[2013] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**H. B. RAMSAY & ASSOCIATES LTD**	**1ST APPELLANT**
AND	**CALEDONIA HARDWARE LTD**	**2ND APPELLANT**
AND	**HAROLD B. RAMSAY**	**3RD APPELLANT**
AND	**JANET RAMSAY**	**4TH APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**1ST RESPONDENT**
AND	**THE WORKERS BANK**	**2ND RESPONDENT**

Debayo Adedipe for the appellants

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the 1st respondent

Harrington McDermott instructed by Director of State Proceedings for the 2nd respondent

28, 30 November, 20 December 2012 and 18 January 2013

PROCEDURAL APPEAL

PANTON P

[1] I have read, in draft, the reasons for judgment of my brother Brooks JA and agree that they accurately reflect the findings of the court.

MORRISON JA

[2] I too have read the draft reasons for judgment of Brooks JA and agree with the reasoning contained therein.

BROOKS JA

[3] This is an appeal against the judgment of Fraser J, handed down in the Supreme Court on 6 June 2012. In that judgment, the learned judge dismissed an application for relief from sanctions that had been filed by the appellants herein. The appellants assert that the learned judge wrongly exercised his discretion in refusing their application.

[4] After hearing submissions from counsel for both the appellants and the respondents, and thereafter considering the matter, we gave our decision on 20 December 2012. We dismissed the appeal and ordered costs to be paid to the respondents. Such costs are to be taxed if not agreed. At that time we promised to give our reasons at a later date. We now fulfill that promise.

[5] The application arose because the appellants failed to obey an order of Master Lindo. The learned Master had, on 2 March 2010, ordered the appellants to pay costs

to each of the respondents, Jamaica Redevelopment Foundation Inc and The Workers Bank. The appellants did not obey that order, and on 13 April 2010, the learned Master made the following order:

> "Unless the costs awarded to the [respondents] on March 2, 2010 are paid on or before June 18, 2010 by 2:00 pm, the [appellants'] statement of case are [sic] to stand as struck out."

[6] Again, the appellants failed to comply. On 15 July 2010, they applied, pursuant to rule 26.8 of the Civil Procedure Rules (the CPR), for relief from sanctions. That is the application, which went before Fraser J.

[7] The appeal turns on three issues:

> 1. whether the application had been made promptly;
> 2. whether a good explanation had been given for the failure, and;
> 3. whether the appellants had generally complied with other rules, orders and directions.

Learned counsel for both sides made submissions concerning the merits of the claim and the prospects of success. I find, however, without denigrating the research and advocacy that went into those submissions, that based on the provisions of rule 26.8, there is no need to consider those arguments.

[8] I shall address the three issues, identified above, in turn. It is first necessary, however, as a backdrop to the analysis, to set out the provisions of rule 26.8:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction **must** be –
>
> (a) **made promptly**; and

(b) supported by evidence on affidavit.

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

(a) the failure to comply was not intentional;
(b) **there is a good explanation for the failure**; and
(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

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

(a) the interests of the administration of justice;
(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely trial date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown." (Emphasis supplied)

Whether the application was made promptly

[9] Fraser J, in a comprehensive written judgment, found that the application had not been promptly made. It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant

relief. Rule 26.8 states that the application "must" be made promptly. This formulation demands compliance. Although the word "must" has been variously interpreted as mandatory in some contexts (see **Norma McNaughty v Clifton Wright and others** SCCA No 20/2005 (delivered 25 May 2005)) and directory in others (see **Auburn Court Ltd and Another v National Commercial Bank Jamaica Ltd and Another** SCCA No 27/2004 (delivered 18 March 2009)), the context of rule 26.8(1) does suggest a mandatory element.

[10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word "promptly", does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case.

[11] In **Hyman v Matthews** SCCA Nos 64 and 73/2003 (delivered 8 November 2006), this court found that an application, made three months after the entry of a judgment as a result of a failure to obey an "unless order", had not been made promptly. The applicant had, however, purported to comply with the order before the application was made, and another factor was that the legal vacation fell within the three-month period. Despite its finding, the court went on to allow the appeal against the judgment at first instance, which had refused the application.

[12] The judgment of Harrison P indicates that the reason for granting the relief was twofold. Firstly, the learned President held that the case was "a transitional case", that

is, it had already been in existence when the CPR came into force. The second reason was that he held that the decision of this court in **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA No 56 and 95/2003 (delivered 18 November 2005) was that all the provisions of rule 26.8, should be read cumulatively.

