[2019] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 122/2017

APPLICATION NO COA2019APP00008

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**OLGA DRUMMOND**	**APPLICANT**
AND	**DENNIS CHATRIE**	**FIRST RESPONDENT**
AND	**HOME INTERNATIONAL LIMITED**	**SECOND RESPONDENT**

Miss Renae Barker instructed by K Churchill Neita & Co for the appellant

Lord Anthony Gifford QC and Miss Marissa Wright instructed by Gifford Thompson & Shields for the respondents

25, 29 November and 13 December 2019

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of my sister Simmons JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] I too have read the draft reasons for judgment of my sister Simmons JA (Ag) and agree with her reasoning and conclusion.

SIMMONS JA (AG)

[3] This is an application for permission to appeal, for the notice and grounds of appeal filed on 19 December 2017 to stand as filed, and for an amended notice and grounds of appeal to be filed. The application is supported by the affidavits of Christine Mae Hudson sworn to on 10 January 2019 and 30 September 2019.

[4] The grounds on which the orders are sought are as follows:

> (i) "That the claimant has a strong prospect of success on the merits of her claim;"
>
> (ii) "That the overriding objective and fairness warrant the extension of time to apply for leave and that leave be granted to file an appeal."

[5] After hearing submissions from both counsel in the matter, we gave our decision on 29 November 2019 to refuse the application and award costs to the respondents, to be agreed or taxed. We also indicated then that we would provide our reasons in writing. This is a fulfilment of that promise.

Background

[6] The claim in this matter arose from an accident which occurred at the entrance to Kingston Wharves on 14 September 2005, during which the applicant was said to have been struck by a motor truck owned by the second respondent and driven by the first respondent. She sustained injuries. The claim itself was filed some five years later on 22 November 2010.

[7] The matter proceeded to case management conference on 19 February 2014, at which all parties were present, it having been adjourned from 19 December 2013.

Orders were made for disclosure, inspection, the filing and exchange of witness statements and, at the respondents' request, for the applicant to be medically examined by Dr Mansingh. A date was set for pre-trial review and for trial to commence on 18 March 2015.

[8] On 6 February 2015, the applicant and her then attorney-at-law did not attend at the pre-trial review and her statement of case was struck out by Straw J (as she then was). Consequently, on 10 November 2017, the applicant filed an application for relief from sanctions. That application was refused by E Brown J on 13 December 2017.

[9] A notice of appeal was filed on 19 December 2017 and the matter proceeded to case management conference in this court and directions were given. The appeal was scheduled for hearing on 19 February 2019. It was subsequently discovered that the applicant had not sought leave to appeal as required by section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and rule 1.8(2) of the Court of Appeal Rules (CAR).

[10] The applicant, in an attempt to remedy the situation, filed an application for extension of time in which to apply for permission to appeal and for permission to appeal in the Supreme Court. The application for extension of time was granted. However, permission to appeal was refused by Lindo J. The applicant now seeks the permission of this court to appeal against the refusal of its application for relief from sanctions.

The decision of E Brown J

[11] The learned judge made the point that, although the sanction was imposed by Straw J on 6 February 2015, the application for relief was not made until 10 November 2017, which was approximately two years and eight months later. He also found that the appellant's explanation for the delay was "less than sincere". He said:

> "…The applicant sought to explain the delay by laying all the blame at the feet of her then attorney-at-law, now disbarred, Mr. Lorne. His office advised her that her witness statement had been filed. Furthermore, and a week before the trial date she visited his office and was informed he would not be available for the trial date but another lawyer would hold for him and she would be advised of the new trial date. Between 2015 and 2017 she made regular visits and telephone calls to Mr. Lorne's office and was told the court had not yet set a new date. It was not until mid October 2017 that she heard of Mr. Lorne's disbarment, retained Miss Christine Hudson who informed her of the status of her claim."[1]

[12] The rejection of her explanation was based on the following:

(1) her failure to explain her absence at the pre-trial review;

(2) the failure to file her witness statement being the only default mentioned in her affidavit, despite her having failed to attend on Dr Mansingh;

(3) the learned judge's finding that, in light of the fact that Straw J's order had been served on Mr Lorne one month before the trial

[1] [2017] JMSC Civ 79 at paragraph [20] (note: the judgment erroneously bears the citation [2017] JMCA Civ 79)

> date, it was incredible that the appellant could have been told that a new court date had not been set.

