IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

SUIT NO. F 045 OF 1994

BETWEEN	**GLORIA FINDLAY**	**CLAIMANT**
AND	**GLADSTONE FRANCIS**	**DEFENDANT**

IN CHAMBERS

Mrs. Angela Cousins-Robinson and Miss Kadia Wilson instructed by Taylor, Deacon and James for the claimant

Miss Carol Davis for the defendant

September 8, 17, 2004, January 21 and 28, 2005

APPLICATION FOR RELIEF FROM SANCTIONS UNDER RULE 26.8

Sykes J

1. This is an application by Mr. Francis, the defendant, for relief from sanctions under rule 26.8 of the Civil Procedure Rules (CPR). He is seeking to have the judgment of Straw J (Ag) set aside on the basis that his failure to pay $8,000 costs on or before July 13, 2003, was not intentional. How did the defendant find himself in this position? It all began on the 15th day of October 2003 when the matter came before Harris J for case management. Her Ladyship made a number of orders.

Order of Harris J

2. I will set out the most relevant ones.

(1) There be standard disclosure by both parties within 14 days of the date hereof.

(2) There be inspection of documents within 10 days of disclosure.

(3) Witness statements be filed and served by each party within 21 days of the inspection of documents.

(4) Listing questionnaire to be file within 14 days of exchange of witness statements.

(5) Pretrial review fixed for February 12th (sic) 2004 at 12:00.

(6) Trial fixed for 21st and 22nd of July 2004.

(7) Claimant to file and serve order on case management conference

3. It is obvious that the parties needed to act with alacrity if the July 21 and 22 trial dates were to be met.

4. Neither Mr. Francis nor Mr. Terrence Ballantyne, his lawyer, was present at this case management conference. However, Harris J had ordered the claimant to serve the order on the defendant. It is common ground that the order was served. It is also common ground that Mr. Ballantyne was served with the notice of case management.

5. When the matter came up for pretrial review on February 12, 2004, once again Mr. Francis and Mr. Ballantyne were absent. The case management conference was adjourned to June 2, 2004. This was approximately seven weeks before the trial of the matter.

6. By February 12, 2004, the claimant filed her own statement with exhibits attached on December 31, 2003. It was served on Mr. Ballantyne on

January 6, 2004. The claimant had also filed another witness statement on January 12, 2004. This was served on Mr. Ballantyne on January 15, 2004.

7. On October 31, 2003, the claimant filed her list of documents, which was served on Mr. Ballantyne on the same date.

8. On January 12, 2004, the claimant filed her listing questionnaire and on February 9, 2004, she filed her pretrial memorandum and served it on Mr. Ballantyne on the same day.

9. Miss. Findlay had complied fully with the order of Harrison J by the time the first pretrial review date arrived. Mr. Francis displayed no such diligence. Mr. Francis filed his witness statement on February 17, 2004, five days after the first pretrial review date. This was the state of the preparation for trial when the matter came before Brooks J on June 2, 2004.

Order of Brooks J

10. Brooks J made the following orders:

(1) The defendant having failed to attend the pretrial review or to comply with the orders for disclosure or inspection made at the case management conference, the pretrial review is adjourned to June 30, 2004 at 12:30pm for ½ an hour for the claimant to make an application for an unless order.

(2) The claimant is to prepare, file and serve the formal order hereof on or before the 9th day of June 2004.

(3) Cost to the claimant in the sum of eight thousand dollars ($8,000) to be paid on or before the 25th day of June 2004 failing which the defendant's statement of case shall stand as struck out.

11. This may seem draconian. The plain truth is that Mr. Francis had not complied fully with order of Harris J. I should point that neither Mr. Francis nor his lawyer appeared before Brooks J. This was the third hearing in this matter that the defendant and his lawyer failed to attend. Every effort was being made, on the part of the court, to keep the trial dates. On June 30, 2004, the matter came before the Master.

The Master's hearing

12. At this hearing, Mr. Francis finally appeared and with him was Mr. Paul Beswick, the partner of Mr. Ballantyne. The Master made these orders:

(1) Costs of eight thousand dollars ($8,000) ordered by Mr. Justice Brooks be paid by the defendant on July 1, 2004 at 10:00 a.m. failing which the order made by Mr. Justice Brooks on June 2, 2004 is to take effect.

