NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO CL. 1997/F – 138

BETWEEN	**R.E. FORRESTER**	**FIRST CLAIMANT**
AND	**R.E. FORRESTER ELECTRICAL CONTRACTORS LIMITED**	**SECOND CLAIMANT**
AND	**HOLIDAY INN (JAMAICA)**	**DEFENDANT**

IN CHAMBERS

Mr. Ransford Braham and Miss Kathryn Cousins for the claimants instructed by Livingston, Alexander and Levy

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company

May 26, 27 and June 1, 2005

APPLICATION FOR EXTENSION OF TIME OF UNLESS ORDER, RULES 1.1, 3.2, 11.16, 11.17, 26.14(3), 28.14(4), 26.8, and 64

SYKES J

1. Should the court extend the time within which the defendant is to comply with an *unless* order?

2. In 1995 the defendant contracted the claimants to install electrical fittings and perform other services at a property known as Holiday Inn, Montego Bay, Jamaica's tourism mecca. The claimants have received part of the sums they say is owed to them. The claimants filed suit on October 8, 1997, under the old Rules of the Supreme Court, to recover the balance. The new Civil Procedure Rules (CPR) came into effect on January 1, 2003. One of the consequences of this was that this case was now under the case management regime introduced by the new rules. At a case management conference held on May 14, 2004, Donald McIntosh J made a number of orders including an order for specific and general disclosure. The application before me concerns that part of the order.

3. The claimants sought to enforce the disclosure part of the order by applying for an *unless* order on February 17, 2005, under rule 28.14(2). Although rule 28.14(3) permits a without-notice application, the claimants served the notice of application for court orders on the defendant on February 22, 2005. The legal advisors of the defendant must be taken to know that such an application can be dealt with without attendance upon the court (see rule

28.14(4)). The risk to the defendant in such a situation is that no one has any obligation to inform him of the date the application will be dealt with by the court. This would suggest to me that litigants who receive notice of an application of this nature need to act with alacrity to try to avoid the consequences of such an order.

4. On April 21, 2005, Beswick J ordered:

> That the defendant comply with the orders on case management conference for specific and standard disclosure made by the Honourable Mr. Justice Donald McIntosh on 10th December 2004 within seven (7) days of service of this order failing which its defence shall be struck out and the claimants shall be at liberty to enter judgment.

5. In passing, I cannot help but note that it took over two months for a without-notice application, in which no party would be attending, to move from the Registry to a Judge of this court.

6. The affidavit of Miss Cousins, dated February 16, 2004, filed in support of the application for the *unless* order told this story:

a. on May 14, 2004, Donald McIntosh J made a number of orders on case management including an order for specific and standard disclosure within 90 days of the date of the order;

b. the defendant failed to comply with the order;

c. on December 10, 2004, Donald McIntosh J extended the time, on an application by the claimants, for

complying with the order for disclosure to February 4, 2005;

d. the defendant was represented by counsel at both hearings;

e. the order on December 10, 2004, also varied the times for compliance with other orders because it appeared that neither party was able to meet the original deadlines;

f. the defendant offered no explanation for its non-compliance with the orders for specific and standard disclosure;

g. the claimants complied with the order for disclosure, under the revised timetable, on January 18, 2005.

7. The claimants served the *unless* order on the defendant on May 19, 2005. It produced the desired effect. The defendant awoke from its slumber.

Holiday Inn's application

8. Mr. Williams, by notice of application for court orders dated May 26, 2005, supported by an affidavit of the same date, is seeking the following orders:

a. That the time limited for complying with the Order of the Honourable Mr. Justice Donald McIntosh dated the 10th day of December 2004 be extended to twenty-one (21) days of the date hereof;

b. Costs of this application be costs in the claim;

c. Such further and other relief and orders as this Honourable Court shall think fit in the circumstances of this case.

The claimant's submission

9. Mr. Braham stoutly resisted the application on the basis that the defendant has shown such scant regard for the orders of the court including the *unless* order that the court should not extend the time. He submitted that even after the defendant received the *unless* order, it did nothing to comply with the order for standard and specific disclosure. This now frantic effort by the defendant is simply an attempt to avert imminent disaster and not a genuine effort to comply with the order. This submission was premised partly of the fact that despite being served with the unless order on May 19, 2005, a date that activated the seven-day deadline, the defendant did not contact the claimants and only made this application six days into the time given to comply with the order.

10. According to Mr. Braham, the affidavit filed in support of the application does not disclose any good and sufficient reason why the court should grant any extension of time. He said that the affidavit does not set out in any detail the efforts made to comply with the order. I agree with Mr. Braham that the affidavit filed in support of this application

is lacking and consistent with a hurriedly put together application. It is now appropriate to set out the legal principles that govern this application.

