IN THE SUPREME OF JUDICATUE OF JAMAICA

IN CIVIL DIVISION

C.L. 1995/W322A

BETWEEN	**ALAN WERB**	**CLAIMANT**
AND	**ERIC RODNEY**	**1st DEFENDANT**
AND	**PATRICIA PHILPOTTS** *(Representative of the Estate of Lascelles Philpotts, deceased)*	**2ND DEFENDANT**

Mr. Charles Piper and Ms. Kanika Tomlinson for the Claimant

Mr. Anthony Williams instructed by Usim, Williams & Company for the 1st Defendant.

Heard: 16th & 23rd January & 13th & 20th February 2008

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT OF APPEARANCE AT PRE-TRIAL REVIEW

Sarah Thompson-James, J (Ag.)

This is an application by the 1st defendant Eric Rodney to set aside a judgment in default of appearance at the Pre-trial Review – I granted the application for the following reasons:

The Background

This is a Claim in negligence commenced by Writ of Summons and Endorsement dated 5th September 1995 and Statement of Claim dated 21st September 1995.

On the 8th February 1996 the applicant herein filed a defence. A case Management Conference was set for the 14th May 2004 and a Pre-trial Review date was set for the 26th April 2005.

On the 26th April 2005 a further Pre-trial Review date was adjourned to 10th May 2006. The trial date for the 20th September 2006 was vacated and a new trial date was set for the 4th June 2007 and the Pre-trial Review was adjourned to the 15th February 2007.

On the 15th February 2007 at the Pre-trial Review it appeared as if the Claimant was fully compliant with the Case Management Conference orders made. However there was uncertainty as to whether the Registrar had notified the 1st defendant of the adjourned Pre-trial Review date. At this stage the Pre-trial Review was again adjourned to the 16th May 2007 with an order to the effect that the 1st defendant was to be served with the orders within 14 days of the claim or the Claimant's Statement of Claim would stand struck out.

An affidavit of service was filed on the 8th March 2007 wherein the affiant Veronica Wilson Assistant Bailiff attached to the Resident Magistrate's Court for the Corporate Area deponed that on the 22nd February 2007 she visited Jacks River, Oracabessa in the parish of St. Mary and personally served Mr. Eric Rodney the applicant/1st defendant with the

(a) Notice of Change of Attorney dated 15th February 2007

(b) Perfected Order on Pre-trial Review dated 10th May 2006

(c) Perfected Order on Pre-trial Review dated 15th February 2007

(d) Notice of adjournment of Pre-trial Review dated 16th February 2007.

Clearly from this affidavit the 1st defendant was in fact served with Notice of the adjourned Pre-trial Review date of the 16th May 2007 on the 22nd February 2007

On the 16th May 2007 the Master ordered that judgment be entered against 1st defendant in default of attendance with damages to be assessed at the trial.

The Issue

It is against this background that the 1st defendant made this application. The application seeks a relief from sanction which falls to be determined under Rule 26.8 of the Civil Procedure Rules 2002 herein after referred to as CPR. Rules 26.8(1) provides that -

An application for Relief from any sanction imposed for failure to comply with any rule, order or direction must be

(a) made promptly

(b) Supported by evidence on Affidavit.

Whilst the application herein was supported by affidavit it must be conceded that the application was not made promptly. As the order was made on the 16th May 2007 and the application is dated 22nd January 2008.

Part 26.8(2) of the CPR reads:

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

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions

The first ground on which the applicant seeks to rely states that the applicant/1st defendant was never informed by any of his former attorneys-at-law of the Pre-trial Review date or of any court appearance and as such the applicant/1st defendant was absolutely unaware of the court date. One would have to look askance at "this absolutely unaware" position – taken by the applicant as the unchallenged affidavit evidence of the assistant Bailiff Veronica Wilson reveals that on the 22nd February 2007 he would have been made aware of the adjourned Pre-trial Review date by way of the document served on him personally by her on the 22nd February 2007.

The second ground is that the applicant had no intention whatsoever of avoiding attending court. This aspect of his application also has to be looked at in the same light as ground one. The assistant Bailiff is saying that she personally served him with the notice of adjourned Pre-Trial Review date yet he did not attend court. Clearly he is denying the service.

The third ground on which the relief is sought states that the overriding objectives of the court is to deal with the case justly and to ensure that the applicant be given the opportunity to defend the suit having regards to the nature of the suit.