(2) The defendant is to comply fully with the said orders made at said case management conference on or before the 9th day of July 2004 failing which the defendant's statement of case shall stand as struck out.

(3) Costs to the claimant in the sum of eight thousand dollars ($8,000) to be paid on or before Tuesday, July 13, 2004 failing which the defendant's statement of case shall stand as struck out.

Impact of hearings

13. From June 2, 2004, the defendant was under the cosh. He could extend the life of his defence beyond June 25, 2004, but only if he paid the

costs of the hearing before Brooks J on or before June 25, 2004. If the costs were paid he still he had to face an unless-order hearing on June 30, 2004.

14. The unless order hearing took place on June 30, 2004 before the Master and at that hearing time to pay the costs of the hearing before Brooks J was extended to July 1, 2004. Assuming he paid the costs by July 1, he still had to pay the costs of the Master's hearing by July 13, 2004 and he still had to comply with the Master's unless order by July 9, 2004.

15. By July 9, 2004, Mr. Francis had complied with the unless order except for filing of the listing questionnaire. He made an error. He paid the costs of the Master's hearing on July 14 and not July 13.

16. This was the state of affairs when the matter came before Straw J (Ag) on July 21, 2004.

Trial before Straw J (Ag)

17. On July 21, 2004, Straw J (Ag) adjourned the matter until July 22, 2004. On July 21, Miss Deacon, counsel for the claimant, applied for judgment on the basis that the defendant failed to pay the costs of the Master's hearing by the stated date and was therefore in breach of the Master's unless order. The defendant's statement of case was struck out under the terms of the Master's order. The defendant and his attorney, Mr. Ballantyne appeared before Straw J (Ag). No application was made for relief from sanctions. The explanation for this is that the attorney did not appreciate that he could have applied for relief from sanctions. Given this situation, it is not surprising that Straw J (Ag) entered judgment for the claimant.

The application for relief from sanction

18. Mr. Francis supports his application with two affidavits. One from himself and the other from Mr. Ballantyne. Mr. Ballantyne has accepted responsibility for the current predicament of the defendant. He says that he failed to inform the defendant of the relevant court dates and the orders made. Mr. Ballantyne readily admits that he did not know of the February 12 and June 2 dates. This sorry state of affairs came about because, according to Mr. Ballantyne, the internal processes of his chambers failed him. Neither the documents served nor the dates were brought to his attention.

19. For his part, Mr. Francis claims that he thought that his attorney was pursuing the matter diligently. He added that he mistakenly thought that he had until July 14 to pay the $8,000. He paid it on July 14. There is a receipt supporting this. What we have then is Mr. Francis' late payment and his failure to file a listing questionnaire resulting in his statement of case being struck out. Was the sanction, at that stage of the proceedings, proportionate to the failures?

20. The two affidavits mentioned above were not before Straw J (Ag) on July 21 and 22 when the claimant applied for judgment on the basis that the defendant failed to comply with the Master's unless order. I now turn to the Civil Procedure Rules, 2002.

Rule 26.6

21. Miss Davis grounded her application under rule 26.6. This rule allows a party against whom judgment has been entered after a striking out to apply to set it aside. The rule states:

(1) A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.

(2) An application under paragraph (1) must be made not more than 14 days after the judgment has been served on the party making the application.

(3) Where the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside judgment.

(4) Where the application to set aside is made for any other reason, rule 26.8 (relief from sanctions) applies.

22. Two circumstances are established under this rule in which a judgment entered under rule 26.5 can be set aside. The first is where the right to judgment has not properly arisen. In this situation, the judgment is set aside as of right once the aggrieved party shows that judgment should not have been entered. The second arises where the right to judgment has properly arisen under rule 26.5. Here, setting aside the judgment is in the discretion of the court. These two are mutually exclusive. In this case, judgment was properly entered under rule 26.5 therefore this application is to be considered under rule 26.6(4).

