IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2006 HCV 00705

IN CHAMBERS

BETWEEN	CYNTHIA MEDLEY-ROWE (trading as Wireless Talk)	CLAIMANT
AND	SATURN SALES MANUFACTURING COMPANY LIMITED	1ST DEFENDANT
AND	ALTHEA CROSDALE	2ND DEFENDANT

Mr. Seymour G. Stewart for Claimant.

Mr. Lawrence Philpotts-Brown instructed by Clough Long and Co. for Defendants.

Practice and Procedure – Application for relief from sanctions – Judgment entered because of failure to attend Case Management Conference – Application to set aside judgment – Factors to be considered – CPR rule 26.8
Practice and Procedure – Consent Order referring accounts to accountant - Whether parties estopped from objecting to the findings of the accountants

26th March and 22nd April 2008

BROOKS, J.

Mrs. Cynthia Medley-Rowe is a wholesaler of cellular phone cards to the public. She, for her part, purchased the cards from Saturn Sales Manufacturing Co. Ltd. In February 2006, Mrs. Medley-Rowe filed the present claim against Saturn Sales and one of its employees Althea Crosdale. The particulars of claim allege that because of deliberate mishandling of her account with Saturn Sales, she had overpaid Saturn Sales sums in excess of

$22,000,000.00. Saturn Sales, in turn, asserts that it is she who owes it over $8,000,000.00 on a taking of accounts between the two.

On 21st February 2008, Master Lindo struck out her claim and ordered judgment on the counter-claim, because of Mrs. Medley-Rowe's failure to attend a case management conference. She now applies for relief from sanctions on the basis that the non-attendance at the appointed time was due to a mistake as to the time of the conference. Mr. Philpotts-Brown, on behalf of the Defendants, vigorously opposed the application, highlighting, among other things, a history of previous defaults by Mrs. Medley-Rowe.

The issue to be determined is whether Mrs. Medley-Rowe has satisfied the requirements of rule 26.8 of the Civil Procedure Rules (CPR), to allow the court to grant her the relief which she seeks.

Assessment of the application

Rule 26.8 governs the matter of relief from sanctions. I shall examine the application in the context of the provisions of the rule.

Rule 26.8 (1)

The application was filed the day following the Master's order. I shall treat the terms of rule 26.8 (1) as having been complied with, as the application was filed promptly and was supported by an affidavit.

Rule 26.8 (2)

Rule 26.8 (2) provides:

"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." (Emphasis supplied.)

Mrs. Medley-Rowe is obliged to satisfy all three requirements of the rule. (See the judgment of P. Harrison J.A. (as he then was) in *International Hotels Jamaica Ltd. v. New Falmouth Resorts Ltd.* (SCCA 56 and 95 of 2003, delivered November 18, 2005) (page 3). I have highlighted the word "only" because it imposes a severe restriction which will be considered later.

In respect of the first requirement, Mr. Stewart, her attorney-at-law deposed that he and Mrs. Medley-Rowe failed to attend at the appointed time because of a scheduling error. They attended at the Master's chambers at 3:00 p.m. on the 21st in the mistaken belief, that the hearing was scheduled for 3:30 p.m. Mrs. Medley-Rowe had in fact driven to the Supreme Court from Montego Bay, over a hundred miles away, in order to attend. She had complied with the other orders made by the Master on 4th February, which was the date of the hearing, when the order to attend on the 21st had been made. Having got to the Master's chambers, at 3:00 p.m., it was then that the Master informed Mr. Stewart of the order made at 9:30 a.m. I am prepared to accept, on this explanation, that the failure was not intentional.

I am also prepared to accept that there is a good explanation for the failure. Inadvertence has been accepted as a good explanation for the failure

of counsel to attend a hearing. In *Edward Seaga v Western Broadcasting and others* C.L. S. 243 of 1999 (delivered 15/12/2006) Campbell, J. granted relief from sanctions where the failure to attend was due to a misapprehension as to the date of the hearing. In the instant case, it is noteworthy that Mr. Stewart was not the attorney who represented Mrs. Medley-Rowe on 4th February 2008, when the Master made the order to attend. I also note that the first order on the minute of order then made, speaks to a deadline of 3:00 p.m. It is conceivable that that also was a basis for the mistake being made. I do not seek to provide an excuse for Mrs. Medley-Rowe, but I adopt the words of Campbell J, in saying, it "is safe to assume that the misapprehension [by the attorney-at-law] contributed to the absence of the [party]" (paragraph 20 of *Seaga v Western Broadcasting*).