The legal principles

11. An *unless* order is a peremptory order directing a party to the litigation to do a specified act, within a specified time, which, if not done, is visited by sanctions prescribed by the order. It is a fundamental principle that a litigant who fails to comply with such an order, should suffer the penalty prescribed by the order unless he can show good reason why the stated consequences should not follow. A necessary corollary of this is that the litigant who seeks to extend the time within which to comply with an *unless* order must show good cause why this should be done.

12. In seeking to assist the court, Mr. Williams directed the court's attention to rules 11.16 and 11.17 of the CPR. For the reasons given by Mr. Braham those rules do not apply here. Mr. Braham submitted that those rules apply to applications for rehearing of an order made in the absence of the affected party. That is not the application here. Mr. Williams is not asking that I rehear the order made by Beswick J. Mr. Williams next referred to rule 26.8. I do not think that that rule is applicable here either. Rule 26.8 deals with applications for relief from sanctions. In the case before me, the sanction has not yet been applied. It is

imminent and what Mr. Williams is trying to do is to prevent the prescribed sanctions from taking effect. To describe the present application as an application for relief from sanctions is a misuse of language. One cannot apply for relief from something that has not yet occurred. There does not seem to be any rule in the CPR that addresses, specifically, the issue in this case.

13. It therefore seems that if I have the power to grant this application, one possible source of the power is rule 26.1(7) which states:

> *A power of the court under these Rules to make an order includes a power to vary or revoke that order.*

14. In delivering my oral judgment on the matter on Friday, May 27, 2005, I erroneously stated that rule 26.1(2)(c) contained the power to vary an order. On further reading, rule 26.1(2)(c) assumes the existence of the power to do what is stated in the rule and what the rule does is put it beyond doubt that the court can extend the time for compliance even if the application is made after the time stated in the order. A variation of an order, under rule 26.1(7), must include the power to extend the time to comply with the order.

15. I observe in this matter that even though the claimants applied for the *unless* order under rule 28.14(2) that rule, strictly speaking, does not say that one applies for an *unless* order. What rule 28.14 says is that a person may

apply for an order to strike out the case of a party who has not complied with the order for disclosure and upon such an application the court may make an *unless* order (see rule 28.14(5)). It seems, therefore, that when the claimants applied for the *unless* order they must have had in mind rule 26.4 which permits an application for an *unless* order and sets out what must be done when such an order is applied for. Rule 26.4(3) says that the registry must ***immediately*** refer such an application to a judge, master or registrar who may grant the application, or seek the views of the other party or direct an appointment for hearing. As note already, it took over two months before the order was heard by a Judge. In this case, Beswick J granted the application for the *unless* order. Rule 26.4 does not provide for an application to vary an *unless* order so this is why I believe that the power is found in rule 26.1(7). I think rules 28.14 and 26.4 are related. It would be quite remarkable if an applicant could only apply for the draconian remedy of a striking out but not for the lesser remedy of an *unless* order.

16. There is nothing in rule 26.1(7) to suggest that *unless* orders are excluded from this power and neither is there any other rule providing otherwise for dealing specifically with applications for extension of time to comply with *unless* orders. It is to be noted that rule 26.1(7) does not state the criteria the court takes into account when

considering an application under that rule. This being so, it is my view that such applications are governed exclusively by the overriding objective.

17. This conclusion is supported by the analysis of Dyson LJ in ***Sabrina Robert v Momentum Services*** [2003] C.P. Rep. 38, which I accept to be sound in principle, if one formulates the major premise to be derived from the case at a higher level of generality than in the terms of the actual rules it dealt with. He said, speaking of rules 3.9(1) and 3.9(2)(a) of the English rules, there is a difference between applying for relief from a sanction and an extension of time for doing something (see rules 3.9(1) and 3.1(2)(a) of the English rules that correspond to rules 26.8 and 26.1(2)(c) of the Jamaican rules). Consequently, in his view, the criteria applicable for relief from sanctions have no relevance to an application for an extension of time. His Lordship stated that because the rule dealing with applications for extension of time had no listed criteria, its use in any particular situation is governed by the overriding objective.

18. Even though Dyson LJ was contrasting a rule for extension of time, that did not contain within itself any criteria, with a rule that dealt with applications for relief from sanctions, the real principle from his analysis is that where a rule grants a power and the rule does not have within it any stated criteria for the court to consider when

applying that rule, the court uses the overriding objective exclusively.

