JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 49/2006

BEFORE:	**THE HON. MR. JUSTICE PANTON, P.** **THE HON. MRS. JUSTICE HARRIS, J.A.** **THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**	
BETWEEN	**VILLA MORA COTTAGES LIMITED**	**1ST APPELLANT**
AND	**MONICA CUMMINGS**	**2ND APPELLANT**
AND	**ADELE SHTERN**	**RESPONDENT**

Mr. David Batts and Mr. Seyon Hanson instructed by Livingston, Alexander and Levy for the Appellants.

Ms. Carol Davis for the Respondent.

July 10 and December 14, 2007

PANTON, P.

I agree with the reasoning and conclusion of Hazel Harris, J.A. and I have nothing to add.

HARRIS, J.A.

This is an appeal from an order of McDonald, J. (Ag.) refusing an application by the appellants for leave to extend the time within which to file witness statements and to restore their defence which had been struck out.

The action herein is grounded in negligence. The 1st appellant is a hotel at Norman Manley Boulevard, Negril in the parish of Westmoreland, owned and operated by the 2nd appellant. The respondent was at all material times a guest at the hotel.

It is necessary for the procedural history of this case to be outlined. On October 26, 1999 the respondent filed a Writ of Summons and Statement of Claim, claiming damages against the appellants for injuries sustained by her by reason of severe electrical shock while using a refrigerator located in the office of the 1st appellant. Paragraphs 4 and 5 of the Statement of Claim reads:

> "4. During her stay at the said hotel, the Plaintiff was permitted and/or authorised by the First and/or Second and/or Third named Defendant to use a refrigerator located in the office of the said hotel for the purpose of storing items belonging to the Plaintiff.
>
> 5. On or about the 15th day of February 1996 while the Plaintiff was in the office of the said hotel and in the process of using the said refrigerator for the purposes for which she was permitted and/or authorised to use the same, she received a severe electric shock from the said refrigerator as a consequence of which she sustained injuries and has suffered loss and damage and incurred expenses."

On March 20, 2000 the appellant, with the consent of the respondent, filed a defence denying liability. A reply to the defence, with the consent of the defendant, was filed by the respondent on May 11, 2000. On June 27, 2000

Summons for Directions was filed. An Order on the Summons for Directions was made on September 26, 2000. The action came on for trial on two occasions, July 22 and November 25, 2002, but was adjourned.

On July 9, 2004 an amended Statement of Claim was filed. By these amendments, several particulars of injuries and particulars of special damages were added to the claim.

A Case Management Conference was held on July 9, 2004 and the following orders were made:

> "1. That the Claimant be given permission to put in signed expert reports from the following of the Claimant's doctors:
>
> Dr. Charles Kaplan M.D [sic]
> Dr. Bernard Cohen M.D.
> Dr. Eric R. Brown Ph.D [sic]
> Dr. Chris Morrison Ph.D [sic]
> Dr. David Levine M.D [sic]
> Dr. Glenton Smith M.D.
> Dr. Nelson Hendler M.D., M.S.
>
> 2. All expert reports to be filed & served on the Defendant on or before Wednesday 14th July, 2004.
>
> 3. Defendant to be given permission to file and serve an amended Defence on or before 14th July, 2004.
>
> 4. That both parties give to the other Standard Disclosure on or before 16th September, 2004. That there be inspection of documents served by 23rd September, 2004

5. Witness statements by each witness to be exchanged on or before 30th November, 2004 [sic]

6. Listing questionnaire to be filed by both parties on or before 30th May, 2005 [sic]

7. Trial to be by judge alone.

8. Witnesses limited to 3 for Claimant and 5 for Defendant.

9. Pre-trial conference set for 6th June, 2005 at 10:00 a.m. for 1 hour.

10. Trial to be set for 3 days the 26th, 27th, 28th February, 2007 [sic]

11. Costs of case management conference to be costs in the claim.

12. Formal order to be prepared filed and served by Claimant's Attorney-at-law."

On July 13, 2004 an Amended Defence was filed. It is important that paragraphs 4, 5 and 6 of the Amended Defence be rehearsed. They state:

"4. The Defendants deny paragraph 4 of the Amended Statement of Claim and say that the Plaintiff had a refrigerator in her allotted room which she impliedly had permission to use, and which was in good working order, but it was not true that the Plaintiff [sic] permission to use the refrigerator which was in the office, and that the refrigerator in the office was the 2nd Defendants private refrigerator.

