the party or that party's attorney-at-law;

(f) whether the failure to comply has been or can be remedied within a reasonable time;

(g) whether the trial date or any likely trial date can still be met if relief is granted; and

(h) 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.

Sub-rule (b) has been satisfied. The application is supported by evidence on affidavit, but has the applicant satisfied the other requirements? Kay LJ in **RC Residuals Ltd v Linton Fuels Oils Ltd and another** [2002] 1WLR 2786 at para 12 cited with approval the following observations made by Brooke LJ in **Bansal v Cheema** (unreported) 2nd March 2000, Court of Appeal (Civil Division) Transcript No 358 of 2000:

> *"It is essential for courts exercising their discretion on an occasion like this, to consider each matter listed under CPR r 3.9(1) systematically in the same way as it is now well known that courts go systematically through the matters listed when an application is made for the exercise of the court's discretion under section 33 of the Limitation Act 1980."*

It should be noted that rule 26.8 (1) (2) (3) is almost identical to English rule 3.9 (1).

Was the Application made promptly?

Notice of the Unless Order of King J was served on the defendant's attorney on the 31st October 2008. No application was made on behalf of the defendants at the adjourned PTR although Thompson-James J (Ag.) contacted the defendant's attorney. The application was not made until the 29th January 2009, eight (8) days after the trial at which judgment was entered and indeed almost three months after the Order of King J was made. Her failure to comply is indeed substantial. Her conduct has been historically dilatory.

Was the Applicant's Failure to Comply Intentional?

The applicant was present at the CMC; the dates for the PTR and trial were given. She failed to demonstrate the necessary interest in her matter as stated earlier. Her failure to comply amounted at least to a reckless disregard for the Court's Orders.

Has she given a good explanation?

It is true that the attorney was responsible for filing and serving the relevant documents. However she could have liaised with her attorney.

Has the Applicant complied generally with all the Relevant Rules, Practice Directions, Orders and Directions?

From the inception of the matter, the applicant's conduct has been lethargic. She has had to seek the permission of the court to file her defence out of time. Although two Pre-trial Reviews were held to facilitate compliance with the CMC's Orders, the defendant failed to comply. She also failed to attend the trial although she had personal

knowledge of the date. No real effort was made on her part to comply with the requirements of the Unless Order. Indeed, she has treated with scant regard every Order of the court in this matter. Rule 6.8(2) has therefore not been satisfied.

The Interest of the Administration of Justice

This matter has been before the court since 1st March 2004. There has been a CMC, not one, but two, Pre Trial Reviews and a trial. There have also been applications such as this and for stay of execution. This case has been allotted more than its appropriate share of the court's limited time and resources.

It cannot be in the interest of the administration of justice to continue to encumber the list with this matter.

The Effect which the granting or not would have on each party

It cannot be fair that the claimants who have conscientiously and diligently pursued their case to the point of obtaining a judgment at trial should be deprived of the judgment and incur further expense of going through another trial because of the applicant's lack of diligence and vigilance.

The overriding objective of the court is to enable the court to deal with cases justly. In so doing the court must ensure that case are dealt with expeditiously and fairly (Rule 1).

Whether the Failure to Comply was due to the Party or the Attorney

As earlier stated, the failure to comply cannot wholly, if at all, be laid at the attorney's feet.

The defendant was present at the CMC; she has not refuted the claim of the attorney that she was unable to pay her. If impecuniosity prevented her from putting her

attorney in funds, she should have attended the PTR and explained to the judge so that judicial time would not have been wasted in fixing another PTR and going ahead with a trial date which she was plainly not interested in attending or had no intention of attending.

Can the Trial Date be met?

The reason for making the Unless Order is to ensure that the trial date can be met. The applicant certainly could not meet the trial date as the proverbial 'horse had galloped through the gate.' Had the judge not proceeded with the trial without the applicant, the trial process would have been adversely affected.

It is the court's view that the sub-rule 3 (g) contemplates a situation where a trial has not taken place. It is apparent that in the circumstances, the application is too late. In **RC Residuals v Linton Fuel Oils Ltd** (CA), the claimants failed to serve expert reports within the time. As a result the trial date was vacated. A new trial date was fixed. It was ordered that the expert reports should be filed by 4:00 p.m. on a particular day or the claimant would be prevented from relying on that evidence at the trial. Although the claimant's attorney endeavoured without success to comply, the two reports were 10 and 20 minutes late, Kay LJ found that:

> *"The failure was not a substantial one. It had no consequences for the defendants and it had no effect upon the matter proceeding to trial on the date that was indicated."*

Conclusion

Sir Swinton Thompson in **R C Residuals Ltd v Linton Fuel Oils Ltd and Another** at para 28 stated:

> *"This court cannot stress too strongly the importance of strict compliance with court orders, particularly unless orders. If relief is granted lightly an entirely wrong message goes out to litigants and their advisers. Further, as Brooke LJ pointed out in the course of argument, judges of first instance are entitled to complain if, having made orders envisaged by the rules and which they are encouraged to make this court then lightly sets them aside."*

Having examined each matter listed in Rule 28.1, the applicant's historically dilatory conduct throughout the matter; the fact that a trial has been conducted and the absence of any real prospect of the applicant succeeding in defending the matter, I am firmly of the view that in acceding to the application I would not be exercising my discretion judiciously.

The application is refused.

Leave to appeal granted.

Stay of execution of the judgment of Pusey J.

Costs to the claimants to be agreed or taxed.