Although the English cases on this issue must be read with a careful appreciation of the differences between the relevant rules, one may note that relief was granted, in circumstances similar to the instant case, in *Southwark London Borough Council v Onayomake* [2007] EWCA Civ. 1426. There, Mr. Onayomake's statement of case had been struck out for failure to attend a further case management conference. It was not his first default. The explanation given in the application for relief was that his solicitor was delayed by public transport and had been unable to contact the district judge who was to have heard the matter. The Court of Appeal ruled:

> "If O's solicitor had attended the hearing it was inconceivable that the judge would have struck out his defence and counter-claim. Instead it was likely that the worst that would have happened would have been the making of an unless order. O's solicitor had not made numerous errors but had merely failed to attend court at the correct time...."

The third hurdle that Mrs. Medley-Rowe has to clear is the requirement of general compliance with previously applicable rules and orders. Here she faces serious difficulty. There have been a number of previous defaults; missed deadlines for filing documents as well as non-attendances. Explanations were eventually tendered for the absences and failure to comply. Frankly, some of the explanations indicate that Mrs. Medley-Rowe had other matters which she felt deserved priority over this claim. In the absence of a clear and unambiguous "yes" in answer to the question of previous compliance, I must consider rule 26.8 (3). I am obliged to digress briefly in order to explain the obligation.

In *International Hotels* McCalla J.A. ((Ag.) as she then was) emphasized the need for tribunals at first instance, to demonstrate compliance with rule 26.8 (2) as well as 26.8 (3). In *R.C. Residuals Ltd. v. Linton Fuel Oils Ltd.* [2002] 1 W.L.R. 2782, the United Kingdom (U.K.) Court of Appeal, in contemplating the equivalent provisions in their Civil Procedure Rules (rule 3.9 (1)), ruled that the court considering an application for relief from sanctions, was obliged to consider systematically each of the matters listed in the rule (Kay, L.J. at p. 2788, paragraph 20). Mr. Stewart cited both these cases, among others, in support of his submissions.

I am bound by the decision in *International Hotels*. It is necessary to point out, however, that the provisions of the U.K. rule, 3.9 (1), although very similar to the cumulative wording of our rules 26.8 (1), (2) and (3), bear differences which create a very dissimilar effect. Rule 3.9 provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including -
>
> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly:
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party.
>
> (2) An application for relief must be supported by evidence."

It will have been noted that there is no restriction placed in that rule on the ability of the court to grant relief from sanctions. I have already emphasized the restrictive nature of our rule 26.8 (2). It is therefore somewhat incongruous, in the face of that stringency, for there to be an absolute requirement to contemplate the terms of rule 26.8 (3), which states:

> "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."

If, for instance, there was no good explanation for a party's failure to comply, then that should be an end to the matter, according to rule 26.8 (2). There would be no need, in my view, to consider "the interests of the administration of justice" and the other provisions of rule 26.8 (3). It would seem that a tribunal need only consider rule 26.8 (3) if it found that the provisions of rule 26.8 (2) had been satisfied.

I accept, however, that the words "generally complied" in rule 26.8 (2) (c), does allow the court some flexibility so as to consider the provisions of rule 26.8 (3). In considering, therefore, whether Mrs. Medley-Rowe has "generally complied" with previously applicable rules and orders, I shall examine each of the provisions of rule 26.8 (3).

Rule 26.8 (3)

In light of the basis for embarking on this enquiry, (the question of general compliance), it would seem that I am not restricted to the

breach which led to Master Lindo's order. Subparagraphs (a) and (e) mentioned below, appear to afford general consideration.

a. The interests of the administration of justice

This claim involves large sums of money; both on the claim and the counter-claim. There are allegations of fraud against Ms. Crosdale. In the face of these serious issues, the words of Rowe, P. in *Williams v Wilson and others* (1989) 26 J.L.R. 172 at page 175 G are appropriate:

> "Justice sits more securely for plaintiff and defendant when both have had their day in court and the issues litigated are decided on their merits."

A slip such as Mrs. Medley-Rowe's should not be the basis upon which judgments of this court should rest. It is my view that the interests of justice and its administration would be better served if the judgment secured, were to be on the merits of the claim.

b. Was the failure to comply due to the party or that of the party's attorney- at-law?

Although Mrs. Medley-Rowe was present on 4th February when the appointment was made, it is probable that she was content to be guided by her attorney-at-law, who, it proved, was under a misapprehension.

c. Can the failure to comply be remedied within a reasonable time?

Bearing in mind the nature of the failure in this case, namely a failure to attend a hearing, the question would be how soon a new hearing may be convened. The hearing can be rescheduled for a date within the course of

this year. That is not an unreasonable lapse of time, bearing in mind the state of the court's list.

d. Can the trial date still be met?

There having been no trial date set, this is not a relevant consideration.

e. The effect which the granting of relief would have on each party

A grant of relief would be significant for Saturn Sales. It would be deprived of its judgment for $8,588,477.20 together with interest thereon at the rate of 25% per annum from 1st August 2005. The result of a refusal would be dramatic for Mrs. Medley-Rowe. She would have lost her chance of proving her claim for over $22,000,000.00, as well as being placed under the obligation to pay the sum Saturn Sales claims; all because her attorney-at-law got the time wrong. It would be an unsatisfactory result. It is true that she may, and I use the word "may" advisedly, be able to recover those sums from her attorney-at-law, but it seems a wholly disproportionate result, when a trial would avoid that sort of litigation.