[13] The learned judge also found that even if the appellant's evidence was accepted, it was not reasonable for her to have continued to "repose such blind faith in her attorney-at-law". He said:

> "[25] … A reasonable claimant would have visited the Civil Registry of the Supreme Court and made enquiries, especially one who knew she was also at fault in absenting herself from the pre-trial review. Instead of that reasonable response, the claimant somnambulated into 2016.
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> [26] During 2016, the claimant continued to make regular visits and calls to Mr. Lorne's office and received no new information. Common sense would have told any ordinarily intelligent person that she was getting the run-around, to be unforensic for a moment. A claimant who was anxious or even serious to pursue her claim would have recognized that it was time for drastic action…"

[14] In addition, the learned judge expressed the view that the appellant ought reasonably to have become aware of the consequences of her default no later than six months after the sanction was imposed. He found that she was "manifestly dilatory in allowing the matter to pass into a persistent vegetative state until she was roused from her slumber by news of Mr. Lorne's predicament".

[15] In the final analysis the court found that the application was not made promptly and that there should be finality to ligation as the defendants were entitled to think that the matter had ended.

The notice and grounds of appeal

[16] By notice and grounds of appeal filed on 19 December 2017, the appellant challenges this decision on the basis that the learned judge erred as a matter of law in failing to take into account or properly consider the legal authorities in refusing the application for relief from sanctions.

The issues to be resolved

[17] Miss Barker submitted that the following issues are to be considered by this court:

a) whether the appellant's application for relief from sanctions was made promptly;

b) whether the failure to comply with the case management conference orders was intentional;

c) whether there is a good explanation for the failure; and

d) whether the appellant had generally complied with relevant rules and practice directions.

Discussion

[18] Rule 1.8(7)[2] of the CAR sets out the considerations for the court in determining whether it should grant an application for permission to appeal. It states: "[t]he general rule is that permission to appeal in civil cases will only be given if the court or the court

[2] Formerly rule 1.8(9)

below considers that an appeal will have a real chance of success". In assessing whether there is a real chance or prospect of success the court is mindful of the guidance from the case of **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A, wherein Morrison JA (as he then was), referring to the dictum of Lord Woolf from **Swain v Hillman** [2001] 1 All ER 91, observed as follows:

> "[21] This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in Swain v Hillman and another [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'… So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[19] Miss Barker submitted that the appeal has a real prospect of success as the application for relief from sanctions was made promptly. In this regard reference was made to the decision of this court in **HB Ramsay & Associates Ltd and ors v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1 in which Brooks JA indicated that in assessing promptitude some degree of flexibility in approach could be employed. It was submitted that the learned judge failed to adopt that approach in his consideration of the application for relief from sanctions.

[20] Counsel also referred to **Villa Mora Cottages and another v Adele Shtern,** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 49/2006, judgment delivered 14 December 2007 in which Harris JA (Ag) (as she then was) stated:

> "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."
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> "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)."[3]

[21] Reference was made to the affidavit of Christine Mae Hudson, which sets out the timeline between the order of Straw J striking out the matter and the filing of the application for relief from sanctions. It was submitted that, since the applicant did not become aware of Straw J's order until mid October 2017, the filing of the application on 10 November 2017 demonstrates promptness in dealing with her case.

[22] It was also argued that the applicant's failure to attend the pre-trial review should not have been held against her as the Civil Procedure Rules, 2002 ('CPR') do not mandate a party's attendance where that party is represented by an attorney-at-law.[4]

[23] Miss Barker also submitted that the blame for the failure to comply with the case management conference orders lay at the feet of the applicant's former attorney. In this regard reference was made to the affidavit of Miss Hudson in which she stated that the applicant attended at the attorney's office in an effort to prepare her witness

[3] Pages 10 and 14, respectively
[4] Rule 27.8(1)

statement on several occasions and was led to believe that all was well. The court was also informed that, although the applicant had fully complied with the order to attend to be examined by Dr Mansingh, from all indications, that was not brought to the attention of the learned judge.

[24] It was also submitted that the applicant should not be punished for the sins/mistakes of her attorney. In this regard, reference was made to **Hytec Information Systems Ltd v Coventry City Council** [1997] WLR 1666, in which Ward LJ stated:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."[5]

[25] Reference was also made to **Merlene Murray-Brown v Dunstan Harper & another** [2010] JMCA App 1 in which Phillips JA said:

> "…The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible

[5] Page 1675

> prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended…"[6]

[26] It was submitted that, in light of the fact that the order striking out the claim was never communicated to the applicant, the delay which at first blush appears to be inordinate, is not in fact so.

