[2023] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00085

BETWEEN	**CHRISTOPHER WILLIAMS**	**1ST APPELLANT**
AND	**GAUNTLETT MARKETING INNOVATIONS LTD**	**2ND APPELLANT**
AND	**REBECCA RHOENA BLACKWOOD**	**RESPONDENT**

Mrs Emily Shields and Ms Maria Brady instructed by Gifford, Thompson & Shields for the appellants

Ms Diandra Bramwell instructed by Bramwell, Melbourne & Associates for the respondent

7 December 2022 and 24 November 2023

Civil Practice and Procedure – Relief from sanctions – Application for extension of time to comply with case management conference orders – Permission to argue amended notice and grounds of appeal

BROOKS P

[1] Mr Christopher Williams and Gauntlett Marketing Innovations Ltd ('the appellants') appealed the decision of J Pusey J, handed down in the Supreme Court on 23 November 2020. On that date, J Pusey J refused the appellants' application for relief from sanctions and also granted an application by the respondent, Ms Rebecca Blackwood, for judgment against the appellants. The appellants assert that J Pusey J wrongly exercised her discretion in refusing their application and have appealed to this court to reverse her decision.

[2] We heard the appeal on 7 December 2022 and handed down the following decision:

> "1. The appeal from the decision of J Pusey J made on 23 November 2020 refusing an application for relief from sanctions is dismissed and the judgment and orders of the learned judge are affirmed.
>
> 2. The appeal having been determined the respondent shall be at liberty to execute the judgment of J Pusey J made on 23 November 2020.
>
> 3. By agreement of the parties the sum of $1,000,000.00 paid into an interest-bearing account in obedience to an order of Sinclair-Haynes JA made on 21 July 2021 on an application for a stay of execution shall be released to the respondent in partial settlement of the judgment debt.
>
> 4. Costs of the appeal to the respondent to be agreed or taxed."

At the time of delivering the decision, we promised to put our reasons in writing. This is the fulfilment of that promise. We also apologise for the delay and any inconvenience it may have caused.

The factual background

[3] The factual background to the appeal is that the parties entered into a written agreement in December 2009, by which Ms Blackwood paid $4,000,000.00, and another sum of $800,000.00 to the appellants. The sums were paid on the basis that they constituted an investment in projects which Gauntlett Marketing Innovations Ltd ('the company') was pursuing. She was to get back her principal at the end of a year, if she wished, along with 10% of any profit that was made on the enterprise. At the end of the period, despite demands for repayment, she got neither.

The litigation

[4] On 12 August 2014, Ms Blackwood filed a claim against the appellants to recover her money.

[5] The appellants filed a defence to the claim. Mr Williams, the managing director of the company, asserted in the defence that he acted in his capacity as an officer of the company and, therefore, was not personally liable to Ms Blackwood. The company asserted that Ms Blackwood invested in the venture, and her money was used as intended but that the venture failed, and, therefore, the investment was lost. The company contended that repayment of the principal sum and or interest depended on whether a profit was made. The collapse of the venture, the company averred, meant that it was not liable to Ms Blackwood for the sums that she invested.

[6] The company counter-claimed against Ms Blackwood. It averred that she either caused or materially contributed to the failure of the venture. It asserted that she made improper approaches to the third party with whom the company had sought to go into business. Those approaches, the company claimed, caused the third party to withdraw from the proposed deal.

[7] Ms Blackwood replied to the defence and filed a defence to the counter-claim. She denied having approached the third party.

[8] The case proceeded on the route to trial. The following events occurred along that route:

a. mediation failed in 2016 because the parties could not agree;
b. after several adjournments, a case management conference was held on 31 May 2017 and orders were made for the parties to have settlement discussions and setting dates for a pre-trial review and the trial (both in 2019);
c. on 3 December 2018, again after other adjournments, orders were made setting a timetable for the filing of documents, and confirming the 2019 pre-trial review date and trial date;

c. on 1 April 2019, counsel who appeared for the appellants successfully applied to have his name removed from the record as appearing for them;

d. on 22 May 2019, at a pre-trial review, the appellants, not having complied with the case management conference orders, Thompson-James J ordered ('the unless order'), in part, that:

> "3. If the [appellants] do not comply with orders made at Case Management Conferences on or before July 3, 2019 their statement of [c]ase stands struck out and judgment entered for [Ms Blackwood]."