A defence was filed on the applicant's behalf in the year 1996 although he contends in paragraph 2 of his affidavit in support that he was not aware of this. On the 27th May 1996 Taylor Deacon & James attorneys-at-law representing applicant filed a Notice of Application to have their names removed from the record. Learned Counsel Janet Taylor in her affidavit indicates that she had made attempts to communicate with applicant by way of telephone and in writing but to no avail.

The question that may well be asked is: was the applicant made aware of these attempts?

Paragraph 3 of applicant's affidavit states that at no time was he informed of Case Management Conference dates or Pre-trial Review dates or any trial dates until he received correspondence from Claimant's attorney to attend court on the 4th and 5th June 2007 – which he did. This again is not consistent with the affidavit of the assistant Bailiff.

Paragraph 4 of the applicant's affidavit that speaks to his absence from the Pre-trial Review of 16th May 2007 when default judgment was granted. This paragraph states that he was not informed of the date by any of his former attorneys at law and he had no other means of knowing. This follows in the same vein of inconsistency with the assistant Bailiff's affidavit. I am not sure if the applicant is speaking the truth with regard to his defence as well as the

reasons given for his non-attendance at court but it must be borne in mind that the affidavit of the assistant Bailiff was not tested by cross-examination.

Sime 6th Edition at page 327 points out that the most Draconian sanction that may be imposed is striking out – and courts considering imposing sanctions such as stays and striking out have to pay attention to the fact that they may be depriving the Claimant of access to the court which has particular importance under article 6 of the European Convention on Human Rights citing **Woodhouse vs Consignia PLC 2002 1WRL 2558.** Whereas the convention might not apply to the Jamaican courts I am sure the sentiments expressed must be applicable.

Rules 26.8(3) of the CPR states:

In considering whether to grant relief the Court must have regards to

(a) the interests of the administration of justice

(b) whether the failure to comply was due to the party or the 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 the relief or not would have on each party

I would adopt the view stated at page 334 of Stuart Sime ***(supra)*** that the better view is that it is essential for the judge to consider each of the sanctions listed systematically and then to weigh the various sanctions in deciding whether

granting relief would accord with the overriding objective i.e. to deal justly with the case.

In **Woodward Vs Finch 1999 CPLR 699** – the claimant was 3 days late in complying with an order for service of witness statement. He explained his delay by pointing to a change in solicitors and a problem in transferring his legal aid certificate. He purported to serve his witness statement the day before his application was heard. The court of appeal refused to interfere with the judge's decision to grant relief, despite a history of non-compliance and the fact that the excuse put forward was not a good one.

In the present case the respondent is contending and rightly so that the relief had not been applied for promptly.

I fully appreciate that the applicant in this situation did not apply for relief promptly and that the excuse for his non attendance put forward may have difficulty competing with the affidavit evidence of the assistant Bailiff.

However I find that he has an arguable defence and I do not think he should be deprived of this opportunity.

The failure to comply I find can be remedied within a reasonable time Justice Bryan Sykes **in Pario Solutions *(formerly the Lewis Group)* Ltd vs. Gotel Communication Ltd Claim No. 2005 HCV 00515 paragraph 10 heard on April 19, and May 2 2007**, in relation to a trial date opines that when a

"Claimant properly obtains a judgment he obtains a thing of great value particularly here where trial dates are still an average of thirty-six – forty-eight months from the filing of the claim". I appreciate the awesome significance of this statement but the trial date in this case is set for June 10th 2008. It seems to me that granting this relief will still allow the trial date to be met.

In Conclusion

The Applicant has filed a defence, the trial date can still be met, there cannot be much adverse effect on either party as the Claimant is expected to be here for the trial and refusing the relief would not be in keeping with the overriding objective of the court.

The applicant was not prompt in applying for relief from sanction. His explanation may well not be adequate nor convincing but in **Finnger vs. Park Side Health Authority 1998 1WLR at page 411** – it was held that a court considering an application for more time in the absence of any good reason for the delay still has to consider all the circumstances of the case recognizing the overriding principle that justice had to be done and the absence of a reason was just one of the factors that had to be weighed.

Order

1. The application is granted

2. That 1st defendant complies with all Case Management Conference Orders on Pre-trial Review orders within 21 days of the date hereof or his of statement of case shall stand struck out.
3. Leave to appeal granted to the Claimant
4. 1st defendant's attorney to prepare file to serve after herein.
5. Costs to Respondent to be agreed or taxed