THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

FEDERATION OF ST CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT

Claim No: SKBHCV2022/0175 formerly
SKBHCV2016/0146

BETWEEN:

JOSEPHINE HUGGINS

Claimant

-and-

[1] SKN CHOICE TIMES LIMITED
[2] DWIGHT COZIER

Defendants

Before Master Alvin Pariagsingh

Appearances: Mr. Anthony Gonsalves KC leading and Ms. Chauntelle Hobson for the Claimant.
Mrs. M. Angela Cozier for the Defendants.

2023: June 13,
September 13.

JUDGMENT
Claimant's application for an 'unless order'

[1] PARIAGSINGH M: The Claimant has applied for an 'unless' order as a result of the Defendants' failure to satisfy various orders for costs made in her favour.[1] The Defendants oppose this application. For the reasons set out below, I have refused the application with no order as to costs.

[1] Application filed on January 30, 2023.

BACKGROUND

[2] It is not necessary to recite the history of the proceedings or the orders for costs for the purpose of this decision. It suffices to say that this claim has had a protracted procedural history spanning over 7 years, including several interlocutory applications and an appeal before the Court of Appeal, and with at least 10 orders for costs having been made against the Defendants.

[3] Importantly, each of the 10 costs orders specify the amount of costs to be paid, and 7 of the orders specify the date by which the costs are to be paid. Of the 10 costs orders, 1 has been complied with and satisfied by the Defendants. The remaining 9 orders, which are the subject of the Claimant's application, are referred to in this judgment as "the Costs Orders".

THE APPLICATION

[4] The Claimant, by her application filed on January 30, 2023, seeks an order, pursuant to rules 26.3(1)(a) and 26.4(1) of the Civil Procedure Rules 2000,

> "That the Defendants be compelled to comply with the various orders made for costs against the Defendants in favour of the Claimant within 7 days of the date of any order made on this application, and in default of the Defendants' compliance, the defences of both Defendants be struck out and judgment be entered for the Claimant for damages to be assessed."

[5] The 'unless' order is sought on the ground that the Claimant is in default of the Costs Orders by either failing to comply with the times specified for compliance with the orders, or failing to satisfy them with convenient speed. The application is supported by the affidavit of Sherima Richards, who is the legal secretary of the Claimant's attorney. The affidavit repeats the grounds of the application, attaches copies of the relevant court orders and a "certificate of default" which contains a list of the cost orders which have not been satisfied.

[6] The question which arises in this application is whether the Court should exercise its discretion to make an 'unless' order given all the circumstances of this case.

[7] The Claimant submits that it is an abuse of the Court's process for the Defendants to continue to defend this claim having not satisfied the orders for costs against them. The Claimant strongly urges the Court to exercise its discretion 'in a way to guard its processes and the integrity of the process by granting the order sought'.

[8] In opposition, the Defendants have not sought to argue that the application for an 'unless' order should be refused because there was no default on their obligations under the Costs Orders. Neither have the Defendants sought to give any reasons for their default in relation to the Costs Orders. The Defendants submit, in the main, that there is a general principle that Costs Orders are enforceable at the end of the matter. They contend that-

> "orders made on interlocutory applications during the case management conference phase of the proceedings and which cannot be enforced in the court as outstanding orders for costs because they are all costs in the cause and are therefore unenforceable before trial of the matter".[2]

THE LAW – 'UNLESS' ORDERS

[9] The Court's discretion to grant an unless order is reflected in rule 26.4(1) of the Civil Procedure Rules 2000 as follows: "If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'."

[10] Rule 26.4(1) specifies that unless orders are appropriate where there has been non-compliance with a rule or court order in respect of which no sanction for non-compliance has been imposed. Apart from this express requirement, whether an unless order should be imposed is ultimately a matter for the Court's discretion,

[2] Affidavit of Dwight Cozier filed on March 21, 2023 in Opposition to the Application for an Unless Order at paragraph 10.

bearing in mind the circumstances of the case. Earlier decided cases however inform the exercise of the court's discretion in a number of ways.

[11] Firstly, unless orders are usually granted in cases where this is repeated and contumelious default by a party. As Ellis J (as she then was) in Scatliffe v BVI Health Authority[3] stated- "…unless orders are normally used where a party has repeatedly failed to comply with rules of court or court orders and the Court determines that this non-compliance must cease." In Denton v T.H. White Limited[4] it was further stated that "Unless orders should be reserved for situations where they are truly required to ensure litigation proceeds efficiently and at a proportionate cost".