The appellants were neither present nor represented on that occasion;

e. Mr Williams was served with a copy of the unless order on 4 June 2019;

f. the appellants did not comply with the unless order but, on 14 August 2019, through new attorneys-at-law, applied for relief from sanctions; and

g. on 17 March 2020, Ms Blackwood, through her attorneys-at-law, filed an application for judgment pursuant to the unless order.

[9] Mr Williams filed an affidavit in support of the appellants' application to the court below. He explained that he and the company were strapped for cash, following the failure of the project and were unable to fulfil their obligations to the counsel whom they had retained. He said that he was also unable to give the litigation his full attention because he had to take care of his son, who is autistic and needs special care. Mr Williams said that he is the main caregiver for the child and his obligation continues.

[10] Ms Blackwood resisted the appellants' application. She filed an affidavit asserting that the appellants were dilatory in their approach to the litigation and did not deserve relief from sanction. She also stressed that the appellants' defence had no real prospect

of success. Ms Blackwood pointed to the prejudice that the appellants' delay had caused her as she too has an autistic child and needed the money in order to take care of the child. She accordingly asked for judgment to be entered in her favour.

[11] Both applications went before J Pusey J.

The decision

[12] J Pusey J refused the appellant's application for relief from sanctions. The result was that the "unless order" that Thompson-James J granted took effect. J Pusey J reduced the reasons for her decision to writing. She outlined her understanding of the requirements of rule 26.8 of the Civil Procedure Rules ('CPR') and, after considering the submissions of counsel on both sides, found that:

a. the appellants' application was made promptly in the circumstances (rule 26.8(1)(a) of the CPR);

b. it was supported by an affidavit (rule 26.8(1)(b) of the CPR);

c. the explanations provided for the failure to comply with the unless order were insubstantial, given the reason advanced by the appellants' former counsel;

d. the appellants although requesting mediation did not attend most of those sessions; and

e. Mr Williams could have managed his affairs, concerning tending to the needs of his child, more efficiently.

[13] J Pusey J concluded that the appellants had not satisfied the "only if" provisions of rule 26.8(2) of the CPR and, therefore, there was no basis on which she could exercise her discretion to grant relief from sanctions. She granted the appellants leave to appeal from her decision about the sanctions.

[14] It is that appeal which is presently before this court.

The appeal

[15] The appeal turns on whether J Pusey J properly applied rule 26.8 of the CPR in arriving at her decision. The court acknowledges that she had the discretion to either grant or refuse the appellants' application. This court will only disturb that decision if it is shown that she was plainly wrong, as the appellants asserted (see **John MacKay v The Attorney General of Jamaica** [2012] JMCA App 1).

[16] It is first necessary, however, as a backdrop to the analysis, to set out the provisions of rule 26.8 of the CPR:

> "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)

[17] The appeal was considered based on whether the appellants should have been found to have satisfied each of the paragraphs of that rule.

Paragraph (1)

[18] The appellants, having missed the deadline for complying with the unless order, applied for relief from sanction six weeks after the deadline had passed. As mentioned before, the application for relief from sanction was supported by an affidavit.

[19] The delay cannot be said to be egregious in the circumstances and allows the court to consider para. (2) of the rule.

Paragraph (2)

<u>The failure was not intentional and there is a good explanation for it</u>

[20] The failure to comply with the unless order, according to Mr Williams was due to the appellants' financial situation and his inability to handle the rigours of the litigation by himself. He deposed that he did not know about the unless order, since he was absent from the case management conference at which it was made. He said that it was when the appellants were able to accumulate the funds that they retained new counsel to handle the case on their behalf.

[21] Ms Blackwood countered some of that evidence by proving that Mr Williams collected the formal order some days after it was made.

[22] In some instances, impecuniosity may be accepted as a reason for delay. In **Leymon Strachan v The Gleaner Company and Another** (unreported), Court of

Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, this court accepted impecuniosity as a reason for delay in the filing of notice of grounds of appeal because the applicant was involved in "continuous litigation". However, this court rejected impecuniosity as an excuse in the case of **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6 where the managing director of the applicant advanced that the applicant was impecunious.

