IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2007 HCV 03502

(NO. 2)

BETWEEN	**KRISTIN SULLIVAN**	**CLAIMANT**
AND	**RICK'S CAFÉ HOLDINGS INC**	**DEFENDANT**
	T/A RICK'S CAFÉ	

IN CHAMBERS

Manley Nicholson instructed by Nicholson Phillips for the claimant

Shaun Henriques for the defendant

APPLICATION FOR RELIEF FROM SANCTIONS – RULE 26.8 OF THE CIVIL PROCEDURE RULES – WHETHER RULE 26.8 (1) AND (2) MANDATORY

April 7 and 15, 2011

SYKES J.

1. In an earlier judgment this court had held that on a proper construction of the order of Evan Brown J. (Ag) made on May 11, 2010 and extended on May 14, 2010, Mrs. Sullivan's claim against Rick's Café was struck out as of January 31, 2011. The reasons for judgment were delivered on March 31, 2011. The application before the court now is an application under rule 26.8 of the Civil Procedure Rules ('CPR') for relief from that sanction. The application is refused with costs to Rick's Café. These are the reasons.

2. Mr. Shaun Henriques in his now customary style and methodology has opposed this application with every sinew of his body and vigour of his mind. He has advanced just about every submission that can be made against this application. He, as is customary, submitted very, very and extremely detailed written submissions which were supported by exhaustive oral submissions. Mr. Manley Nicholson was equal to the task and also made important submissions on the matter.

3. A summary of the allegations has been set out in the previous reasons for judgment and need not be repeated in full. The court will only add such details as are necessary for the disposition of this application. In addition to the allegations stated in the previous judgment, there are the relevant parts of Mr. Manley Nicholson's affidavit explaining the reason for the non-compliance with Evan Brown J.'s (Ag) unless order of May 11, 2010.

4. Learned counsel Mr. Nicholson explained in the affidavit that the omission to file the core bundle was his and not that of Mrs. Sullivan's. He further explained that his 'heavy workload with attendant court scheduling over the preceding several months … occasioned this issue not coming to his attention' (see para. 5 of affidavit dated March 30, 2011). He added that 'having complied with the other court orders … [he] was of the sincere belief that there were no outstanding orders not complied with.' He also swore that 'the core bundle was prepared in advance of the 31 January 2011 deadline and among the court documents apparently unfiled' (see para. 5 of affidavit dated March 30, 2011). Mr. Nicholson stated that there is now full compliance with all the orders because the core bundle has now been filed. It was filed on March 29, 2011. It should be noted that the March 14 order also required the core bundle be served on the defendant by January 31, 2011.

5. There is no reason to doubt Mr. Nicholson's evidence that the core bundle was prepared before January 31, 2011 but was not filed because counsel genuinely thought that he had done so. Mr. Henriques submitted that what Mrs. Sullivan had, if it was the same one that was filed on May 14, 2009 was tantamount to non-compliance. One of the complaints of Mr. Henriques is that Mrs. Sullivan did not file any core bundle before the November trial dates. He observed that no core bundle was filed between November 4, 2009, when the matter was adjourned, and May 11, when the matter first came before Evan Brown J. (Ag). It was this failure that led to the unless order made on May 11. Mrs. Sullivan purported to file a core bundle to meet the May 14, 2009 date. On this date, Mrs. Sullivan purported to file a core bundle but on examination was found to be in such an unsatisfactory state that Evan Brown J. (Ag) extended the unless order. Mr. Henriques went as far as submitting that what was filed in March 2011 in purported compliance of the order is still unsatisfactory because it is in the same state as that which Evan Brown J. (Ag) found wanting.

6. The resolution of this application came down to rules 26.8 (1) and (2) of the CPR and the question of whether those rules are compulsory as submitted by Mr. Henriques. Mr. Henriques further submitted that if any of the compulsory criteria are not met then that is the end of the application. This court accepts Mr. Henriques' submission and as the cases below show, he is well supported by authority. This way of looking at the matter is supported by authority from the Courts of Appeal of Trinidad and Tobago and the Eastern Caribbean.