Is there a real prospect of success?

The mere fact that there is much at stake does not mean that relief must be granted. The Court of Appeal expressed that view in the *Southwark* case, mentioned above. It similarly opined that relief could be denied even where the failure to comply lay entirely with the legal representative. The

point is that all the factors must be considered, including the prospects for success.

Campbell, J. in *Seaga v Western Broadcasting,* mentioned above, opined that in addition to the considerations set out in r. 26.8 (3), the court could properly consider whether the defaulting party had a real prospect of success at trial. The learned judge cited the judgment in *Gloria Findlay v Gladstone Francis* F045 of 1994 (delivered 28/1/2005) where Sykes, J., at paragraph 32 of the latter judgment said:

> "...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."

I respectfully agree with that approach and will seek to apply it here.

The resolution of the claim and counter-claim in the instant case will depend, in large measure, on the taking of careful accounts between these parties. This process had already begun, and there have been differences in opinion between two firms of accountants involved in considering the accounts. I shall mention this aspect again in another context, but I find that the indications are that there are serious issues to be tried and it cannot be said that Mrs. Medley-Rowe's case has no real prospect of success.

Does estoppel apply?

Mr. Philpotts-Brown submitted that Mrs. Medley-Rowe's case has no real prospect of success because she has agreed to abide by a report by a

firm of accountants. That report, says Mr. Philpotts-Brown, indicates that it is Mrs. Medley-Rowe who owes Saturn Sales in excess of $8.5m. The consent order made on 5th February 2007, stated in part, as follows:

> "The matter is to be referred to BDO Accountants of 26-28 Beechwood Avenue, Kingston 5 in the parish of Saint Andrew and the documents to be submitted to BDO by each party on or before 9 April 2007 to determine the amount owing to each party."

Counsel relied on the unreported judgment in *Century National Bank Ltd. and others v Windsor Commercial Land Company Ltd. and others* C.L. 1993/C363 (delivered 23/12/2005). In that case, Campbell, J. considered a consent order with similar wording to that quoted above. The learned judge ruled that the agreement that culminated in the consent order was fair and reasonable and was entered into with a view to resolving the dispute. He found that, as the parties each had able legal representation at the time of the consent order, the Defendants were estopped from denying the balance which the accountants had concluded that they owed to the Claimant.

I agree with Mr. Stewart that the *Century National* case is distinguishable from the instant case on an integral finding made by Campbell, J. The learned judge found that because of inadequate record-keeping by both parties to the claim, the accountants had done the best job that was possible in the circumstances. He held that the parties, in arriving at the consent order, had contemplated their respective inability to provide

all the necessary documentation. He ruled that it was that report which would have informed the court's decision at trial. (See page 12)

In the instant case, Mrs. Medley-Rowe's accountants, Daly Garrick Daly have seriously disputed BDO's method and findings. There is no indication that a better job cannot be done in the circumstances. Daly Garrick Daly have made recommendations as to how the matter may be investigated. In light of that dispute, and the opinion that a proper audit is capable of going a far way in resolving the matter, I am of the view that this court should not relinquish its authority to a firm of accountants.

I am also not convinced that the consent order was an agreement to resolve the case on the decision of the accountants. There were other provisions in the *Century National* order which would have assisted Campbell J. in arriving at his conclusion to the contrary. They included a provision which stipulated that the party found by the accountants, to be indebted to the other, would stand the costs of the accountant's report. That provision is not duplicated in the instant case.

I find that Mrs. Medley-Rowe is not estopped by the consent order.

Conclusion

Although there may be somewhat of a tenuous basis on which to have had resort to rule 26.8 (3), in dealing with this application for relief from sanctions, I have made reference to that rule on the basis that, at the date of

Mrs. Medley-Rowe's non-attendance, all previous orders had, by then, been complied with. The reason for the non-attendance is excusable. It is feasible for the matter to proceed to case management conference and to trial. The assessment of the factors stipulated in rule 26.8 (3), as well as her prospects of success, dictates that Mrs. Medley-Rowe ought to be given relief from sanctions and an opportunity to pursue her claim.

I, therefore, make the following orders:

1. Orders 1, 2 and 3 of the order made herein by the Master on 21st February 2008, are hereby set aside.
2. The Claimant's claim is ordered restored and her Replies and Defence to Counter-claim filed herein on February 18, 2008 are to stand as being properly filed.
3. The date for the case management conference shall be fixed by the Registrar.
4. The Claimant is to pay all previous unpaid orders regarding costs on or before 15th May 2008, failing which her statement of case shall stand as struck out.
5. Costs of this application and costs thrown away, to the Defendants to be taxed if not agreed.