Relief from sanctions

23. Rule 26.6(4) directs you to rule 26.8 which states

(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief ***only if*** *it is satisfied that –*

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders (sic) 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.

24. It is important to note the structure of this rule. While it has all the factors in the English equivalent, they are grouped differently (see rule 3.9 CPR (UK)). The rule says that the application must be made promptly and supported by affidavit evidence. The second paragraph uses the expression ***only if*** . This has the effect of restricting the operation of the judicial

discretion. By this, I mean that subparagraphs (a), (b) and (c) of rule 26.8(2) must be met before the discretion can be exercised. The phrase ***only if*** has the effect of raising the bar for applications under this provision. By contrast, the English equivalent says that the court "will consider all the circumstance including" the nine factors listed thereafter (see rule 3.9 CPR (UK)). This may well be a reflection of developing special rules to deal with the chronic problem of delay in the courts here. The policy of the rule is that those who have been diligent and complied with the rules and orders should not be lightly deprived of their judgments. The rule rewards the industrious while erecting barriers in front of the indolent.

25. This application was made promptly. It was made on August 19, 2004. I take into account the necessity for the claimant to retain other attorneys. There would be an inevitable time lapse because of the change of attorneys. The application was supported by affidavit evidence.

26. It seems to me that paragraph (3) is not exhaustive of the matters the court can take into account. This is an immediate inference that can be drawn from the terms of the rule and rule 1.1(2). Rule 1.1(2) requires the court to deal with cases justly. The concept of "justly" is not defined in the rule. Rule 1.1(2) says "justly" includes and not "justly" means. What is clear is that the matters listed at rule 26.8(3) must be taken into account. This means that in dealing with this application I must have regard to the matters listed in the rule as well as any other relevant consideration that would enable me to deal with the case justly. It seems to me that I am not to have any rigid hierarchy of the matters listed in subparagraph (3) and apply them in any particular order of importance. What may be significant in one case

may be of less significance in another. This means that I must have regard to the particular facts of the case before me. There is no one size fits all.

27. One point made by the English authorities which I accept is that the considerations in rule 26.8(3) should each be considered and a judge should demonstrate that he has (see ***Woodhouse v Consignia plc*** [2002] 1 W.L.R. 2559, ***RC Residuals Limited v Linton Fuels*** [2002] 1 W.L.R. 2782). The Court of Appeal, in both cases, indicated that unless the trial judge showed that he took into account the matters set out in the English rule, it would be difficult to conclude that he considered conscientiously all the factors listed in the rules. I take the same view in respect of our subparagraph (3). In my opinion, what is required is a balancing of the findings under each head using the principle of the overriding objective as the guiding light to the exercise of my discretion.

Application to case

28. I now consider factors under rule 26.8(3).

(1) the interests of the administration of justice

It is in the interest of the administration of justice that parties comply with orders made by the court. In considering whether to grant relief, the court must be careful that it is not sending the wrong message to litigants: ignore the orders, delay as long as you wish and you will be granted relief. The party who has dutifully complied with the rules must not leave the court with a sense of injustice. After all, it was his industry that secured his judgment. It is also in the interests of justice that cases should be disposed of quickly as possible, at least cost and in a manner that is fair to all concerned. A further

consideration is the impact on other litigants in the court. As rule 1.1 indicates, a matter should not consume a disproportionate share of the courts resources. If this happens then other litigants are deprived of the opportunity of having their cases dealt with within a reasonable time. Granting relief in inappropriate cases undermines the rule of law (see ***RC Residuals Limited v Linton Fuels***).

In the instant case, the defendant's lawyer did not even know of the orders despite the fact that they were served on his chambers. The proper administration of justice requires that attorneys become aware of orders made in matter in which they appear, especially if the order was properly served on them.

(2) Whether the failure to comply was due to the party or that party's attorney-at-law

This requirement if not applied sensibly can lead to total chaos. Generally, in matters before the court, there is no separation between the attorney and his client. The conduct of the attorney is the conduct of the client. It would quite chaotic if judges had to start second-guessing whether the conduct of the attorney qua attorney is that of his client. In the case before me, Mr. Ballantyne has claimed full responsibility for his client's predicament. From the available evidence, Mr. Francis did not know of the court dates.