Rule 26.8

7. Rule 26.8 of the Jamaican CPR reads:

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

(a) made promptly; and

(b) supported by evidence on affidavit.

*(2) The court may grant relief **only if** (my emphasis) 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 (sic) 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.

8. In looking at this rule, it needs to be stated that rule 26.8 (3) is not exhaustive of the matters that are to be considered. Rule 26.8 (3) does not say that the matters listed there are the only factors to be considered. What the provision does say is that in exercising any discretion, 'the court must have regard to' the factors listed. It must be noted too, that the structure of rule 26.8 precludes any grant of relief if any of the criteria listed in rule 26.8 (1) and (2) is not met. The criteria in rule 26.8 (1) and (2) are gate keeping provisions that permit the exercise of the discretion 'only if' the standards set are passed. The court will now go through the requirements of rule 26.8 (1) and (2) in a systematic way and indicate why the application for relief from sanction was refused.

Rule 26.8 (1) (a) and (b)

9. The first requirement that has to be met by Mrs. Sullivan is that the application for relief from sanctions must be made promptly and supported by an affidavit (rule 26.8 (1)). The application before this court is supported by an affidavit so that hurdle is cleared. The more problematic one for Mrs. Sullivan is whether the application was made promptly. Promptly is not defined in the rules, however, it is obvious that the context in which this adverb is used in the rules conveys the sense of 'without delay', 'quickly' or 'at once'. Time, necessarily begins to run from the date the sanction takes effect. It is in relation to this time, objectively determined, that 'promptly' is measured. There is no room for the offending party's subjective understanding of when time begins. The sanction in this case took effect on January 31, 2011. The application was made on March 30, 2011. This is an eight week delay. To act eight weeks after the imposition of the sanction could not be regarded as 'acting without delay', 'quickly' or 'at once'. In this case, counsel for Mrs. Sullivan was present when the unless order was made on May 11, 2010 and extended on May 14, 2010. The order said file and serve the core bundle. Neither was done. The court now moves on to rule 27.8 (2).

Rule 26.8 (2)

10. The court finds that the non-compliance was not intentional despite Mr. Henriques' submission to the contrary. The explanation provided for the failure to file the core bundle was the pressure of work and a genuine belief that the bundle was filed. Mr. Henriques submitted that this explanation is not a good one. He relied on the decision Harris J. in ***The Attorney General of Antigua and Barbuda v Antigua Agregates*** *[in original]* ***Ltd*** Claim No. ANUHCV 2005/0492 (delivered March 30, 2010). This is a decision of the Eastern Caribbean Supreme Court in the High Court of Justice of Antigua and Barbuda. In that case the Attorney General submitted that pressure of work in his chambers prevented him from complying with the order to file witness statements by a specified date failing which he could not rely on the proposed witnesses at trial. He failed to meet the deadline and applied for relief from sanctions. Harris J. rejected the submission on the ground that pressure of work was not a good reason. Additionally, his Lordship held that the Attorney General did not produce evidence to support the conclusion that non-filing of the witness statements was because of pressure of work in the chambers.

11. On the other hand, Mr. Nicholson relied on ***Auburn Court Limited v Town and Country Planning Appeal Tribunal*** S.C.C.A. No. 70/2004 (delivered March 28, 2006) from the Court of Appeal of Jamaica. In that case, the appellant's counsel failed to take steps to complete the record of appeal in the required time. The time for filing the record expired on August 9, 2005. On January 27, 2006, the respondent filed its application to strike out the appeal. The appellant's filed its application for extension of time on February 24, 2006. In other words, six months after the record should have been filed the appellants applied for leave to extend time to file the record. The reason given by counsel for the appellant for the failure was heavy work load coupled with frequent absences from the island because of the illness of his