[12] Secondly, because an unless order made pursuant to rule 26.4(1) carries the serious consequence of striking out, the court must not make unless orders lightly. In Scatliffe v BVI Health Authority, Ellis J opined that an unless order which results in a matter being struck out should granted be exceptionally, "in serious cases of contumelious failure to comply with court orders" in keeping with the "general reluctance of courts to decide a case on procedural grounds rather than on its real merits". The reason for this was discussed by the Caribbean Court of Justice in Barbados Rediffusion Services Limited v Asha Mirchandani.[5] In that case, de la Bastide PCCJ cautioned that the nature of striking out, which is the consequence of an unless order, requires a cautious approach to the imposition of unless orders. He said:

> "A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken. In fact, this is a consideration which should be taken into account by the judge who is asked to make an unless order. He should not use the threat to strike out contained in such an order unless there is a real prospect that noncompliance with the order might warrant the imposition of such an extreme penalty."

[3] BVIHCV2011/0087 (delivered June 1, 2015).
[4] [2014] EWCA Civ 906
[5] CCJ Appeal No. CV 1 of 2005.

[13] The nature of striking out, which is the result of non-compliance with an unless order, is the reason that unless orders have been described in Hytec Information Systems v Coventry City Council[6] as orders of "last resort".

[14] Thirdly, the jurisdiction of the court to make an unless order in the event that a party to proceedings does not comply with a previously made order for costs has been described as "clearly established".[7] The relevant guiding principles were discussed in Michael Wilson & Partners Ltd v Sinclair.[8] In summary, the court must approach such orders against the background of all the circumstances of the case. The Court should bear in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely – that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.

[15] Other relevant circumstances outlined by the court in Michael Wilson & Partners Ltd v Sinclair include the likelihood that granting an unless order would impact a litigant's right to access the court; the availability of alternative means of enforcing the costs order through different means of execution; the reasons expressed by the court for imposing the costs orders that were not complied with; whether the defaulting party has advanced any cogent reasons, supported by evidence, for failing to comply with the costs orders.

DISCUSSION AND ANALYSIS

[16] I find it easier to treat with the Defendants' submissions first. I find no merit in the Defendants' submission that, as a matter of general principle, the Costs Orders are enforceable at the end of the matter.

[6] [1997] 1 WLR 1666.
[7] Northern Powerhouse and others v Gavin Lee Woodhouse [2023] EWHC 1331 (Ch) at paragraph 5.
[8] [2017] EWHC 2424 (QB)

[17] Three of the orders for costs relied on by the Claimant are:

i. On July 11, 2018, Drysdale M ordered- "Costs to the Claimant in the sum of $1,500.00"

ii. On May 20, 2019, the Court of Appeal ordered "Costs in the sum of $1000.00 to the [Claimant] to be paid on or before Monday June 3, 2019".

iii. On January 11, 2021, the Court of Appeal ordered, in relation to an application to discharge the order of Farara JA [Ag.] that "The costs of the application shall be fixed in the sum of $1,000 to be paid to the [Claimant] on or before January 2021".

[18] The remaining orders for costs were made along similar lines. In each order, costs were summarily assessed by the court and, in most of the orders, deadlines were specified for compliance. None of the Costs Orders called for an assessment of costs to be done. None of the Costs Orders were "costs in the cause" (as the Defendants argued), which would require the question of costs to be reserved and determined at the end of the claim, as a matter of law.

[19] I have not come upon any authority that supports the Defendants' position that there is a general rule that the Costs Orders are only enforceable at the end of the matter, and neither has any been produced by the Defendants' who advanced it. To the contrary, the Civil Procedure Rules are clear and unambiguous regarding when orders or judgments of the court are effective. Rule 42.9 of the Civil Procedure Rules 2000 states that: 'A judgment or order takes effect from the date it is given or made, unless the court specifies that it is to take effect on a different date.'

[20] The effect of the rule is that orders are effective and therefore enforceable when they are made unless it is stated that it takes effect on a date in the future. There is no rule that says that interlocutory costs are payable only at the end of a matter. In view of the express wording of the rule 42.9, and the absence of any express provision or case to support the position put forward by the Defendants, I find that as a matter of law, there is no general rule that prevents the Claimant, in these

circumstances, from enforcing interlocutory costs orders which were made in her favour earlier in these proceedings.

