

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA**

SUPREME COURT CIVIL APPEAL NO COA2021CV00081

APPLICATION NO COA2022APP00225

BETWEEN	OPAL WALLACE	APPLICANT
AND	DINSDALE WILLIAMS	RESPONDENT

Harrington McDermott and Ms Annmarie Jordan instructed by Annmarie Jordan for the applicant

Lemar Neale and Miss Chris-Ann Campbell instructed by Nea|Lex for the respondent

13, 14 and 17 March 2023

BROOKS P

[1] Ms Opal Wallace failed to obey an “unless” order of this court to file and serve a record of appeal and skeleton arguments within a specific time. Consequently, her appeal to the court stood struck out. She has now applied for relief from that sanction and asks that the appeal be reinstated. She asserts that she missed the deadline by only one day. The respondent to the appeal, Mr Dinsdale Williams, resists the application. He contends that Ms Wallace has a pattern of disobedience to court rules and that a grant of relief would cause him severe prejudice.

[2] The issue for the court to resolve is whether Ms Wallace has satisfied the requirements to allow this court to exercise its discretion in her favour in this regard.

Background

[3] Mr Williams sued Ms Wallace for breach of contract. He claimed that in June 2020 he sold his business to her for an agreed price of \$110,500,000.90. The purchase price was to have been paid in instalments over the course of three and a half years. Ms Wallace, he said, paid only \$1,300,000.00 toward the purchase price. He said that when the second instalment was almost due, she raised a number of complaints about the deal and has paid nothing since.

[4] Ms Wallace, in her defence, said that Mr Williams had overpriced the assets that he said were in the business and did several things to hamper its operation under her watch. She counterclaimed for breach of contract seeking damages of \$1,500,000.00.

[5] Mr Williams applied for summary judgment. Ms Wallace did not have any material before the learned judge of the Supreme Court before whom the summary judgment application went. She asserts that she had been short-served with the application. The learned judge granted the application and gave judgment for Mr Williams in the sum of \$108,700,000.00 together with interest thereon and costs.

[6] Ms Wallace was out of time in filing her application for leave to appeal. The Supreme Court granted her an extension of time and granted her leave to appeal.

[7] When the matter was eventually in this court, Ms Wallace was again dilatory. Mr Williams applied to have the court strike out the appeal. The application came before the court on 10 October 2022. Ms Williams appeared in person at that hearing as her previous attorneys-at-law had had their names removed from the record as appearing for her. The court refused the application but ordered Ms Wallace to “file and serve the record of appeal and skeleton arguments within 21 days of [that date]”. The court further ordered that “[f]ailure to comply with [the order to file the documents] the appeal will stand struck out”.

[8] Ms Wallace should have filed the documents by 31 October 2022. Her new attorney-at-law attended at this court's registry on 1 November 2022 seeking to file the documents. The Registrar, properly, refused to accept them. On 2 November 2022, the application for relief from sanctions was filed on behalf of Ms Wallace, along with a record of appeal, skeleton arguments and chronology.

[9] Ms Wallace also seeks a stay of the orders of the learned judge in the court below made on 17 and 25 June 2021 granting summary judgment, interest and costs. Mr Neale, on behalf of Mr Williams, resists that application and submitted that if this court is minded to grant the stay of execution, it should do so on the condition that Ms Wallace pays at least \$38,000,000.00 to him.

Analysis

Authority to grant relief from sanctions

[10] Mr Neale submitted that once the appeal has been struck out it cannot be restored by an application for relief from sanction. The submission is misplaced. The sanction is one which this court imposed, and it has the authority, not only by virtue of its inherent power to control its processes, but rule 1.7(b) of the Court of Appeal Rules ('CAR') permits it to "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".

[11] It is permissible for a case to be restored by way of applications for relief from sanctions. One such case is **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49, where order 6 of the orders of Edwards J provided that "unless the [c]laimant attends the trial to give evidence her statement of case stands struck out". The claimant did not attend, and accordingly, the statement of case was struck out. The claimant later applied for relief from sanctions, seeking, among other things, that the statement of case be restored. Batts J, a judge of concurrent jurisdiction, later heard the application and granted relief from sanctions but also

granted leave to appeal. This court, at para. [51], found that Batts J exercised his discretion correctly, and it did not interfere with his discretion to grant relief from sanctions. This court has, by virtue of rule 2.14 of the CAR, all the powers of the Supreme Court, particularly the powers set out in Part 26 of the Civil Procedure Rules ('CPR'). Rule 2.19 of the CAR also incorporates rule 26.8 of the CPR to allow applications for relief from sanctions in this court.

Considering the application

[12] Rule 26.8 of the CPR outlines the matters that a court must assess in considering an application for relief from sanctions. The rule states:

- “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."

(a) Rule 26.8(1)

[13] Pursuant to rule 26.8(1) of the CPR, an application for relief from sanction must be made promptly and supported by affidavit evidence. Those requirements amount to a "preliminary test" and must be satisfied before the court can proceed to consider the other requirements under rule 26.8 of the CPR (see para. [36] of **University Hospital Board Management v Hyacinth Matthews**). In the present case, the application for relief from sanction was made on 2 November 2022. There is no issue that it was made promptly and was supported by evidence on affidavit.

[14] Since the preliminary test has been satisfied, the court may now consider the other requirements under rule 26.8.

(b) Was the failure intentional?

[15] In the affidavit in support of the application, Ms Jordan averred that the default resulted from her misapplying the principle of "clear days" to the court's order. She thought that she was within the stipulated time when she sought to file Ms Wallace's documents on 1 November 2022. There is, therefore, no evidence to suggest that the failure was intentional. Mr Neale's submission to the contrary cannot be accepted.

