[2021] JMSC Civ 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 03051

BETWEEN	**CLIFFROY FRANCIS**	**CLAIMANT**
AND	**HECTOR GILPIN**	**DEFENDANT**

Mr Ian Davis instructed by HollisLaw Attorneys-at-law for the Claimant

Mr Linton Walters instructed by Linton Walters and Co Attorneys-at-law for the Defendant

Heard: December 20, 2021

Civil Procedure – Wasted Costs Orders – CPR 64.13 and 64.14

MOTT TULLOCH-REID, J (AG.)

BACKGROUND

[1] This is a claim that arose out of a motor vehicle accident which occurred on March 3, 2005. At the time of the accident, the Claimant was only eight years old. When the matter came up before me on December 7, 2021, the Claimant had attained the ripe old age of 25 years. There were a total of 7 adjournments between January 11, 2011 and December 7, 2021. In my view, only two of those adjournments were for good reason (illness of counsel Ms Hollis – who I will add, had never appeared at any of the assessment of damages hearings even up to March 7, 2016 when her illness was relayed to the Court, and in April 2020 as a result of COVID 19).

[2] On December 7, 2021 the matter came up before me for an Assessment of Damages. Counsel for the Claimant informed me of his readiness to proceed as did Mr Walters who appeared for the Defendant. I was also ready to proceed. The Claimant was present and so was his mother. Mr Dalton Campbell, who was one of the Claimant's witnesses, was absent but Mr Davis indicated he was prepared to go on without him. As we were about to begin, Mr Walters informed the Court that he had not been served with the witness statement of Maria Brown or for that matter, any of the witness statements. Mr Davis said that he had in fact served the Witness Statement of Maria Brown on Mr Walters' firm but as it turns out, the Claimant had served the Witness Statement of Maria Brown filed in June 2011 but not the Witness Statement of Maria Brown filed in 2018 (which was in essence a further witness statement) on which he had intended to rely. He could produce no proof that the other witness statements had been served.

[3] Mr Davis asked for time to consult with his senior which was given. He returned to say he would proceed with the 2011 witness statement of Maria Brown and would disregard the evidence of Mr Francis as there was nothing he could say concerning the accident as he (Mr Francis) had sustained head injuries and it was his mother who had taken care of him and paid his expenses. He also indicated that Mr Francis still continues to suffer from the effects of his injuries. I asked him if that is the case, if he really wished to pursue the claim without the Court hearing from Mr Francis. He said no he did but needed an adjournment so he could get his house in order.

[4] I was reluctant to grant the adjournment in face of the several adjournments which were already granted but the only person I would have done a disservice to in such an instant would be the Claimant. I adjourned the matter with appropriate sanctions in place and made certain orders which would ensure that the assessment would proceed on what would be the final date set for it to take place. I also made an order pursuant to CPR 64.14 summoning counsel for the Claimant to appear before me to make submissions as to why a wasted cost order should not be made against him for the adjournment. This is the issue which I heard today and have considered.

THE LAW

[5] CPR 64.13 provides that

> *(1) In any proceedings the court may by order –*
>
> *(b) direct the attorney-at-law to pay the whole or part of any wasted costs.*

SUBMISSIONS AND ANALYSIS

[6] Mr Davis in arguing against the wasted costs order being made said that his application for adjournment was made pursuant to CPR 1. The Court in seeking to achieve the overriding objective should deal with cases justly. In seeking the adjournment on December 7, 2021, it was his aim to help the Court to ensure that the parties were on an equal footing given the complexity of the case and that the case was dealt with fairly. He said that not having Mr Francis' witness statement would prejudice his case as it would not allow the Court to take into account Mr Francis' disability and future disability. Mr Davis has however failed to realise that he had been given 7 opportunities to do so prior to the December 7, 2021 hearing date.

[7] Counsel argued that in seeking relief from sanction, he would show to the court that he has a good explanation for seeking the adjournment and that he has otherwise complied with the orders of the Court. He says everything was in place except the witness statements. It seems to me that on the morning of the trial, the documents that contain the evidence on which the Claimant's case would be grounded, would of all the documents filed and served, be the most important weapon in the Claimant's arsenal. Their absence then, would be detrimental to the Claimant's case irrespective of the fact that all other documents had been filed.