mother. Harris J.A. (Ag) (as she was at the time) referred to rule 26.8 of the CPR as well the relevant Court of Appeal rules and observed that, 'Although Rule 1.13 of the Court of Appeal Rules gives the Court the power to strike out an appeal, in light of rule 26.8 of the CPR it is incumbent on the Court, after examining all the circumstances of a case to determine how best to deal with it justly' (pages 4 – 5). Despite the reference to rule 26.8, the judgment of the court does not show that her Ladyship approached the matter as one of an application for relief from sanctions. It seemed to have been thought of as an application for extension of time within which to comply with the rules. If this is correct, then it appears that the court did not regard the fact that the appellant could not file its bundle unless time was given as a sanction, albeit one that took effect by operation of the rules rather than one specifically imposed by a court order. This is quite different from the position taken by the Court of Appeal of Trinidad and Tobago.

12. Her Ladyship found that in some circumstances a heavy workload is reasonable excuse but not adequate. Reference was made, by her Ladyship, to another decision of the Court of Appeal of Jamaica where a delay of fourteen months to comply with an order because of the attorney's heavy workload and oversight was found to be a good reason but not altogether adequate (***C.V.M. v Tewarie*** S.C.C.A. 46/2003). In the specific case, Harris J.A. (Ag) found that the delay in filing the record had no deleterious effect on the respondent and further the attorney's dereliction of duty should not be visited on the client.

13. Mr. Henriques sought to distinguish ***Auburn Court*** on several grounds. Firstly, he said that the case before the court involved an unless order in which the sanction was imposed by a court order as distinct from the rules of court whereas no unless order arose in ***Auburn Court***. Second, in the case before the court, this was the second set of trial dates the claimant had consumed. The first was from November 4 – 6 2009, and the second set was from March 29 to March 31, 2011. Third, the unless order has taken effect

and as it presently stands there is no claim before the court whereas in ***Auburn Court*** the appeal was not struck out and was still before the court. Fourth, in the present case, when the unless order was made a trial date was set ten months down the road whereas in ***Auburn Court*** no hearing date for the appeal was set.

14. To these points of distinction this court wishes to add that ***Auburn Court*** despite referring to rule 26.8 was not purporting to deal with an application for relief from sanctions. Also ***Auburn Court*** did not purport to give a comprehensive definition of promptly and so could not be taken as saying as a matter of law promptly covers a person who acts eight weeks late.

15. One possible explanation of the outcome in ***Auburn Court*** is provided by dictum from the Eastern Caribbean Court of Appeal. In the case of ***Nevis Island Administration v La Copropriete du Navire J31*** (St. Christopher and Nevis Civil Appeal No. 7 of 2005) (delivered April 3, 2006) Barrow J.A. held, at paragraph 5, in relation to the distinction between an application to extend time and an application for relief from sanctions:

> *It was emphasized that the discretion to extend time was unfettered. In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief under CPR 2000 is distinctly fettered …*

16. Rule 26.8 of the CPR in ***Nevis Island Administration*** is in identical terms to that of Jamaica. The Court of Appeal there is insisting that the requirements of rule 26.8 (1) and (2) must be met before relief from sanctions can be entertained. Barrow J.A. seems to be saying that under the

rules the discretion to extend time is unfettered whereas the discretion to grant relief from sanctions is circumscribed by the conditions precedent stated in rule 26.8 (1) and (2). This seems to be how Harris J.A. (Ag) viewed the matter in ***Auburn Court.*** In any event, what Barrow J.A. is unambiguously saying is that when there is an application for relief from sanctions the discretion is hedged around by rule 26.8 (1) and (2).