19. This is consistent with what I consider to be the correct statement of law expressed by the English Court of Appeal in the case of ***Vinos v Marks and Spencer*** [2001] C.P. Rep 12 where it was held that the general wording of a rule in the CPR cannot override the clear words of a specific rule even if the specific rule leads to a result that the judge may consider to be "unjust". Lord Justice Peter Gibson stated the reasons for this quite eloquently at paragraph 27:

> *The construction of the Civil Procedure Rules, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the Civil Procedure Rules, unlike their predecessors, spell out in Part 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word "seek" acknowledges that the court can only do what is possible.* ***The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case****....*(my emphasis)

20. The challenge, then, is to identify the considerations that should guide the court when exercising the power to extend time to comply with an order conferred by rule 26.1(7), bearing in mind the principle that orders, particularly orders as to time, should be complied with and

the court should not be seen to be encouraging the idea that a party can flout an order of the court. It is necessary to state the issue in this way because there seems to be a burgeoning but erroneous school of thought, echoes of which I heard in this case, that suggests that even where the wording of a particular rule is clear, some how a court can apply the overriding objective to nullify the effect of the clear words. According to this school of thought a judge can pluck out of his mind his idea of what is *just* and apply it to the case before him. The usual way in which the heresy is presented is by an appeal to "the merits of the case" meaning, the court should simply look at whether the litigant has a "deserving case", however defined, and minimize the impact of other relevant considerations that may compel the conclusion that the justice of the particular case requires that the court makes an order that prevents the claim or defence from continuing. To accede to this approach would, in my view, be the modern version of the Chancellor's foot; a foot that led commentators of many centuries ago to wish that all Chancellors had the same shoe size. Even equity, notwithstanding its flexibility and ability to produce new remedies, developed maxims to guide her deliberations. The development of criteria, for cases such as the present one, produces greater certainty and consistency.

The criteria

21. It would seem to me that the applicant has to tender some explanation for the non-compliance and the explanation should establish, if possible, that the failure to comply with the *unless* order was not borne out of an obstinate refusal to comply with the order. The applicant for the extension of time should indicate what efforts he made to comply with the order, why those efforts failed and when he can comply with the order, assuming he is in a position to do so. If he is unable to comply with the order then no doubt the reason for this should be forth coming.

22. This is in keeping with the judgment of Browne-Wilkinson VC (as he then was) in ***Re Jokai Holdings Ltd*** [1993] 1 All ER 630, 637d. The Vice Chancellor stated:

The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

23. Implicit in this passage is the principle that the court does not take a benevolent view of non compliance with court orders. The offender has to make the clear and unambiguous case that his non-compliance was not the result of a decision not to comply with the order. Of course,

the conduct of the offending party may be such that despite the protestations to the contrary, the only reasonable and rational conclusion is that he had no intention of complying with the order.

24. Since I have said that rule 26.1(7) is governed exclusively by the overriding objective, it necessarily means that the explanation provided by the applicant is then assessed in the full context of the case, having due regard to the principles governing orders generally and *unless* orders in particular. Therefore the court should look at the possible impact on the other parties to the claim and upon other litigants who may be deprived of their share of the court's resources. Is it possible to keep the case management, pretrial review and trial dates? Has the delay caused undue hardship to the other parties? Will an extension of time create difficulties for the other parties? How has the applicant for the *unless* order behaved in the proceeding so far? The answers to these questions are some of the factors the court ought to consider when faced with this kind of application.

25. Another principle to bear in mind is that expressed by Roskill LJ (as he was at the time) in ***Samuel v Linzi Dresses Ltd*** [1981] QB 115, 126. He said:

To say that there is jurisdiction to extend the time where an "unless" order has been made and not complied with is not to suggest - let this be absolutely plain - that relief should be automatically granted to parties who have failed

to comply with the orders of the court or otherwise than upon stringent terms either as to payment of costs or as to bringing money into court or the like. Orders as to time... are not made to be ignored but to be complied with.

26. This passage buttresses that of the Vice Chancellor. It reinforces the point that the offending party should properly explain the reason for his non-compliance.

27. To this stringent approach to court orders generally and *unless* orders in particular is added the judgment of Bernard J.A. (as he then was) in the Trinidad and Tobago Court of Appeal in ***Gordon v Yorke Elias*** (1985) 35 WIR 312. I understand the Justice of Appeal to be saying that in situations like this there are two principles that have to be harmonised: first, the need to see that court orders are not flouted and second, that a litigant should not be lightly deprived of access to the courts.

28. It is true that the last three cases cited were decided before the CPR. However, what I am extracting from them is the general approach to court orders generally and *unless* orders in particular.