[8] Mr Davis also argued that the 65-page bundle which was filed on behalf of the Claimant was a bit voluminous and because his instructing counsel had filed the

same documents twice he was confused and was of the view that everything was on file. I must say that I do not consider a 65-page bundle voluminous.

[9] He asked me to consider whether the failure to comply was due to his client's fault or the attorney's and whether the failure can be remedied. He argues that the failure to serve the documents has been remedied as the documents have now been served on the Defendant's attorneys-at-law and everything is in order for him to proceed on the adjourned hearing date. This may be so but there was an adjournment and someone has to pay the costs for that adjournment. In addition, I have already recognised that the failure to be ready for trial was the attorney's fault which is why I made an order for him to appear to say why a wasted costs order should not be made.

[10] Counsel also argued that the adjournment was unavoidable and that in making the decision the Court was to consider the interest of the administration of justice. I believe that I am considering the interest of the administration of justice when I make the order for wasted costs. Justice is not just for a claimant. Justice is also for defendants. This is why lady justice is blind and the scales she carries are to be balanced. I also do not agree that the adjournment was unavoidable. Counsel for the Claimant had ten years to get ready for the Assessment of Damages. Ten years later, they were still not ready to proceed. In a case where the issue to be considered by the Court is not complex and the only live issue is the issue of quantum, there is no reason for the matter to take in excess of thirteen years (counting from the date the claim was initiated) to be completed. But more importantly, the Defendant's counsel was present at court and ready to proceed. The Defendant would have to pay his counsel for his attendance at the hearing. When there is an adjournment because the Claimant is not ready to proceed, the Defendant will be entitled to his costs. Why should those costs come from the Claimant's pockets when he too was ready to proceed but for his attorney's being ill-prepared? If the fault lies with the attorney, then the attorney should pay the costs for the adjournment.

[11] Mr Davis has been in this matter since 2019. His name appears on the record. I believe that he has had ample time to put the file and the case in order. When the matter came up for Assessment of Damages on December 7, 2021 after 7 previous adjournments, counsel was entirely unprepared and but for questions posed to him by the Bench he would not have realised he was not in a position to proceed. Important documents had not been served, he was not familiar with the content of his file and not only wasted the Defendant's time but the Court's time.

[12] Generally speaking, counsel who appear in the assessment court are of the view that adjournments can be applied for and will be granted "*willy nilly"*. This is not so. Once the matter is on the Court's list it is expected that the matter will be heard. Documents are to be filed and served in sufficient time, bundles are to be filed and the parties are to attend and be ready to proceed on the scheduled date. Adjournments should only be sought and will only be granted if there is good reason to do so. Counsel may find themselves at the General Legal Council or in Court themselves as the Defendant if they do not understand the importance of being ready on the date that the Court sets for the trial or the assessment of damages to take place.

[13] Paragraph F of PRACTICE DIRECTION NO 16 of 2021 provides that

> *To ensure hearing date certainty and the timely disposal of matters fixed for assessment of damages and for trial in the "Fast Track Courts: DCM 1" in accordance with this Practice Direction,* ***adjournments will only be granted in exceptional circumstances and upon production of satisfactory proof of the necessity for an adjournment*** *(my emphasis)****.***

This is the posture of the Court. Where in the Judge's discretion an adjournment is granted and the reason the adjournment has to be granted is because of the attorney's failure to ready the matter so that the hearing can proceed, the attorney may find that he or she will have to pay wasted costs.

[14] I found Counsel for the Claimant's state of preparedness and readiness lacking and I do not agree with him that a wasted cost order should not be made. I therefore order as follows:

a. HollisLaw, Attorneys-at-law for the Claimant are to pay the Defendant wasted costs in the amount of $25,000 for the adjournment of the Assessment of Damages hearing which took place on December 7, 2021.

b. The Claimant's attorneys-at-law are to file and serve the Form.