[13] In my respectful opinion, **Hyman v Matthews** should be regarded as belonging to the period of transitional cases where "particular care should [have been] taken to give ample time to the parties to adjust to the new requirements" (per Panton JA (as he then was) in **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** at page 8). I find that that era has already passed. In its wake, the court may well take a more stringent approach to diliatory applications.

[14] In addressing the matter of promptitude in the instant case, Mr Adedipe, on behalf of the appellants, submitted that "[p]romptitude cannot be assessed without taking into account the state of mind of the applicant". That submission was a part of a wider submission that the assessment of whether the application was made promptly, should take into account the time at which the applicant became aware of the default, and not the time at which the default occurred. I find that the submission does not have much force in the context of a sanction that is applied pursuant to an "unless order". Where such orders are made, the party affected is given notice of the requirement and the penalty for non-compliance. The deadline for compliance should, therefore, be uppermost in his mind.

[15] In the instant case, the learned Master's original order had already been disobeyed, so it ought to have been a matter of priority for the appellants and their attorneys-at-law to ensure that the extended time, given by the learned Master, was met. If, despite all efforts to comply, some slip had occurred, the default should have been immediately obvious to the relevant parties. What instead occurred, according to Mr Harold Ramsay, one of the appellants, is that although he paid the required sum to his attorneys-at-law two days before the deadline date, he has been informed by the attorneys-at-law that "as a result of inadvertence the said sums...[were] not paid over to the Attorneys-at-law representing the [respondents]".

[16] Mr Ramsay said that he made his payment on 16 June 2010. The payment to the respondents should have been made by 18 June 2010. The failure automatically brought the sanction into force. In that context, it is inconceivable that it should have taken almost a month (15 July 2010) for the application for relief from sanctions to have been filed. The appellants' attorneys-at-law should have been eagerly expecting the monies and anxious to turn them over to their counterparts, on or before 18 June 2010. They should have been pressing their clients for the funds. In addition, the appellants, having made the payment, should have been anxious to have word from their attorneys-at-law, that the sum had been remitted and that their claim had been saved from the fatal axe.

[17] Despite the lapse, all Mr Ramsay has stated, in an affidavit filed on 5 July 2010, is that the "failure to comply with the order of the Court was certainly not intended on my part or on the part of any of the other [appellants]". It is significant that the

attorneys-at-law, to whom the monies had been paid, have not explained the default. Neither has any explanation been proffered for the delay in making the application.

[18] In the circumstances, I find that the application was not made promptly and, for that reason, should not be considered. It should, therefore, fail. In that regard I am, respectfully, in complete agreement with Fraser J in his finding to that effect. Like the learned judge, however, I shall consider the other aspects of the application in the event that rule 26.8(2) should, in fact, also be considered.

Whether a good explanation had been given for the failure

[19] The issue of whether a good explanation has been given is one of the three requirements of rule 26.8(2) that an applicant must fulfill before the court will grant relief from sanctions. I shall consider all three.

(a) Was the failure to comply intentional?

[20] Whereas Mr Ramsay's affidavit indicates an intention to comply with the order, no explanation has been given by the attorneys-at-law for their default. It will be presumed, subject to what will be said below, that the default was not intentional.

(b) Is there a good explanation for the failure?

[21] Mr Ramsay's affidavit does not give any explanation for the failure. His evidence that his attorneys-at-law have told him that the default was by way of inadvertence, is inadequate. Mrs Minott-Phillips QC, on behalf of the respondents, submitted that the term "inadvertence" was a conclusion to be drawn from an explanation and was not itself an explanation. I agree with the submission. Without speculating what

explanation the attorneys-at-law would have given, it would seem, accepting Mr Ramsay's uncontraverted testimony about having paid over the monies, that at best, their explanation would have been "oversight". Based on the situation described above, and the expected action that it demanded, I would describe such oversight as "inexcusable" and consequently, reject that explanation as being a good one.