5. The 3rd Defendant admitted that the Plaintiff complained of receiving an electrical shock on the date set out in paragraph 5 of the Amended Statement of Claim, but if her complaint was genuine, which is doubted, it

was not severe as alleged, and in any case it would have been caused by her going to the refrigerator on her way from the beach, barefooted and wet, without permission from the Defendants.
The Defendants say the complaint by the Plaintiff is faked, because the said refrigerator was mounted on two pieces of board which insulated it, and say further a representative from the Tourist Board to whom the plaintiff had complained, attended and inspected the refrigerator, touched it and it did not shock him it, [sic] if which is denied, [sic] the Plaintiff did receive an electric shock, the Defendants say that the Plaintiff by the unauthorized use of the refrigerator, and by going barefooted and wet to the said refrigerator, and with full knowledge of the risk of being shocked, accepted such risk, and by reason of such acts voluntarily agreed to waive such claim for any injury received. Furthermore the Defendants say that the matters complained of by the Plaintiff were occasioned without any negligence or breach of duty on the part of the Defendant and further the Defendants deny the particulars of injuries set out in paragraph 5 of the Amended Statement of Claim AND do not admit the special damages claim as set out in the Amended Statement of Claim.

6. The Defendants deny paragraph 6 of the Amended Statement of Claim and the particulars pleaded therein, and say if which is denied the Plaintiff did sustain electric shock and consequential injury, she was the author of her own misfortune."

On September 24, 2004 a List of Documents was filed by the respondent and on June 2, 2005, a Listing Questionnaire was filed by her. On June 6, she

filed a Witness Statement. On that date a Pretrial Review was held and the following order made:

> "1. Permission granted to the Claimant to call and put in evidence at the trial report of Mr. Levi Sommerville, professional engineer.
>
> 2. The Defendants to file and serve list of documents by 29th July, 2005, failing which the Defence stands struck out.
>
> 3. Pre-trial Review adjourned to 6th December, 2005 at 2:00 p.m. for 1 hour.
>
> 4. Time for exchange of witness statements extended to 25th November, 2005.
>
> 5. Costs to be costs in the claim.
>
> 6. Claimant's Attorney-at-Law to draft, file and serve the order [sic]"

On July 29, 2005 Listing Questionnaire was filed by the appellants.

On December 6, 2005 the following order was made:

> "1. Defence struck out.
>
> 2. Claimant's Attorney-at-Law to file Request for Judgment on or before 12th December, 2005.
>
> 3. Pre-trial Review adjourned to Monday, 12th December, 2005 at 9:30 for ½ hour."

The adjourned Pretrial Review, although fixed for December 12, 2005, was held on December 13, 2005 on which date judgment was entered for the respondent and May 3, 2006 was fixed for the assessment of damages.

On April 28, 2006 the respondent filed an application to further amend the Statement of Claim. There is no evidence as to whether leave was obtained. On May 5, 2006 the respondent filed a Supplemental Witness Statement. No Witness Statement nor List of Documents had been filed by the appellants.

On April 20, 2006 the appellants filed an application for extension of time to file Witness Statement and for the restoration of their defence. This application was refused on June 9, 2006.

Rule 11 of the Civil Procedure Rules 2002 ("CPR") gives the Court discretion to extend time.

A discretionary power is also conferred on the Court by Rule 26.8 of the C.P.R., to grant relief from sanctions imposed for non-compliance with a rule or an order. The Rule provides:

> "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 with 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."

