IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C. L. 2000 T 084

IN CHAMBERS

BETWEEN	DR. LESLIE TOBY	CLAIMANT
AND	A. H. HINCHCLIFFE	1ST DEFENDANT
AND	MANPOWER & MAINTENANCE SERVICES LIMITED	2ND DEFENDANT

Mr. Nigel Jones for the Claimant.

Mr. John Graham and Ms. Khara East instructed by John G. Graham and Co. for the Defendants.

Practice and Procedure – Application for relief from sanctions – Claimant's Statement of Case struck out because of failure to obey orders made at Case Management Conference – Application filed three years after act of striking out – Claimant's Attorney-at-Law blamed for delay – Attorney-at-Law now dead - Whether application made promptly – Whether general compliance with other orders – CPR rule 26.8

2nd and 22nd March 2010

BROOKS, J.

Dr. Leslie Toby held important posts in the field of medicine before he migrated to Jamaica. It is not surprising, therefore, that he felt aggrieved by what he deems to be an untrue slur on his character and professionalism. He alleges that this was perpetrated by Mrs. Audrey Hinchcliffe, the Chief Executive Officer of Manpower and Maintenance Services Ltd. According

to Dr. Toby, Mrs. Hinchcliffe defamed him in a letter she wrote to his then employers; the operators of Nuttall Memorial Hospital.

The contents of the letter are unimportant for these purposes. Suffice it to say that Dr. Toby filed suit against Mrs. Hinchcliffe and her company on June 30, 2000. The action survived the transition to the system governed by the Civil Procedure Rules 2002 (CPR) and was subjected to the normal case management regime. Dr. Toby's compliance with the orders made at the Case Management Conference and the Pre-Trial review were, however, not normal. Of the several orders, he complied with one. As a result, his statement of case was struck out. He has applied for relief from this sanction and blames the situation on his previous Attorney-at-Law, Dr. Bernard Marshall, who is now deceased.

The questions which have to be determined in this application are:

a. whether Dr. Toby has satisfied the requirements of rule 26.8 of the CPR, to allow the court to grant him the relief which he seeks, and

b. whether the death of Dr. Marshall should be considered in resolving the issue.

Before dealing with the application I should state that the order made by Sykes, J. on October 6, 2005 prescribed, among other things, that:

> "1. The Order on Case Management Conference made on the 17th March, 2004 by the Honourable Mr. Justice Daye be varied as follows:
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> ...
>
> iv. The Claimant's Witness Statements to be filed and exchanged on or before November 24, 2005.
>
> ...
>
> viii. Unless the Claimant complies with paragraph (1) above, the Claimant's Statement of Claim will be struck out without further order..."

Although Dr. Toby was not present, he was then represented by Dr. Marshall. His non-compliance with order "iv" above meant that his Statement of Claim was automatically struck out as at November 24, 2005.

I should also mention that I have not seen the minute of Sykes, J's order. There is a typed order on the file but it has not been signed. There is no perfected order on the file. Dr. Toby, in his List of Documents does, however, state that one of the documents in his possession is "Order on Pre Trial Review October 6th 2005". The list is the only document filed in compliance with the Pre-Trial Review Orders.

Has Dr. Toby has satisfied the requirements of rule 26.8 of the CPR?

Rule 26.8 governs the matter of relief from sanctions. I shall examine the application in the context of the provisions of that rule.

Whether the application was made promptly

This application for relief from sanctions was supported by an affidavit as required by rule 26.8 (1). The other requirement of the paragraph was, however, not satisfied. The application was not made

promptly. The rule states that it "must" be so made. This formulation demands compliance.

Although he had not complied with the various orders, Dr. Toby and his attorney-at-law attended at court on June 5, 2006; the date scheduled for the trial of the matter. The trial was adjourned for it to be ascertained whether the claim had been struck out. The next step taken by Dr. Toby was on April 9, 2008, when he filed this application for relief from sanctions.

I shall now consider the word 'must', as it used in rule 26.8 (1). The judgment of Smith, J.A. in *Norma McNaughty v Clifton Wright and others* SCCA 20/2005 (delivered May 25, 2005), gives guidance. The issue in that case, was whether or not the rule in the CPR which permitted the court to enlarge the time for making applications (rule 26.1 (2) (c)), applied to applications to restore proceedings which had been automatically struck out under Part 73 of the CPR. His Lordship emphasised the mandatory nature of the word "must", as used in rule 73.4 (4), and found that it excluded the consideration contemplated by rule 26.1 (2) (c). The latter rule, Smith J.A. emphasised, "specifically excludes its application "where these rules provide otherwise"".

A similar rationale applies to rule 26.8 (1). If, therefore, the application has not been made promptly the court has no discretion to extend

the time within which to apply for relief. "Promptly", does, however, have elasticity as a character trait. Dr. Toby asserts that in this case it was only when he consulted his present Attorney-at-Law, Mr. Jones, in January 2008 that he discovered that no document had been filed on his behalf in this claim since the trial date in 2006. He said that he, "immediately instructed Mr. Jones to take the necessary action to remedy this unfortunate situation".

Dr. Toby deposed that he was in constant contact with Dr. Marshall who advised him to be patient because the court "is known for inordinate delays". I find that, despite that fact, an application made twenty-one months later, cannot be considered as satisfying a requirement for prompt action. That should therefore be an end to this application.

In the event, however, that I am wrong in this conclusion and because there is authority to suggest that all the provisions of rule 26.8 (3) should be considered, I shall consider rules 26.8 (2) and (3).

Rule 26.8 (2)

Rule 26.8 (2) provides:

> "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." (Emphasis supplied.)