[22] Where there is no good explanation for the default, the application for relief from sanctions must fail. Rule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph. The Privy Council, in **The Attorney General v Universal Projects Ltd** [2011] UKPC 37, in considering a similarly worded rule, used in the Civil Procedure Rules of Trinidad and Tobago, held that the absence of a "good explanation" within the meaning of the rule, was fatal to the application. Their Lordships, in that context, said at paragraph 18 of their opinion:

> "The Board has reached the clear conclusion that there is no proper basis for challenging the decision of the courts below that there was no "good explanation" within the meaning of [the rule equivalent to rule 26.8(2)(b) of the CPR] for the failure to serve a defence by 13 March. **That is fatal to the Defendant's case in relation to** [the rule equivalent to rule 26.8 of the CPR] **and it is not necessary to consider the challenge to the other grounds on which the Defendant's appeal was dismissed by the Court of Appeal**." (Emphasis supplied)

[23] At paragraph 23 of their opinion, their Lordships addressed the issue of oversight where it is used as an explanation. They said:

> "To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. **But it is difficult to**

> **see how inexcusable oversight can ever amount to a good explanation**. Similarly if the explanation for the breach is administrative inefficiency." (Emphasis supplied)

Despite the finality of the absence of a good explanation, I shall, nonetheless, consider the remaining element of rule 26.8(2).

Whether the appellants have generally complied with all other orders, rules and directions?

[24] This issue was identified above, as one of the crucial issues in this appeal. It is also the third element identified by rule 26.8(2). In this context, Mr Adedipe complained that Fraser J's finding, that there had not been general compliance by the appellants, prior to the application of the sanction, was flawed. Learned counsel argued that not all the points identified by the learned judge were, in fact, relevant to the issue.

[25] Fraser J listed, at paragraph 59 of his judgment, what he said were unanswered complaints about the appellants' alleged general diliatory approach. The complaints were that they had failed to:

> "a. comply with the order granting leave to file a reply out of time which stipulated the reply should have been filed by March 16, 2010;
>
> b. comply with the order for standard disclosure by June 10, 2010;
>
> c. file their listing questionnaire by September 6, 2010; and
>
> d. have their representative present at the pre-trial review on September 20, 2010 contrary to CPR rule 27.8. This failure had to be viewed in the context whereby it is clear that counsel for the claimants was aware of the pre-trial review date based on the

> Formal Order of April 13, 2010 which records the presence of counsel holding for the claimants' attorney-at-law and paragraph 4 of the affidavit of urgency of Debayo Adedipe sworn to, and filed, on July 20, 2010 in which he adverts to the pre-trial review date of September 20, 2010 as one of the bases on which an early date was being sought. It was at this pre-trial review that judgment was granted in favour of the 1st defendant."

In respect of those complaints, the learned judge said at paragraph 60:

> "Those submissions not having been countered it is manifest that the mandatory requirement that there should have been general compliance with the other rules, practice directions orders and directions has not been established."

[26] Although, before Fraser J, there was no contest to that list of complaints, Mr Adedipe submitted, before us, that the learned judge was wrong to have accepted them as being all valid. Learned counsel submitted, in respect of the complaint about the absence of a reply, that the order setting out the time for filing a reply was "merely permissive, not mandatory". Failure to file a reply, therefore, should not have been considered as non-compliance, even if there had been a request for permission to file one. I agree with Mr Adedipe in respect of that submission.

[27] I cannot agree with Mr Adedipe, however, that in this case, because the sanction had been in force from June 2011, the appellants were, therefore, exempt from complying with orders which required their action or presence thereafter. I do accept that the consideration would vary from case to case, depending on what was required of the defaulting party. I find, however, that a court assessing an application for relief from sanctions should not be restricted to considering the applicant's conduct prior to

the application of the sanction; subsequent action may well indicate the attitude of the applicant to the progress of the matter. In any event, not all sanctions inflict a penalty that is fatal to that party's case. In such cases, subsequent action should be considered.

[28] In the instant case, it would have been open to the court assessing the question of relief from sanctions, to consider whether the appellants had demonstrated that they were serious about getting their case back on track and placing themselves in a position where the adverse effects of the default were minimised. The appellants missed that opportunity for making a favourable impression in that regard.

[29] In any event, rule 28.6(2) requires an applicant to comply with all three of its requirements. It states that the "court may grant relief only if it is satisfied that" the three requirements have been satisfied. Even if Fraser J was wrong in finding that there had not been general compliance, the appellants' failure to satisfy the requirement of a good explanation would have been fatal to their application.

[30] The appellants' failure to clear the threshold requirements set by rule 28.6(2) made it unnecessary for Fraser J to consider the provisions of rule 26.8(3) and I respectfully agree with his finding to that effect.

Conclusion

[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the

court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant.

[32] In the instant case, the appellants not only failed to make their application promptly, but also gave no explanation for their default. Fraser J was, therefore, correct in refusing to consider the provisions of rule 26.8(3) and was correct in refusing the application for relief from sanctions.

[33] For those reasons, I agreed that the appeal should have been dismissed and costs awarded to the respondents, as set out in paragraph [4] above.