The following grounds of appeal were filed:

"a. The learned judge failed to exercise her discretion properly, or at all in refusing the Application in circumstances where the trial date would not have been affected;

b. That in refusing to grant the relief prayed for the learned judge failed and/or refused to appreciate that the failure to comply could have been remedied within a reasonable time;

c. The learned judge failed/neglected and/or refused to appreciate that none of the parties would be prejudiced by permitting the judgment to be set aside and permitting the Defendants to file the documents so as to enable the trial to proceed on its merits;

d. The learned judge failed to accept the explanation put forward on behalf of the Defendants as a good explanation in circumstances where the Attorney who had conduct of the matter was transferring his practice, and where the 3rd Defendant from who he had taken instructions had fallen ill and died leaving him without instructions for a period of time consequent upon the 2nd Defendant having been resident overseas.

e. Further, that the learned judge failed to accept either of the explanations put forward to

explain the failure to comply, either separately or cumulatively, in circumstances where if the isolated impact of each explanation when taken alone was not a sufficiently good explanation, then the cumulative effect of all the said explanations would have amounted to a good explanation particularly where the said effect was that;

i. The Attorney who had conduct of the matter was transferring his practice to another Attorney;

ii. The 3rd Defendant had fallen ill and subsequently died

iii. The 2nd Defendant was Resident overseas;

iv. Some of the Witnesses had changed their addresses.

f. Further and/or in the alternative that the learned judge erred in law in finding that the discretion to grant relief could not be exercised, despite finding that the failure to comply was not intentional, and that the Appellants generally complied with all other relevant rules, practice directions, orders and directions.

g. The learned judge's findings of fact were unreasonable having regard to the evidence and were unsupported by the evidence before her."

The burden of the appellants' submissions was that in refusing the application, the learned judge wrongly exercised her discretion by reason of her failure to take into account the requisite factors prescribed by Rule 26.8 (3) of the C.P.R. when considering Rule 26.8 (2).

The learned judge was faced with an unenviable task. On one hand, the appellants were clearly in breach of the Case Management Orders, the consequence of which was the striking out of the defence. The respondent would therefore have been entitled to judgment. However, on the other hand, the defence advanced by the appellants is not without merit, and their application to restore the defence had been promptly made and was supported by evidence on affidavit.

It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.

The function of the Court is to do justice. "The law is not a game, nor is the Court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits" per Wooding, C.J. in **Baptiste v. Supersad** [1967] 12 W.I.R. 140 at 144. In its dispensation of justice, the Court must engage in a balancing exercise and seek to do what is just and reasonable in the circumstances of each case, in accordance with Rule 1 of the C.P.R.

A court, in the performance of such exercise, may rectify any mischief created by the non- compliance with any of its rules or order.

In dealing with the Court's jurisdiction to remedy a procedural default, in **Watson v. Fernandes** [2007] C.C.J. 1 (AJ) at page 36 paragraph 39 Saunders and Hayton J.J.A., said:

> "Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in **Barbados Rediffusion Services Ltd. v Marchandani**. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court's ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times."

Under the previous rules, a rigid approach was adopted by the Court in dealing with the question of striking out for reason of delay or for non-compliance. The birth of the C.P.R. heralded a new approach. It is one in which the Court dispenses some measure of flexibility in determining whether a defaulting party should be permitted to continue his case. In **Biguzzi v. Rank Leisure plc.** [1999] 1 W.L.R. 1926 at 1933 Lord Wolfe M.R. said:

> "Under rule 3.4. (2) (c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The

> fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C.P.R. over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

In **Watson v. Misseldine** [2001] 1 All ER 91 Lord Justice Stuart-Smith had this to say:

> "It is clear that the Court is now able to adopt a much more flexible approach to the question of striking out for delay or non-compliance with an order, than was possible under the somewhat rigid rules of the old law. In **Biguzzi v Rank Leisure plc** [1999] 1 WLR 1926, this Court made it clear that references should no longer be made to the old cases (see per Lord Woolf MR at p1932). But some of the considerations which were relevant before are obviously relevant now. For example the length of, explanation for and responsibility for the delay; whether the Defendant has suffered prejudice as a result and if so whether it can be compensated for by some order relating to costs or interest or it is so serious that it would be unjust to the Defendant to require the case to be tried. Moreover, the delay may be such that it is no longer possible to have a fair trial."

It is necessary at this stage to make reference to the affidavit of Mr. Eric Frater, sworn and filed on December 13, 2005, in support of the application. Paragraph 5 (i), (ii), (iii) and (iv) reads:

> "THAT the delay and non compliance with the Orders, was not intentional and was due to a number of circumstances as set out below:—

(i) The orders fell in a period when I was in the process of transferring my practice to another Attorney-at-Law, with a certain amount of dislocation attendant.

