

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2006

BETWEEN:

J.R. O'NEAL AND G.A. COBHAM LIMITED

Applicant

and

CLIFF WILLIAMS

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

On written submissions:

Messrs. Maples and Calder for the Applicant

Messrs MCW. Todman & Co for the Respondent

2006: September 14.

JUDGMENT

[1] **BARROW, J.A.:** Serial non-compliance has brought the defendant to this present pass where it must apply for an extension of time within which to apply for leave to appeal and for leave to appeal against the refusal of Master Mathurin to set aside her order striking out the defence.

[2] The non-compliance began with an order made by Master Cottle at a case management conference on 21st February 2005 directing that the defence be amended. The Master had formed the view that the defence did not comply with Part 10.5 of the Civil Procedure Rules 2000 (CPR 2000), which specifies that a defendant is not permitted to simply deny an allegation in the Statement of Claim but must state his reasons for resisting the allegation. The Master adjourned the claim for case management on 19th July.

- [3] On that date the defendant had not complied with the order to amend. The case was again adjourned for case management to 11th October 2005, with costs to the claimant.
- [4] On 11th October the defendant had still not complied with the order to amend. When the matter was called no one was present for the defendant. Master Mathurin entered judgment for the claimant for damages to be assessed. The defendant refers to this as 'the October order'.
- [5] In the affidavit filed by the solicitor who had day to day conduct of the defendant's case he stated that the defendant was not present on that date because of an oversight. He stated that when the defendant first learned of the October order, in February 2006, it immediately applied to set it aside on the grounds that the October order 'offended the fundamental principle of natural justice that if a decision is to be made against a party, that party must be given an opportunity to be heard before the decision is made.' The solicitor for the defendant also relied on the ground that while the Master had the jurisdiction to strike out the defence it was a pre-requisite for the exercise of that jurisdiction, in the language of rule 26.2(2) of CPR 2000, that the Master had to give the applicant "*reasonable opportunity to make representations*".
- [6] The solicitor deposed that when he learned, on the day the application to set aside the October order was to be heard, that it was listed to be heard by the same Master who had made the very order, that is, "who had denied the applicant its right to be heard" he sought to persuade the Registrar to place the application before another judge "who would be able to bring, and be seen to bring, an impartial mind to bear on the application." The solicitor deposed that he stressed that it was fundamentally unfair for the application to be heard by the same Master. He stated that he was genuinely concerned because "the complaints

about the propriety of the order went to the heart of the way she denied my client a fair hearing.”

- [7] Unable to persuade the Registrar to shift the matter from before the Master the solicitor made the objection to the Master who rejected it and advised that she would arrive at her decision on the application to set aside based on the written submissions. The Master gave her decision in a written Ruling made on 27th March 2006 (the March order).
- [8] The defendant was again guilty of non-compliance because, as the solicitor deposed, he filed a Notice of Appeal and did not comply with rule 62.2, which states that if an appeal may be made only with leave (which the solicitor accepts is the case with the March order) a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. The solicitor deposed that he had proceeded with all despatch to draft a Notice of Appeal against the March order and full skeleton arguments in support, within the 14 days time limit, so it is not as if he were being dilatory. However, by the time the lawyer on the other side drew to his attention that he needed leave, the time limit for applying for leave had expired. As soon as he caught up on his mistake he filed the present application, for an extension of time and for leave to appeal. He is 20 days out of time, he deposes, but says no prejudice is caused to the other side because the defendant was always clear in its indications that it intended to appeal.
- [9] The claimant's opposition to the application for the extension of time and for leave to appeal is based on two grounds: 1) the defendant has been guilty of unwarranted delay and, 2) the intended appeal has no realistic prospect of success and should therefore be refused.
- [10] In relation to the first ground, recent decisions of this court have shown that the court approaches the matter of delay in complying with rules that state time limits

for doing things (such as applying for leave to appeal or filing a notice of appeal) on the footing that such delay is non-compliance for which a sanction is imposed, that sanction being the loss of the right to do the thing. Therefore, when a party applies for an extension of the time within which to do the thing that party is, in reality, applying for relief from sanctions. Accordingly, the court has held that rule 26.8 applies.¹ The relevant part of rule 26.8 reads as follows:

- “(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 effect which the granting of relief or not would have on each party;
 - (b) the interests of the administration of justice;
 - (c) whether the failure to comply has been or can be remedied within a reasonable time;
 - (d) whether the failure to comply was due to the party or the party’s legal practitioner; and
 - (e) whether the trial date or any likely trial date can still be met if relief is granted.
- (4) ...”