[27] Counsel argued that the learned judge failed to consider the factors set out in rule 26.8(3) of the CPR in arriving at the conclusion that the applicant failed to act promptly in seeking relief from sanctions. For completeness, I have set out rules 26.8(1), (2) and (3) which state:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
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> (a) made promptly; and
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> (b) supported by evidence on affidavit.
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> (2) The Court may grant relief only if it is satisfied that -
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> (a) the failure to comply was not intentional;
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> (b) there is a good explanation for the failure; and
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> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
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> (3) In considering whether to grant relief, the Court must have regard to –
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> (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;

[6] Paragraph 30

> (c) whether the failure to comply has been or can be remedied within a reasonable time;
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> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
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> (e) the effect which the granting of relief or not would have on each party."

[28] Lord Gifford QC, in his submissions on behalf of the respondents, stated that the history of the matter shows that there have been extraordinary delays on the part of the applicant since the occurrence of the accident on which her claim is based. In this regard, he pointed out that the accident which took place on 14 September 2005 happened over 14 years ago. He also pointed to the fact that the claim was filed approximately five years after the accident.

[29] Learned Queen's Counsel stated that there is no dispute that the first respondent was driving a large trailer head, and was exiting from the compound at Kingston Wharves, where the applicant was employed as a security monitor. It was also asserted that he does not know whether the applicant came into contact with the trailer head and if she did, the circumstances in which it occurred. The court was advised that, in an affidavit filed 28 March 2012, Mr Everoy Chin, the second respondent's managing director, indicated that there was a difficulty locating the relevant documents and witnesses because of the passage of time.

[30] It was submitted that the appeal has no real prospect of success as the application for relief from sanctions was not made promptly. Reference was made to **National Irrigation Commission Limited v Conrad Gray and another** [2010]

JMCA Civ 18 in which Harrison JA at paragraph [16] described promptness as "the controlling factor under rule 26.8". Having found that the applicant had failed to act promptly there was no need for the learned judge to consider the factors set out in rule 26.8(3).

[31] Specific reference was also made to paragraphs [14] and [16] of that judgment, which state:

> "[14] The first stage, as Mr. Spence puts it, is for the court to consider whether or not the appellant's application seeking relief from sanctions was made promptly. Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:
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> > 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'
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> …
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> [16] In our judgment, the application plainly could, and reasonably should, have been issued well before it was done. Six months was altogether too long a delay before making this application. Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand."

[32] It was also submitted that where a party's failure to act promptly was due to the default of his attorney-at-law, that fact will not exonerate him. Reference was made to

Hytec Information Systems Ltd v Coventry City Council which was also cited by counsel for the applicant. Reference was also made to **Reid v Abdalla and others** (unreported) Supreme Court, Jamaica, Claim No C.L. 2002/R 031, judgment delivered 27 February 2009, in which Sykes J (as he then was) stated:

> "Considerations under rule 26.8 (3)
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> 60. The interests of the administration of justice are best served by compliance with court orders by litigants and their legal advisers. There must be proper use of judicial time which is both valuable and limited. Litigants have a responsibility to see that their attorneys act promptly when the court gives orders. Attorneys have an obligation to see that their clients do what is necessary to comply with court orders. From the claimants' affidavit, there can be no doubt that they appreciated that the attorney needed to file the reply promptly. The claimants only signed the reply on March 14. With the deadline looming, I would have expected the claimants to be on the backs of the lawyer to make sure that service took place to meet the March 18 deadline."

[33] Learned Queen's Counsel submitted that no good explanation has been provided for the delay and as such the appeal has no real prospect of success. This he said is compounded by the fact that the applicant failed to comply with other case management conference orders. He submitted that the applicant should have taken "energetic" steps to ascertain why the matter had not proceeded to trial.

[34] It was also argued that at this stage where there has been no disclosure by the applicant and witness statements have not been filed, the respondents would be placed in a disadvantageous position if the matter was restored. This is evident from the affidavit of Mr Chin. In these circumstances, any restoration of the matter is likely to result in an injustice to the respondents.

[35] Lord Gifford submitted that, even if the applicant is blameless, the delay was far too long and the risk of injustice to the respondents is too great. He submitted that the respondents should not be made to suffer because of her delay as she has a remedy in negligence against her former attorney-at-law and recourse can also be had by reporting him to the General Legal Council which has the power to order restitution.