17. In like manner, the Court of Appeal of the Republic of Trinidad and Tobago has taken the same position regarding its rule 26. 7 of the CPR. It is identical to Jamaica's rule 26.8 except that it is numbered differently and has one less factor to be considered, under rule 26.7 (4) (T&T) (rule 26.8.(3) (Jam.)), if the court gets to the stage of considering the actual exercise of the discretion. Three decisions from Trinidad and Tobago are referred to below and in order to follow the references to the CPR there, the equivalent Jamaican rules will be placed in square brackets.

18. The cases are ***Trincan Oil Ltd & Ors v Chris Martin*** Civ App. No 65 of 2009; ***Trincan Oil Ltd v Schnake*** Civ. App. No. 91 of 2009 and ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** Civ. App. No. 104/2009. Jamadar J.A. in ***Chris Martin*** stated at paragraph 13 (quoted in ***Universal Projects*** at para. 50):

> *The rule is properly to be understood as follows. Rules 26.7 (1) and (2) [Jam. CPR rule 26.8 (1) (a) and (b) respectively] mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) [Jam CPR rule 26.8 (2), rule 26.8 (3) respectively] are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four*

factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied.

19. Jamadar J.A. gave the rationale for the new rules in paragraph 18, 19 and 20 of ***Chris Martin*** (quoted in ***Universal Projects*** at para. 50):

> *The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions.* ***The changes introduced by Rule 26.7 were intended to bring a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and their attorneys will become aware of them and will adapt their behavior accordingly, thus effecting the desired change in culture.*** (my emphasis)
>
> *Simply put, in the context of compliance with the rules, orders and directions the 'laissez-faire' approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated.*
>
> *Finally, reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions.*

20. Interestingly, the Court of Appeal of Trinidad and Tobago treats an application for extension of time as an application for relief from sanctions and applies the criteria set out in Trinidad and Tobago's rule 26.7. The reasoning is that an application for extension of time is in reality an application for relief from a sanction because the party is barred by the rules from taking the next step until he gets approval from the court and that approval cannot come unless the bar imposed by the rules is removed. This is so even if the time to be extended is one set by the rules rather than by a court order. It is said that that non-compliance with the time period set by the rules has the same result as if the time was imposed by a court order (see ***Schnake*** at para. 13 – 16 by Jamadar J.A.). The court in ***Schnake*** mitigated the strict rigours of rule 26.7 by pointing out that if the application for extension of time is made before the sanctions take effect then rule 26.7 is a rough guide to the exercise of the discretion but once the sanctions have bitten then strict compliance with rule 26.7 is required. The court accepted the position of the English Court of Appeal on this point (***Sayers v Clarke Walker*** [2002] 1 W.L.R. 3095). This is in sharp contrast with ***Auburn Court*** where the Court of Appeal of Jamaica did not take the view that an application for extension of time is in actuality an application for relief from sanctions.

21. The great virtue of rule 26.8 (1) and (2) of the CPR is that it sets out mandatory criteria which must be met before the discretion is exercised. It ensures greater consistency in outcome. This fundamental shift is perhaps the clearest indication that the Rules Committee comprising eminent judges of the Court of Appeal, the Supreme Court as well as distinguished practitioners at the public and private bar were dissatisfied with the way judges were exercising their discretion to extend time under the CPR. The Committee had before it the English CPR rule 3.9 which does not have the same strict preconditions but chose to reject that approach and introduce mandatory conditions before the discretion can be exercised. This court cannot dilute the rule 26.8 and take it back to the pre-CPR days exemplified

by ***Evans v Bartlam*** [1937] All ER 646 where Lord Atkin's dictum typifies the spirit of the bygone age. His Lordship said at page 650D:

> *… unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow the rules of procedure..*

22. This passage emphasises the idea that a trial at quite literally any cost is acceptable. Never mind how costly it is to the parties, to the courts, and other persons waiting to use the scarce public good of judicial time. The CPR has reversed all this and now puts at the forefront of all court users' minds the idea that saving time and cost are just as important as a trial itself. One could hardly find a clearer indication of the movement away from the cry, 'A trial! A trial!, Costs are of no moment as long as there is a trial!' This is not to say persons should not have their day in court but it is not any longer their day in court at any cost, without regard to other litigants, without regard to the resources of the court.