[11] The claimant’s objection of unwarranted delay is really an invocation of the mandatory requirement contained in rule 26.8(1)(a) that an application must be made promptly. Whether an application was made promptly is a question that needs to be examined in light of all the surrounding circumstances and not only by reference to the length of time. It seems to me, however, that instead of a consideration of promptness the particular facts of this case immediately engage a consideration of the factor of general compliance that is contained in rule 26.8(2)(c).

¹ Nevis Island v La Corpropiete Du Navire J31 et al Civil Appeal No.7 of 2005 – Saint Christopher and Nevis ; Ferdinand Frampton v Ian Pinard et al Civil Appeal No. 15 of 2005 – Commonwealth of Dominica

[12] The idea, indeed the policy, upon which rule 26.8 rests, is that relief from sanction is to be granted as a matter of discretion and that there are conditions that must be satisfied. This is why the rule is framed in terms that the court may grant relief *only if it is satisfied* that the conditions are met. These are not judge made conditions, which are sometimes open to the complaint that they are unsettled, but are legislated conditions, which are settled and certain. In this case it is not open to the defendant to argue that it has generally complied with other relevant rules directions and orders. The defendant failed to comply with rule 10.5 which requires it to state the reason for resisting an allegation in the statement of claim; it failed to comply with the direction to amend its defence; it failed on a second occasion to amend; and it failed to attend a case management conference. If general compliance is the price that an applicant must pay for relief from sanction then the defendant is deeply in debt.

[13] What makes the defendant's non-compliance especially bad is that even at this late stage the defendant has still not explained its failure to comply with Master Cottle's original direction to amend the defence, nor has the defendant amended. It clearly emerges from the affidavit filed in support of the current application for extension of time and for leave to appeal that the solicitor for the defendant continues to hold the view that Master Cottle was wrong in ordering the defendant to amend and, therefore, that the defendant deliberately decided not to comply with the order. I am sure that if it were put in those stark terms to the solicitor for the defendant he would deny it but I am equally sure that is what the contents of the affidavit reveal. The relevant passage in the affidavit² states:

"8. I accept that Master Cottle took the view that the defence did not comply with CPR 10.5. That is his view. I think it does comply with CPR 10.5. This is a matter for legal argument and it will be addressed when this matter is argued." (Emphasis added)

No doubt it was for this reason that Master Mathurin thought it necessary to recall the observation of the Privy Council, and I fear that even at this stage the

² The affidavit of Michael George Pringle filed 27th February 2006

observation has not been given proper weight, that an order of a court is valid and effective according to its terms unless it is set aside or is reversed on appeal; see **Isaacs v Robertson**³ The defendant did not appeal the order of Master Cottle but even now its solicitor takes the stand, in effect, that the Master can think what the Master wants but that he, the solicitor, knows better.⁴ It is an unfortunate stance because it has lead to wilful non-compliance and, therefore, to abuse of the process of the court.

[14] It follows, therefore, in my view, that the defendant is seriously afoul of rule 26.8(2)(c) because it has generally failed to comply with other directions, rules and orders. For that reason I hold that this court may not grant relief from the sanction that attaches to the defendant's non-compliance with the rule that required the defendant to apply for leave to appeal within 14 days of the decision. The defendant may not be granted an extension of time.

[15] In the event I am wrong in the view I have taken I go on to consider whether the defendant has a real prospect of success on appeal since it makes no sense to extend time for prosecuting an appeal that has no such prospect. The intended appeal, it must be remembered, is not against the decision to strike out the defence – the strike out decision is the October order – it is against the decision of the Master refusing to set aside the October order – the refusal to set aside is the March order. It is clear from the argument and affidavit for the defendant that what the solicitor for the defendant really wants is for all orders made against it – even the original order of Master Cottle directing it to amend its defence, which the defendant is hopelessly out of time for appealing – to be set aside and for this court to:

“return this matter to a case management conference so that both parties can be given the opportunity to plead their cases as they want to, if they so wish. Thereafter the matter can proceed to trial or summary judgment as the case may be.”⁵ (Emphasis added)

³ [1984] 3 All ER 140

⁴ See also paragraph 15, below

⁵ Affidavit of Michael George Pringle filed 27.2.06 at paragraph 15

[16] The defendant's application to Master Mathurin to set aside was made pursuant to rule 11.18 which states:

"11.18 (1) A party who was not present when an order was made may apply to set aside or vary an order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing -

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other might have been made."