[36] It must be borne in mind that parties to litigation are bound by the orders of the court and are expected to comply with those orders. In an effort to deal with cases justly, the courts have been mandated to actively manage those cases with a view to transparency and dispatch.

[37] The proposed appeal concerns the exercise of the judge's discretion to refuse relief from sanctions. It will therefore attract Lord Diplock's caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, which indicates that:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."[7]

[38] This court will therefore not disturb the decision of a judge on an interlocutory application where it is based on the exercise of his or her discretion unless "…it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set

[7] Page 1046

aside on the ground that no judge regardful of his duty to act judicially could have reached it'".[8]

[39] The claim in this matter was struck out due to the applicant's failure to comply with the case management orders made by Edwards J (as she then was). By virtue of those orders disclosure was to take place by 30 September 2014. Witness statements were to be filed and exchanged by 12 December that year. The respondents filed their witness statement, listing questionnaire and pre-trial memorandum as ordered. The applicant filed nothing. Trial was scheduled for March 2015.

[40] When the application for relief from sanctions was considered, the learned judge formed the view that "the claimant was manifestly dilatory" and as such failed to meet the threshold test in rule 26.8(1). This position is in keeping with the view expressed by Phillips JA in **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49 who said:

> "…rule 26.8 of the CPR, albeit similar in the wording, is divided into three separate paragraphs. Due to the umbrella words of each paragraph, they fall for consideration at different stages when considering whether to grant relief from sanctions. Paragraph 26.8(1) (which requires the application to be made promptly and to be supported by evidence) acts as a preliminary test which must be satisfied before the application can be considered by the court under rule 26.8(2). Rule 26.8(2) states three specific factors that must be in effect in order for the court to grant relief, and in circumstances 'only if it is satisfied…' As a consequence, the matters set out therein must be satisfied before the court can consider the factors set out in rule 26.8(3). Put another way, any

[8] **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraph [20]

failure to satisfy those factors precludes the consideration of the court under rule 26.8(3)."[9]

[41] This view also echoes those expressed in **HB Ramsay & Associates Ltd** by Brooks JA, who said:

> "[9] …It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief. Rule 26.8 states that the application 'must' be made promptly. This formulation demands compliance. Although the word 'must' has been variously interpreted as mandatory in some contexts (see **Norma McNaughty v Clifton Wright and others** SCCA No 20/2005 (delivered 25 May 2005)) and directory in others (see **Auburn Court Ltd and Another v National Commercial Bank Jamaica Ltd and Another** SCCA No 27/2004 (delivered 18 March 2009)), the context of rule 26.8(1) does suggest a mandatory element.
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> [10] In my view, if the application has not been made promptly the court may well, in the absence of an application for extension of time, decide that it will not hear the application for relief. I do accept, however, that the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case"

[42] Brooks JA, having found that the application had not been made promptly, agreed that it should fail. He also went on to address the criteria listed in rule 26.8(2) in the event that they should in fact be considered. For the purposes of that exercise it was assumed that the delay was not intentional.

[43] He, however, found that there was no good explanation for the default and that in such circumstances the application for relief must fail as it is a precondition for the grant of relief.[10]

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[9] Paragraph [36]

[44] Brooks JA also went on to consider whether the appellants had generally complied with all other orders, rules and directions. In conclusion, he stated:

> "An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant."[11]

Conclusion

[45] In the case at bar, the learned judge, having conducted a comprehensive assessment of the affidavit evidence, found that the applicant had failed to act promptly and, in accordance with **HB Ramsay & Associates Ltd**, gave the matter no further consideration. This was clearly a signal to the applicant that enough is enough, or as E Brown J put it "[t]here must be finality in litigation". The points raised by Lord Gifford in respect of the risk of injustice to the respondents if the matter is allowed to proceed are also in my view, well founded. If in 2012 there was a difficulty locating documents and witnesses, the situation is likely to have deteriorated significantly. Therefore, even if the applicant could be said to have acted promptly, the risk of injustice to the respondents

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[10] See **The Attorney General v Universal Projects ltd** [2011] UKPC 37 at paragraph 18
[11] Paragraph [31]

would have tipped the scale in their favour. So too would the fact that the order for disclosure and filing of witness statements has not up to today been complied with.

[46] It has not been demonstrated that the learned judge misapplied or ignored any principles of law or misunderstood any issue of fact in arriving at his decision. In the circumstances, I formed the view that the appeal has no real prospect of success. It is for the foregoing reasons that I concurred with the decision to refuse the application for permission to appeal and award costs to the respondent, to be agreed or taxed.