[21] The Defendants in their written submissions have also raised tangential attacks on the Costs Orders themselves. The Defendants have sought to suggest, for example, that some of the orders should have been "costs in the cause". Costs in the cause is generally used when an interlocutory application is connected to a determination to be made at the trial of the substantive claim, e.g. an application for interim injunctive relief. The objections to the orders for costs raised by the Defendants could only properly be advanced in an appeal and are not an appropriate response to this application. Neither liability for costs, the quantum of costs, the regime under which the costs orders were made, nor the correctness of the costs orders are issues which arise on the application before this court.

[22] The Defendants have also relied on three authorities in support of their arguments. Having considered them I find none to be helpful in resolving this application. In particular:

1. RXK V Hampshire Hospitals NHS Foundation Trust[9] - This case dealt with an application for a further interim payment on account of damages and costs previously ordered following the entry of judgment for the claimant. I can see no features in this case which are similar to the application at bar. The application at bar is not an application for an interim payment on account of the orders for costs. The principles which govern the enforcement of interlocutory costs orders and the court's discretion to grant 'unless' orders were neither raised nor dealt with in the case.

[9] [2019] EWHC 2751.

2. Junejo v New Wilson Vision TV Limited[10]. This case dealt with an application to strike out. The Court made an 'unless' order instead of striking out. That is not the issue in this application.

3. SID-Ali Atami v Royal Borough of Kensington & Anor[11]. This case demonstrates the court's exercise of the discretion to order costs in relation to a series of interlocutory applications. In this case, the exercise of that discretion is not in issue.

[23] Accordingly, I find no merit in the Defendants' arguments in opposition to this application.

[24] Turning to the Claimant's submissions, I accept that the Defendants are in breach of the Costs Orders. The Defendants have not sought to explain the reasons for failing to honour their obligations under the Costs Orders, outside of the erroneous view that the costs ordered are to be paid only at the end of the matter. This is a less than satisfactory response to the Claimant's application. All this notwithstanding, I do not accept that it is appropriate to grant an 'unless' order in these circumstances.

[25] First, as the Court in Denton v T.H. White Limited stated, unless orders are to be reserved for instances where they are necessary to aid with the progression of litigation. In her application and affidavit, the Claimant has not advanced any reason, other than non-compliance with the Costs Orders, to justify the imposition of an unless order. As earlier stated, the grounds of the application and the affidavit simply explain and reiterate, respectively, the Defendants' non-compliance with the Costs Orders. The application and affidavit therefore, while disclosing a pattern of non-compliance by the Defendants of their obligations under the Costs Orders, do not go further to state the impact, if any, that these instances of default has had on

[10] [2021] EWHC 499.
[11] [2022] EWHC 2618.

the progression of this claim, or to make any connection between the Defendants' default and the ability of the Claimant to prosecute her claim.

[26] From my understanding of the procedural history of the matter, there does not seem to be much of a connection between the over 7-year long delay in this matter and the Defendants' failure to pay costs, and no such connection was made by the affidavit evidence filed by the Claimant in support of this application.

[27] Secondly, as I earlier stated, the Costs Orders are all valid orders that can be enforced and, no evidence has been given of any attempts by the Claimant to enforce them. The costs orders have neither been stayed nor set aside and there are no other bars to enforcement of costs orders during the pendency of a claim that have been brought to the court's attention. The Claimant therefore has a remedy for the Defendants' failure to satisfy the orders for costs, in the form of enforcement. Even at this stage, it is open to choose a method of enforcement and commence enforcement proceedings to recover the outstanding costs ordered against the Defendants. And, if the Defendants wish to do so, they have the right to challenge any enforcement proceedings. That right is built into the enforcement procedures laid out in the Civil Procedure Rules in the form of, for example, an interpleader application.

[28] The Defendants have raised the possibility of a set off in relation to costs if the substantive matter is determined in their favour. In my view, though that possibility exists, it does not prevent the Claimant from pursuing enforcement proceedings at present.

[29] There can be no doubt that enforcement proceedings are available to the Claimant and this issue has been decided by the Court of Appeal in SKBHCVAP2019/0049 which is an appeal from the decision of Ventose J in these proceedings. In allowing the appeal against the decision of Ventose J the Court of Appeal restored the

judgment summons struck out by the judge. These judgment summonses remain pending and can be pursued by the Claimant.