(ii) The 3rd Defendant who is the person from whom I received instructions and is in possession of relevant documents was ill for some time and died on the [sic]. The 2nd defendant is based overseas.

(iii) I have had some difficulty in getting the witness statements signed, as some of the witnesses have changed addresses.

(iv) Upon receipt of an expert witness statement, I sought to find an expert to counter it, and although I made contact with one, it was not possible in the time frame to get him to visit the locus, taking his equipment with him, and to prepare an expert report for use in the case."

The learned judge, after finding that the application had been promptly made, found that the appellants' failure to comply with the relevant orders was unintentional. She also found that there had been general compliance save and except for some orders of July 9, 2004 and June 6, 2005. However, she went on to find that the appellants did not proffer a good explanation for the failure to file the requisite documents.

The critical question arising is whether the learned judge, having found that there was compliance with rules 26.8 (2) (a) and 26.8 (2) (c), was correct in finding that the appellants had not advanced a plausible explanation for their

failure to comply with the orders as required by 26.8 (2) (b). The conditions outlined in Rule 26.8 (2) are fundamentally interwoven. They are inherently and intrinsically bound together as a determative factor as to whether relief from sanction ought to be granted. In **International Hotels Jamaica Ltd. v. New Falmouth Resorts Ltd.** SCCA 56 and 95/03 delivered on November 18, 2005, Harrison, J.A., as he then was, said that these conditions "must be considered cumulatively in order to satisfy a primary test". He went on to say that:

> "Sub-paragraph 8 (3) mandates a court considering the grant of relief from sanctions, in addition, to have regard to:
>
> (1) the interests of the administration of justice;
>
> (2) whether the failure was the party's or the party's attorney-at-law's fault;
>
> (3) whether the failure has been or can be remedied within a reasonable time;
>
> (4) whether the trial date can still be met if relief is granted; and
>
> (5) the effect which the granting or refusal of leave would have on each party.
>
> These are mitigatory factors which could influence favourably or otherwise the grant of relief from sanctions."

The discretionary power conferred on the Court under Rule 26.8 renders it obligatory on the part of a judge, in giving consideration to Rule 26.8 (2) to pay due regard to the provisions of Rule 26.8 (3). In determining whether to grant or refuse an application for relief from sanctions, it is incumbent on the judge to

examine all the circumstances of the case bearing in mind the overriding principles of dealing with cases justly. In so doing, he or she must systematically take into account the requisite factors specified in Rule 26.8 (3).

In **R. C. Residuals Ltd. v. Linton Fuel Oil** [2002] 1 W.L.R. 2782 damages for negligence were claimed by the claimant against the defendant. Liability was admitted but quantum disputed. The quantification of damages was dependent on expert evidence. A trial date had to be vacated by reason of the failure of the parties to serve expert reports within the time specified. In fixing a new trial date the judge ordered that unless the claimant served its expert reports on the defendants by 4 p.m. on April 2, 2002 it would be precluded from relying on the expert's evidence at trial. The claimant's failure to comply with the order within the time specified resulted in the refusal of its application for relief from sanction for permission to rely on the reports at trial.

In allowing an appeal by the claimants, it was held that parties had a duty to comply with unless orders during the time stipulated and that in considering whether to grant relief from sanctions, a trial judge was under an obligation to systematically consider each factor specified in 3.9 (1) of the English C.P.R., (the provisions of which are similar to 26.8 (3) of the C.P.R.). At page 2788 Kay L.J. said:

> "Considering, first, whether the judge did or did not properly weigh the factors that he was required to weigh, I have regard to the terms of his judgment. In

> that, there is no acknowledgement that he was obliged to take into account all those matters listed under CPR rule 3.9(1). He did take into account the two matters to which he made reference: firstly, that there had been a failure to comply with the order and, secondly, that that was not the first occasion when there had been default by the same party not complying with orders in the case. He had regard, I am satisfied, to what were properly to be considered the interests of the administration of justice, namely that, if it became known that the court would readily grant relief from unless orders, they would be unlikely to serve the purposes sought to be achieved by the rules so far as the administration of justice is concerned. It was a factor he was entitled to take into account. However, I can find no indication that he then thought it appropriate, having identified those factors that pointed in one direction, to go on and do the balancing exercise by going through the list contained in rule 3.9 (1) and seeing whether there were factors that pointed in the other direction.
>
> For those reasons I am satisfied that the exercise that the judge performed was a flawed one and that the exercise by him of his discretion cannot be allowed to stand."