Dr. Toby is obliged to satisfy all three requirements of the rule. (See page 3 of the judgment of P. Harrison J.A. (as he then was) in *International Hotels Jamaica Ltd. v. New Falmouth Resorts Ltd.* (SCCA 56 and 95 of 2003, delivered November 18, 2005). I have highlighted the word "only" because it imposes a severe restriction which will be considered later.

In respect of the first requirement, Dr. Toby says in his affidavit that he was always interested in pursuing the claim, but that it was Dr. Marshall's inactivity which caused the default. I'm not convinced that that inactivity is a good explanation for the failure to comply with the orders. Whereas inadvertence has been accepted as a good explanation for defaulting, it is clear, based on Dr. Toby's affidavit, that this was negligence, and perhaps worse, on the part of Dr. Marshall. The cases cited by Mr. Jones on behalf of Dr. Toby in this regard, *Short v Birmingham City Council* [2004] EWHC 2112 and *Woodward v Finch* [1999] CPLR, do not assist him. In *Short* there was not the wanton disregard of the court's orders as exists in the instant case and in *Woodward*, the application was made promptly.

Finally, Dr. Toby cannot claim to have generally complied with previous orders of the court. It was his failure to comply with the orders made at the Case Management Conference which led Sykes, J. to make the "unless order" against Dr. Toby. The Case Management Conference was

held on March 17, 2004; a full 18 months before the pre-trial review conducted by Sykes, J. During the interval, a pre-trial review was scheduled to have been held. It came on before Reid, J. on September 28, 2004. Neither Dr. Marshall nor Dr. Toby attended (it seems, however, that they were served with a formal copy of the orders then made).

As neither party had, by then, complied with the orders made at the Case Management Conference, Reid, J. adjourned the Pre-Trial Review and granted an extension of time to comply. Even when it was directly brought to Dr. Toby's attention in June 2006, that he was in default, nothing was promptly done to attempt to correct the situation. Dr. Toby cannot lay all the blame on Dr. Marshall; some lay on his shoulders.

Although I find that he has not satisfied all the requirements of rule 26.8 (2) I should, out of an abundance of caution, consider the provisions of rule 26.8 (3). This is because our Court of Appeal in *International Hotels*, mentioned above, seems to require first instance tribunals, when considering applications for relief from sanctions, to demonstrate consideration of the provisions of both 26.8 (2) and 26.8 (3). I shall, therefore, examine the circumstances of the instant case against the provisions of rule 26.8 (3).

Rule 26.8 (3)

a. The interests of the administration of justice

This claim involves a letter written in 2000. It has already appeared on a trial list and placed before a judge for trial. It is not clear whether the day was wasted because of the default. Even if it were not, I find that this claim ought not to displace any other case in the future. The issues are personal to Dr. Toby and the alleged sting, inflicted by the letter, could no longer have any effect after almost a decade.

b. Was the failure to comply due to the party or that of the party's attorney- at-law?

Undoubtedly the failure, on the evidence presented, was due to Dr. Marshall's neglect. I have already expressed the view that Dr. Toby must share culpability, although to a lesser extent.

c. Can the failure to comply be remedied within a reasonable time?

It would seem that the failure could be remedied within a reasonable period of time.

d. Can the trial date still be met?

There having been no trial date set, this is not a relevant consideration.

e. The effect which the granting of relief would have on each party

A grant of relief would adversely affect the defendants. An affidavit by their Attorney-at-Law, Mr. John Graham, asserts that the passage of time

has resulted in the "Defendants being prejudiced in their defence to this claim". Firstly, Mr. Graham says that Mrs. Hinchcliffe "cannot recall all of the history of this matter and despite numerous efforts, the Company's file relating to the matter cannot be found". Secondly, according to Mr. Graham, "the persons who would be called on behalf of the Defendants are no longer employed to the Second Defendant and the First Defendant has no means of contacting them".

I find that both these grounds are credible. The effect on the memory speaks for itself, although Mrs. Hinchcliffe did file a witness statement in October 2005. It could perhaps be a memory refresher. The documents on the court's file indicate that the employees, to whom Mr. Graham refers, are largely persons doing manual tasks. It is not improbable that contact would have been lost with them and that it would not be easily re-established.

I find that, whereas granting Dr. Toby his application would give him an opportunity to seek damages for words, which everyone else has, most likely, long forgotten, the effect on the defendants would be disproportionately prejudiced. Dr. Toby fails on this ground as well.

Should the death of Dr. Marshall be considered in resolving the issue?

In *Baker v Bowketts Cakes Ltd.* [1966] 1 W.L.R. 861 Lord Denning, M.R. spoke of parties having recourse to their legal representatives in the

event that the representatives fail to pursue their client's interest diligently. In this case Dr. Toby would have a severe disadvantage in pursuing that course, bearing in mind Dr. Marshall's death. I find, however, that that disadvantage cannot override the provisions with which this court must concern itself when considering an application of this nature. Rule 26.8 (2) imposes a severe limitation, in stipulating the word "only".

In any event, I have found that Dr. Toby should shoulder some of the burden for the default. His application for relief from sanctions must fail.

Conclusion

The delay in complying and the non-compliance with the orders made at the Case Management Conference in this case have led the court to conclude that there was no interest in prosecuting the claim. It may well be that Dr. Toby's Attorney-at-Law must bear the burden of that criticism but Dr. Toby must share some of the responsibility. He has failed to satisfy the requirements of rule 26.8 (2), especially that which stipulates that he should have generally complied with all other relevant rules, orders and directions. His statement of case must remain struck out. It is therefore ordered that:

1. Application for relief from sanctions refused;

2. Costs to the Defendants to be taxed if not agreed.