29. From these three cases and the CPR I believe that these are the applicable principles:

a. court orders are to be obeyed by those to whom they are directed;

b. an *unless* order, a species of peremptory orders, is of particular significance and must be heeded by the party who is obliged to act in accordance with

its terms failing which the sanctions named in the order ought to follow;

c. whenever there is an application for an extension of time to comply with an unless order, the applicant must set out, in an affidavit, the efforts made to comply with the order and why there has been non-compliance;

d. the courts should be slow to "find excuses" for failure to comply with an order;

e. the applicant should demonstrate that he had no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances i.e. circumstances other than an intention to flout the order;

f. the court should look at the possible impact on the management of the case, the impact on other litigants in the court system generally but particularly the impact on other litigants in the particular case. The court is now under an affirmative obligation not to allow any case to consume a disproportionate share of the finite resources of the court;

g. the court should have in mind first, the principle that court orders are not be flouted and that there is need to indicate strong disapproval of ignoring

orders and second, a litigant should not be deprived unnecessarily of access to the courts;

h. if the court is minded to grant relief, it should do so in manner that makes it clear to the offending party and like minded individuals that this type of behaviour is frowned upon lest it be thought that the court is taking a benign view of such conduct.

30. Under the more flexible approach indicated by the CPR, the court can show its displeasure in many ways. For example, the court may (i) extend the time but impose stringent conditions and penalties for future breaches, including striking out the statement of case and entering judgment for the innocent party without further order and/or (ii) make a summary assessment of costs payable immediately or in the near future and/or (iii) staying part of the case of the guilty party.

31. I believe that the considerations set out above will necessarily result in the case being dealt with *justly* as required by the CPR. It is by going through the issues in a systematic way that one is likely to come to a just result rather than deciding that the litigant has a "deserving case" and then reason backwards from that position.

Application to case

32. As I have already said, I agree with Mr. Braham that the affidavit in support of this application is not quite what

is expected. It does not address the issue of non-compliance in the manner indicated by the Vice Chancellor. Many of the gaps were filled in by counsel during the hearing. This is not satisfactory at all. Not that I doubt counsel's word, but it leaves the respondent at the mercy of the applicant. The additional information provided by Mr. Williams deprived the claimants of a proper opportunity to take instructions in order to respond. It is nothing to the point to say that the claimants filed no affidavit in response. The burden is on the applicant to make his case for extension. This emphasises the need for the affidavit to be fulsome. The affidavit in this case ends with the optimistic hope that the defendant can comply with the disclosure orders within twenty one days. The basis for that optimism is not stated. Despite the deficiencies, the explanations given by Mr. Williams show that the non-compliance with the *unless* order was not the product of an intention not to comply with the order.

33. I take into account that the trial date is in October 2006. There is nothing to indicate at this point that the trial date cannot be met. There is no evidence of any detriment to the claimants if the extension were granted. I must take into account that the non-compliance with the initial order and subsequent order of Donald McIntosh J by the defendant has precipitated two applications with attendant costs that could have been obviated had the defendant

either complied with the order or indicated the difficulties it was having. The defendant is still on the wrong side of compliance one year after the initial order was made. The claimants only complied with the disclosure order in January of this year. They too have been tardy. However, having regard to the size of this claim and the complexities involved it cannot be said, yet, that since the case management regime was applied to this case it has taken up a disproportionate share of the courts resources though the time when that conclusion is arrived at cannot be far off. The case is now in its second year of case management and it has not moved very far beyond where it was in May 2004. Witness statements have not been exchange. Expert reports have not been prepared. It is clear from the structure of Donald McIntosh J's order of May 14, 2004, that he hoped that the parties would have exchanged the documents earlier so that an alternative to litigation could be explored. The order was intended to nudge the parties to negotiate. This is why the disclosure was to be done within ninety days of the order and witness statements follow one hundred and fifty days after the order. This expectation is being defeated by the defendant. Notwithstanding this, the defendant should be given another opportunity to comply with the disclosure order. In all the circumstances of this case the order of Beswick J is varied and extended.

34. The final question is that of costs. The applicant asks that costs be costs in the claim. I do not think that that is an appropriate relief to grant in this case. The conduct of the defendant has led to two additional applications. But for the conduct of the defendant, the *unless* order would not have been made and this application would have been unnecessary. The claimants have incurred unnecessary costs. The defendant should pay the costs of this application. Part 64 of the CPR introduces a much more flexible approach to costs which enables the court to reflect its displeasure at the conduct of a party even it is successful on a particular application.

Conclusion

35. The orders of the court are:

a. The defendant is to fully comply with the order of Donald McIntosh J for specific and standard disclosure made 14th May 2004 not later than June 23, 2005, failing which the defence shall be struck out and judgment entered for the claimants without further order.

b. Cost of $35,000 to the claimants to be paid not later than July 1, 2005.

c. Pre trial review date of June 16, 2004 vacated and pretrial review now to take place on July 18, 2006 at 3:30pm.

d. Time for inspection of documents varied and extended to Monday, June 27, 2005.

e. Time within which claimants and defendant to submit the number of experts and their reports varied and extended to Friday, January 27, 2006.

f. Time within which witness statements to be filed and exchanged varied and extended to Friday, February 24, 2006.

g. Defendant's attorney to prepare, file and serve this order.