In the present case, it appears to me that the learned judge had misapplied Rule 26.8 (2). It is manifest that in examining the factors outlined in Rule 26.8 (2) due attention must be given to Rule 26.8 (3). The learned judge had not systematically given consideration to the relevant factors as prescribed by Rule 26.8 (3). This she was bound to do.

As a general Rule, this Court will not interfere with a judge's exercise of his or her discretion unless he or she is plainly wrong in assessing the facts or has misapplied the law see **Watt v. Thomas** [1947] 2 All ER 582. I am satisfied

that the learned judge had fallen into error. It follows therefore, that it falls to this Court to determine whether the appellants ought to participate in the trial, notwithstanding their breach.

I am satisfied that there was no intentional default by the appellants as the learned judge rightly observed. It is also my view that the appellants, although not having filed Witness Statement and List of Documents, had generally complied with other rules, orders and directions, as found by the learned judge.

It cannot be said, however, that none of the reasons advanced by the appellants for non-compliance can be rendered nugatory nor can they be perceived to be inadequate. Two of the reasons advanced by Mr. Frater for the delay are of manifest significance, namely, the fact that he was engaged in transferring his practice and the difficulty in locating some of the witnesses. These, in my view, offer a plausible explanation for the delay and ought to have been accepted by the learned judge.

The failure to comply could, to a large extent be ascribed to be the fault of the appellants' attorney-at-law but this in itself would not be sufficient to bar the appellants from proceeding. Even in cases where the fault can be laid at the feet of a defaulting party the court may lend its sympathy to his cause. In **Matthews v. Hyman** S.C.C.A. 64/03 and **Administrator General for**

Jamaica v. Matthews and Another S.C.C.A. 73 of 2003 delivered on November 8, 2006, the appellant **Hyman's** defence was struck out by reason of his failure to comply with an unless order to deliver interrogatories. A judgment in default of defence was entered. Harrison, P. said:

> "The delay was undoubtedly due to the fault of the appellant Hyman, but that was merely a circumstance for the consideration of the learned judge. The appellant had a good defence and along with the other factors and in the interest of justice he should be given the opportunity to advance it, thereby giving effect to the overriding objectives of the rules. I would allow the appeal of the appellant Hyman, set aside the default judgment against him, and order that his answers filed on 31st July 2002 and his defence filed on 27th February 2001 do stand with no order as to costs."

There is also the matter of locating witnesses. The learned judge failed to consider the fact that there were difficulties in locating witnesses. Clearly witness statements could not have been produced until all or some of the witnesses were found.

In the case under review the application was refused on June 9, 2006. The trial had been fixed for hearing on February 26, 27 and 28, 2007. Had the appellants been granted leave to file and serve the relevant documents, the trial date could have been met.

The grant of the relief sought would not in any way cause undue prejudice to the respondent. Any prejudice which may arise from the delay

could be remedied by way of compensation. So far as the appellants are concerned, their defence raises an arguable defence. It is one in which they could have a real prospect of success as opposed to a fanciful one. See **Swain v. Hillman** [2001] 1 All ER 91. In my view a good defence having been advanced, it would not be just to deprive the appellants of the opportunity to pursue their defence.

I would allow the appeal with costs to the appellants.

DUKHARAN, J.A.

I have read in draft the judgment of Harris, J.A. I agree with her reasons and conclusions and I have nothing further to add.

PANTON, P.

ORDER:

1. The appeal is allowed.
2. The order of McDonald J., (Ag.) is set aside.
3. The appellants' defence is restored.
4. Leave is granted to the appellants to file and serve Witness Statements and List of Documents within 14 days of the date hereof.
5. A date for a further Case Management Conference should be fixed.
6. Costs to the appellants to be agreed or taxed.