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

Mr. Francis' failures have been remedied except for the filing of the listing questionnaire. This can be remedied in a matter of days.

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

This consideration can be easily satisfied. The initial trial date has now passed. Any trial of this matter would be in the future. A trial date has already been secured. At present, there are no other witness statements to be filed; standard disclosure has now taken place; the costs have now been paid, and the listing questionnaire is to be filed in few days. This means that there is nothing outstanding that would hamper the trial of this matter.

(e) the effect which the granting of relief or not would have on each party

In this case, the effect of granting relief would deprive the claimant of her judgment and the certainty of her title to the house, which Straw J's (Ag) judgment secured. On the other hand she would still be in possession and able to live in the house that is the subject matter of the claim. The claimant says that this matter has been ten years on the list and she has complied with all the court orders and done all that she needed to do. That is an undoubtedly an important consideration. However since the rule says that I must take into account whether the default is that of the lawyer or that of

the client then in my view, the result of that finding must have some impact on the outcome. If it were not so then there would be no point in making the distinction. I note in particular that no third party interest is involved in this matter. The claimant has not encumbered the property in any way. In addition, there is no suggestion that any party would be prejudiced by the absence of important witnesses.

Finally, under this head, the claimant says that she has incurred legal fees that she has not yet settled. She says that if the judgment were to be set aside she would incur more expenses in addition to those fees that have not been settled. This too is an important consideration but it can be addressed given the new philosophy behind the awarding of costs under the CPR.

29. I recognize that the good administration of justice requires that cases be dealt with expeditiously but this has to be measured against the risk of injustice to a litigant because of his lawyer's default, particularly where the defendant did not personally contribute to the state of affairs that has come about. The administration of justice while receiving a blow in this case will not be undermined. There is nothing to suggest that applications with similar circumstances are commonplace. I take into account that all the defaults have been corrected save one. The one matter outstanding can be corrected quite quickly without any injury to the claimant. The failure to comply with the orders was not intentional. It seems to me that for the purposes of rule 26.8 (2)(b) in so far as it applies to this case, the failure by the defendant's attorney to inform his client of his (the client's) obligations under the various orders can amount to a good explanation. The plain truth is that the client

was not given the opportunity comply with the rules because the attorney omitted to bring the matter to his attention. In looking at whether rule 26.8(2)(c) has been satisfied, I take into account that the case management conference before Harris J was the first in this matter. Consequently, it is difficult in this particular case to hold the failure to comply with ***all other relevant*** orders against Mr. Francis because his attorney was not in the island when the case management conference was held and there is evidence that the defendant was not informed of the date of the conference although notice of it was served on his attorney by the Registrar of the Supreme Court.

30. There is every likelihood of the new trial date being met because there is nothing further for the litigants to do except to await the new trial date. I emphasize the effect on the claimant because the defendant's position, in this case is, would be enhance if I were to grant relief.

31. After weighing all the factors required by the rule I have come to the conclusion that the relief ought to be granted.

32. I did indicate that the conditions stated in rule 26.8(3) were not exhaustive. I have looked at the defence filed in this matter and it raises issues of fact and law that would make summary judgment in favour of the claimant unlikely. I say this to say, that if the defence did not disclose a case that had a reasonable prospect of success then there would be no point in exercising my discretion to set aside the judgment. If I were to grant relief in circumstances where the defence had no reasonable prospect of success I would be failing in my duty to deal with the case in a manner that would be cost effective.

33. Another factor I can take into account, which is not stated in the rule, is that of proportionality. I conclude that having regard to what the defendant had actually done by July 21, 2004 the striking out of his statement of case was disproportionate to the sin of paying $8,000 dollars a day late and a failure to file a listing questionnaire. Had his attorney been more alert, an application for relief from sanctions could have been made.

Conclusion

34. The relief is granted. The judgment is set aside and the defendant's statement of case is restored. The trial is to take place on June 19 and 20, 2006. The costs incurred by the claimant from the inception of the suit to be paid by the defendant. It is only fair that the claimant who has incurred legal and other expenses should have those expenses met by the defendant.