[17] One of the bases that Master Mathurin gave in her Ruling for refusing to set aside the October order was that the defendant had not complied with rule 11.18(3)(b) which required the defendant to show that it was likely that, had the applicant attended the hearing, some other order might have been made. The Master said that the solicitor for the defendant had merely deposed that "whether or not my attendance would have changed the outcome is speculative." The Master observed, "that does not suffice". That is an understatement. I am at a loss as to how, in the face of the clear language of rule 11.18, the solicitor could ever have imagined that he could simply dismiss the requirement. Based on what was put before her it was hardly open to the Master to have done other than reject the application to set aside and I must say that I am impressed by the temperance in the language that she used. It is germane to refer, again, to the fact that when the application to set aside came before the Master the defendant had still not amended its defence nor explained why it had not done so. It was, for that reason, all the more necessary for the defendant to have shown, in its affidavit supporting its application to set aside the strike out order, that it was likely that the court would have done other than strike out the defence, had the defendant attended. The defendant refused to do so. I can see not even a fanciful prospect that the court of appeal, in these circumstances, would allow an appeal against the Master's decision.

[18] It is unnecessary for my decision on this application to do so but, because it seemed to have been so misunderstood, it may be helpful to say briefly something about the power of the court to impose a sanction without first making an unless order. When Master Cottle directed that the defence be amended he did not specify the consequence of failure to amend and neither did Master Mathurin thereafter specify a consequence. The solicitor for the defendant is convinced that rule 26.2(2) made it a pre-requisite that before the court struck out the defence the defendant should have been given “a reasonable opportunity to make representation” and that, not having been given any notice of impending sanctions, the defendant was deprived of the opportunity to apply for relief from sanctions.

[19] I believe the misconception of the solicitor for the defendant is that the strike out order the Master made was for failing to comply with the order to amend. The true position, as I understand it from her Ruling⁶, is that the Master struck out the defence for failing to comply with the mandatory requirements of rule 10.5, which requires a defence to state reasons for resisting an allegation in the statement of claim. A defence that fails to comply is a defence that is liable to be struck out under rule 26.3(1)(b) and (c). Rule 26.3 states:

“26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (c) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”

[20] The rules, expressly, specify a sanction. It follows that no unless order was necessary to fix a sanction or to inform the defendant of the sanction that could have been imposed. When, therefore, at the original case management

⁶ At paragraph 10 of the Master's ruling

conference Master Cottle directed that the offending defence be amended, the master was giving the defendant the opportunity to avoid the sanction that the rules provide; the Master was not creating or imposing upon the defendant a new obligation for which no sanction existed under the rules. Master Cottle made his order after there had been a hearing and, therefore, after the defendant had been given an opportunity to be heard. The solicitor for the defendant completely overlooks this reality, hence his misconception that the defendant had not been given a reasonable opportunity to make representations. The solicitor for the defendant also overlooks the reality that he knew that if he did not amend he would be left with a defence that the Master had judicially determined, in his presence, failed to comply with rule 10.5 and was therefore liable to be struck out.

[21] The defendant finds itself in the unfortunate position where it has lost the case without a trial on the merits because its solicitor chose to defy the order of the Master that was intended to help the defendant. If the solicitor thought the order was wrong the rules gave him the right to apply for leave to appeal. The sympathy that one has for the defendant itself cannot divert the court from its duty to ensure that the rules, process and orders of the court are not rendered meaningless by the caprices of a litigant's legal adviser.

[22] I would dismiss the application for an extension of time within which to apply for leave to appeal and for leave to appeal, with costs to the respondent in the sum of \$2,500.00.

Denys Barrow, SC
Justice of Appeal