[23] Mr Williams' explanation is not a good one, nor does it satisfy the requirements of proof that the default was not intentional. On the issue of impecuniosity, he essentially suggests that he had other priorities (however reasonable) and chose to attend to them in preference to the litigation. That should be the end of the matter, since the court may only grant relief if the default is not intentional and there is a good explanation for it, but out of an abundance of caution, the court will consider whether the appellants have satisfied the third requirement of para. (2) of the rule.

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

[24] Mrs Shields, for the appellants, raised the issue of whether the appellants had generally complied with previous orders rules and directions. Learned counsel accepted that the appellants had failed to take several steps that were required by the rules. Disclosure, inspection and the filing of witness statements were among the steps that were not taken. The default, she contended, was due to their previous counsel, who failed to do his duty.

[25] The reason for the default is explored more fully below, but it cannot be said that the appellants were in general compliance with previous orders and rules.

Paragraph (3)

[26] Any hesitation that the court may have had in respect of the appellants satisfying paras. (1) and (2) is not replicated in the consideration of the requirements of para. (3). The appellants fail on every aspect of the requirements of this paragraph.

The interests of the administration of justice

[27] The interests of the administration of justice consider not only the circumstances of the parties involved in the individual case but also the circumstances of litigants in other cases and the general demands made on the limited resources of the court (see **Biguzzi v Rank Leisure PLC** [1999] 4 All ER 934 ('**Biguzzi**') at page 940 and **The Commissioner of Lands v Homeway Foods Limited and Another** [2016] JMCA Civ 21). In the latter case, at para. [50], McDonald-Bishop JA (Ag), as she then was, explained that the interests of other litigants must be considered in considering non-compliance by a party. She said:

> "…The court in considering what is just, [Lord Woolf MR explained in **Biguzzi**], is not confined to considering the effects on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice." (Emphasis as in original)

[28] This case was filed in 2014. It has had several case management conferences and is not yet ready for trial. There is no basis for it taking the time and space that other cases should occupy.

The person responsible for the failure to comply with the orders of the court

[29] Regrettably, the appellants' former counsel did them a disservice in providing a damning affidavit in support of his application to be removed from the record as appearing for them. Learned counsel deposed that after an 18 June 2018 adjournment of a case management conference to allow the parties to "return to mediation with a view to settling the matter before" the next date for a case management conference (3 December 2018), he could get no instructions. Para. 4 of his affidavit states:

> "Since that time the [appellants] have failed and/or refused to attend my office and provide me with instructions with respect to the conduct of the mediation and the case generally. The [appellants] have also failed and/or neglected to pay to me long outstanding fees despite repeated requests for this to be done."

[30] That counsel summarised the situation as existing, namely, "lack of cooperation, break down [sic] in relations and [the appellants'] failure to pay legal fees". He was eventually allowed to remove his name from the record as appearing for the appellants.

[31] The reason that the appellants did not challenge counsel's affidavit evidence, Mrs Shields said, was that that counsel told Mr Williams that he did not need to reply. That explanation is untenable.

[32] The failure to comply with the orders of the court clearly lay with the appellants.

The likelihood of a prompt remedy of the default

[33] It is not likely that there would be a great delay in remedying the default. This aspect would not go against the appellants.

The likelihood that the proposed trial date can still be met

[34] This aspect, however, is very much against the appellants. Their default has caused the trial date to be lost. If they were to succeed in an application for relief from sanctions, they would again have to be accommodated court time for the case to be heard.

The effect which the granting of relief or not would have on each party

[35] This aspect too, weighs against the appellants. Whereas the denial of relief from sanctions will allow for the judgment against them to proceed, the effect on Ms Blackwood would be much worse. She has a most meritorious claim based on the written agreement between the parties, and she has already been kept out of her money for over eight years, since the start of the litigation. She should not be forced to endure, what would undoubtedly be more years in wait.

Conclusion

[36] Based on that analysis, it cannot be said that J Pusey J erred in exercising her discretion to refuse the appellants' application for relief from sanctions.

[37] It is for those reasons that I agreed that the appeal should have been dismissed and costs awarded to the respondents, as set out in para. [2] above.

EDWARDS JA

[38] I have read the draft judgment of my learned brother Brooks P and agree.

LAING JA (AG)

[39] I too have read the draft reasons for judgment of my learned brother Brooks P. I agree and have nothing useful to add.