[30] I note that the Claimant has not brought to the court's attention evidence of any efforts to procure compliance with the Costs Orders, whether by way of proceedings against the Defendants for contempt of court, enforcement under Part 45, or otherwise. There are therefore effective and, from all indications, unexplored avenues for redress by way of enforcement proceedings, available to the Claimant to treat with the Defendants' non-compliance with the Costs Orders. I am of the view that the "extreme penalty" (in the words of the CCJ in Barbados Rediffusion) of an 'unless' order should not be visited upon the Defendants as a matter of first resort.

[31] Thirdly, a global view of the procedural history would dictate against granting an 'unless' order. This matter was commenced in 2016. Thus far there have been five (5) written judgments delivered by Masters and four (4) from the Court of Appeal. On January 25, 2023 I gave full trial directions and adopted the posture that; (1) there is a final date by which all interlocutory applications must be filed and; (2) trial directions were to be fully complied with regardless of any outstanding applications. Happily, this is the last permitted pending interlocutory application and all trial directions have been fully complied with including the filing of witness statements.

[32] The matter is not at the embryonic stage and is ripe for pre-trial review. It is now 7 years in the system largely based on the slew of interlocutory applications and appeals. These applications were not only made by the Defendants – the Claimant also made applications. It cannot be said in my view, that the Defendants used the processes of the Court in a way to be abusive by not paying costs when ordered against them. In any event, the Claimant has a remedy which could be explored instead of the extreme option of imposing an unless order.

[33] The matter having finally reached the stage of pre-trial view, with the likelihood of a trial date being set in the near future, I am of the view that granting an 'unless' order for the payment of interlocutory costs only has the potential to either further delay the progress of the matter to a trial, or shut the Defendants out of court in circumstances where the Defendants' default in relation to the Costs Order has not impacted the progress of the matter. Accordingly, at the stage of a pre-trial review view after seven (7) years, I would not exercise my discretion to grant an application for an 'unless' order. More so, the Claimant can enforce the Costs Orders while the matter proceeds to trial.

[34] Counsel for the Claimant argued, and I agree, that the Court ought to protect its process and orders. Counsel aimed his cannons at the seemingly abusive posture of the Defendants not to satisfy orders for costs made against them. Where I part company with counsel for the Claimant is that the duty to protect the Court's process and ensure compliance with orders made requires the imposition of an 'unless' order in these circumstances where: (i) there is no connection between the default of the Defendants in relation to the Costs Orders and the progression of the claim; (ii) the Costs orders are valid and enforceable by other means provided by the rules without any need for resort to the "extreme" option of an unless order; and (iii) the imposition of an unless order may very well further imperil the progress of the matter at a time when a trial date can likely be set in the foreseeable future.

[35] For these reasons, I decline the invitation to make an 'unless' order for the payment of all outstanding costs.

[36] Bearing in mind this matter's procedural history, I am also minded to make directions to further ready this matter for pretrial review.

COSTS

[37] Costs in applications for unless orders are governed by rule 26.4(6) which provides that- "The general rule is that the respondent should be ordered to pay the assessed costs of such an application." The reason for this general rule appears to me to be that a party who is in breach of the rules or orders of the court should not be rewarded with a costs order in their favour, even in the event that they successfully resist an application for an unless order.

[38] I have earlier found that the application for an unless order was misconceived, and that such an order is unavailable in the circumstances where the Claimant had the very viable option of procuring compliance with the Costs Orders through enforcement proceedings. In the circumstances, I am of the view that the general rule on costs in unless order application should not be followed, and that each party should bear their own costs.

ORDERS:

[39] It is hereby ordered that:

1. The Claimant's application filed on January 30, 2023 is dismissed.

2. Each party to bear their own costs of this application.

[40] And it is further ordered that:

1. This matter is adjourned to a date to be fixed by the Registrar within 7 days from today for a pre- trial review before a Judge.

2. The parties are to file and serve all applications to be dealt with at the pre-trial review, including any notice of evidential objections, at least fourteen (14) days before the date fixed for the pre-trial review in default no application shall be made without permission of the Judge.

3. The parties are to file and serve their pre-trial memorandum at least seven (7) days before the pre-trial review.

Alvin Pariagsingh
Master

By the Court

Registrar