(c) Is there a good explanation for the failure?

[16] In the absence of a good explanation for default, the application for relief from sanction cannot be granted (see para. [22] of **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc** [2013] JMCA Civ 1). Whereas the explanation, in this case, may not necessarily be considered a good one, it should not be considered fatal to the application. The issue of "clear days", in the context of an order to perform an act "within" a certain time, was settled some time ago in **Royal**

Caribbean Cruises Ltd and another v Access to Information Appeal Tribunal [2016] JMCA App 19. Mr McDermott has submitted that that case has caused some confusion in the profession on the point, but the case is, with respect, clear in its import and counsel should abide by it, until the Rules Committee addresses the issue.

(d) Has the party generally complied with other orders, rules and directions?

[17] It is here that Ms Wallace has difficulty. An applicant must satisfy all three elements of rule 26.8(2) of the CPR before the court may grant the application for relief from sanction (see para. [29] of **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc**). The chronology of the litigation that has been set out above demonstrates that Ms Wallace has, on several occasions, run afoul of timelines and requirements of the rules regulating litigation. This court recognises that general compliance is “a matter of degree” (see para. [76] of **The National Workers Union v Shirley Cooper** [2020] JMCA Civ 62). It is also noted that on two of the occasions of non-compliance, Ms Williams may have had a plausible explanation. She had been short-served on one occasion in the court below, and in this court, she was without the benefit of legal representation at a critical time. For these reasons, the court will hold that she was not generally non-compliant. She has therefore crossed that hurdle. It must be said, however, that this case rests on its own facts in this regard and should not be used as a precedent for disobedience of court orders.

(e) What do the interests of the administration of justice demand?

[18] The interests of the administration of justice consider more than just the respective interests of the parties to the dispute. Ms Wallace has incurred more of the resources of the administration of justice than she should have. She has caused other cases to be displaced as a result. The displacement has, however, not been of major proportions.

(f) Was the default due to the party or that of its attorneys-at-law?

[19] Ms Jordan's admission in her affidavit shows that the default arose from her error, and it should not be visited on Ms Wallace.

(g) Can the default be remedied within a reasonable time?

[20] Ms Jordan asserts that the documents have already been prepared and are ready to be filed. There would be no delay in remedying the default.

(h) What is the effect on the date for the hearing of the appeal?

[21] A date had not yet been set for the hearing of the appeal, but the default has no doubt caused a delay in the progress of the appeal. The delay, however, cannot be said to be significant.

(i) What effect would the granting of relief or not have on each party?

[22] Ms Jordan submitted that a grant of relief would cause Mr Williams "little if any prejudice". That statement ignores the facts of the case and the contents of Mr Williams' affidavit in opposition to the application. Ms Wallace has averred that she took possession of assets worth \$38,000,000.00, based on her valuation. She further averred that Mr Williams had agreed to a revaluation of the assets to \$57,480,000.00. Yet she has, over the course of almost three years, paid only \$1,300,000.00. The prejudice to Mr Williams is manifest.

[23] In his affidavit in opposition, Mr Williams averred that Ms Wallace's failure to honour the terms of the agreement has caused him hardship. He states that he is indebted to several persons, and a project that he was hoping to have financed from the sale of the business to Ms Wallace, has floundered.

[24] To further delay the litigation would cause him hardship.

[25] Ms Wallace did not produce an affidavit in support of this application. There is nothing to expand on Ms Jordan's assertion, in para. 29 of her affidavit in support of

the application, that “[Ms Wallace] will be significantly prejudiced if the court does not grant the [relief from sanctions]”.

[26] In assessing prejudice on both sides, it must, however, be said that the prejudice to Ms Wallace may be gleaned from the fact that there seems to be a genuine dispute as to the value of the liability to Mr Williams and Ms Wallace should have an opportunity to contest the appropriateness of an order for summary judgment in that context. The goods have been secured, it is said, pursuant to an order of the court below and an injunction in this court. That may provide some protection to Mr Williams, although he has instituted contempt proceedings against Ms Wallace in the court below for breaching its order. The injunctions also make it unnecessary to accede to Mr Williams’ request for Ms Wallace to make a payment (\$38,000,000.00 was requested), either to him or into court.

Conclusion

[27] Based on all the above, Ms Wallace should be granted relief from the sanction, which took effect on 1 November 2022, and her appeal should be restored.

[28] In light of that order, it is appropriate to further stay the execution of the judgment of the court below until the determination of the appeal or further order of the court.

FOSTER PUSEY JA

[29] I have read the draft judgment of Brooks P and agree with his reasoning and conclusion.

V HARRIS JA

[30] I, too, have read, in draft, the judgment of Brooks P. I agree with his reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

- (1) The application for relief from the sanction of the striking out of the appeal herein, consequent on the order of this court made on 10 October 2022, is granted.
- (2) The appeal herein is restored.
- (3) The applicant is hereby granted an extension of time to comply with the orders of this court made on 10 October 2022. The record of appeal, the skeleton arguments and the chronology filed on 2 November 2022 shall stand as properly filed.
- (4) The respondent is permitted to file and serve skeleton arguments on or before 28 April 2023.
- (5) The application for a further stay of execution of the orders of Laing J made on 17 and 25 June 2021, respectively, is granted until the determination of the appeal or further order of this court.
- (6) The injunction granted in this court on 15 February 2022 remains in force until the determination of the appeal or further order of this court.
- (7) The matter is set for case management conference on 13 June 2023 at 2:00 pm.
- (8) Costs of this application to the respondent. Such costs are to be on an indemnity basis and are to be taxed if not agreed.