23. Lord Russell in ***Evans*** took the point even a bit further. At page 651A his Lordship said:

> *R.S.C. Ord. 13, r. 10, in its terms is unfettered by any conditions, and purports to confer upon the court or a judge a full power to set aside a judgment signed in default of appearance, and, if thought fit, to impose such terms, as conditions of the setting aside, as may be just*

24. This type of judicial munificence led Lord Russell to reject the submission that the default judgment that had been entered should not be set aside unless there was a serious defence to the action. The rejected submission has now found itself in the CPR where, depending on the application before

the court, the presence or absence of a real prospect of success is a factor of great weight. We dare not go back to the bad old days of civil litigation.

25. The ***Evans v Bartlam*** thinking permeated civil litigation in Jamaica when the CPR came into being. The Rules Committee rightly and properly rejected that approach. In the modern world where countries are seeking to move up the league table of economic development, litigation that moves at the pace of a disabled rheumatoid arthritic snail does not assist in that endeavour.

26. In this case, Mrs. Sullivan had allocated to her six days of a busy Supreme Court to have her matter heard. It was said that she was ill on both occasions yet no medical certificate has been forthcoming from her. In November 2009 it was being said that she had health challenges. To date, no medical report or certificate of any kind has been produced. In March 2011, it was being said that her doctor advised against traveling to Jamaica because of a deterioration in her health. As it was in November 2009, no medical evidence in support of this claim has been forthcoming. In respect of the March 2011 trial dates, it was being suggested by Mr. Nicholson that the Rick's Café's application to strike out her claim precipitated an anxiety attack which affected her ability to travel. In Mr. Nicholson's affidavit filed in support of this application it was said that Mrs. Sullivan was not able to afford the cost of travel to Jamaica and needed a loan to attend the trial Her financial ill health was not improved by her anxiety attacks she is alleged to have suffered a few days before the March 2011 trial dates.

27. From May 11, 2010 she knew that she was operating under the draconian provisions of an unless order. The life line was extended from May 11 to May 14 and then from May 14 to January 31, 2011, a further eight months, yet she missed the deadline.

28. Mr. Nicholson said that Mrs. Sullivan had an application to give evidence by video link and that application which was filed before the November 4 – 6, 2009 trial dates has not yet been heard. It is being said that no date was set for its hearing. The rules say that as many matters as can be dealt with each time the matter comes before the court should be dealt with on each occasion. The application could have been dealt with on November 4, 5 or 6, 2009. Mr. Nicholson says that the file could not be found in the Supreme Court registry and so was unavailable to the trial judge on those dates. This fact however does not explain why the matter was not pursued in all of 2010. There was nothing precluding Mrs. Sullivan from pursuing her application on either May 11 or May 14 2010 when the matter came before Evan Brown J. (Ag) or before any other judge after those dates.

29. At the end of the day, the real question is whether Mrs. Sullivan had more than ample opportunity to pursue her claim. She could have presented her evidence by video link yet she did not display any urgency in pursuing that application. She had further time from November 4, 2009 (matter adjourned from November 4 and not heard on November 5 and 6) to January 31, 2011 to complete her preparations for trial yet that opportunity was not taken. The explanation of counsel and the entreaty not to visit her counsel's omissions on her would make policing of the new rules impossible. Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief. Surely this is not the new culture being promoted by the CPR. If that were the case then CPR would not be worth the paper that it is written on.

Disposition

30. This court is obliged, in the circumstances, to find that the application was not made promptly thus rule 26.8 (1) was not surmounted. This court is also compelled to find that the reason advanced by counsel is not a good one and so rule 26.8 (2) (b) was not met. There is therefore no need to consider the factors listed in rule 26.8 (3) or any other factor.