EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2012/002

BETWEEN:

ROBIN MARK DARBY

Appellant

and

LIAT (1974) LIMITED

Respondent

Before:

The Hon. Mde. Janice M. Pereira Justice of Appeal

On written submissions:

Mr. Dane Hamilton, QC of Dane Hamilton & Associates for the Appellant
Mr. Kendrickson Kentish of Lake & Kentish for the Respondent

2012: June 5.

Civil appeal – Security for costs – Relief from sanctions – Application made after time for payment of security had expired - Whether court erred in refusing to grant relief

An order for security for costs was made against the appellant on 17th November 2010. The Order required the appellant to give security within 28 days failing which the appellant's claim would stand as struck out. The appellant, who had previously complied with all rules, orders and directions of the court, failed to provide security within the requisite time limit. At a later date, the appellant was able to and did provide such security. On 28th January 2011, an application for relief from sanctions was made by the appellant. The affidavit in support of the application was made by an attorney at law on behalf of the appellant who resides in Switzerland. The application was opposed by the respondent.

The Master, after considering that promptness was a requirement of an application for relief from sanctions and being concerned that counsel appearing was one and the same as the attorney at law who swore the affidavit in support of the application, thus according little or no weight the explanation proffered by the appellant, denied the application and ordered that the appellant's claim remain struck out and ordered that costs be paid to the respondent. The appellant appealed.

Held: granting the appellant relief from sanctions and deeming the security for costs paid into court on 13th January 2011 duly paid; ordering that in the event that payment

into court has not yet been made the appellant shall make payment into court no later than Friday, 15th June 2012, and that upon payment into court, the appellant's claim shall be deemed not to have been struck out; awarding costs occasioned on the application for relief from sanctions to the respondent fixed in the sum of $1,000.00; and making no order as to costs on this appeal, that:

1. Rule 26.8 of the Civil Procedure Rules does not direct the court to have regard to whether or not the application for relief from sanction has been made promptly in considering whether to grant relief. Therefore, the Master erred in placing undue emphasis on what has been viewed as a lack of promptitude in applying for relief.

   Irma Paulette Robert v Cyrus Faulkner et al St. Lucia Civil Appeal No. 29 of 2007 (delivered 25th October 2007) cited; CPR 26.8(3) applied.

2. It cannot be said that the appellant's failure to comply, which if need be can be easily remedied, was intentional. A court ought to consider all the factors and circumstances in an application for relief from sanctions. In doing so, the court ought to have regard to the appellant's explanation for his failure to comply with the order in the context of what the appellant was required by the order to do. The explanation given was sufficient to explain his failure. The appellant otherwise complied with all other rules, directions and orders of the court. In the circumstances, this was a proper case for the exercise of the court's discretion in favour of granting the relief sought.

   Civil Procedure Rules Part 26.8 applied.

3. A court must pay due regard to the broad and fundamental principles of access to justice and the administration of justice in adjudicating matters before it. In that vein, it is open to a court to grant relief from sanction where the justice of the case requires such. In the present case, the granting of relief would not have had an adverse impact upon the respondent. The respondent requested security; the appellant was ready and did provide the security, although out of time. It would not be in the interest of the administration of justice to exact disproportionate punishment by denying entry through the door of justice for untimely compliance in the face of the appellant's ability and readiness to remedy that failure.

4. The objective of an order for security for costs is to ensure that in the event of an adverse result, the respondent would be able to recover the costs incurred by him in defending the claim. The appellant's late payment of the security did not materially affect the case in such a way that the respondent would not be able to recover such costs. The giving of security or lack thereof had no impact on the merits of the parties' respective cases. No trial dates or case management schedules were fixed by the court; accordingly none would have been displaced in the granting of the relief. As such, the mischief which an order for security for costs is aimed at protecting was curable.

JUDGMENT

[1] PEREIRA JA: This appeal filed 11th April 2012, is against the decision of the Master refusing relief from sanctions against the late payment of security for costs in respect of a claim brought by the appellant against the respondent for damages for wrongful dismissal.

Background

[2] An order requiring the appellant (the claimant below) to give security for costs of the respondent in the sum of $20,000.00 was made on 17th November 2010. Security was required to be given within 28 days (by 17th December 2010) failing which the appellant's claim was deemed to be struck out.

[3] The matter was adjourned (in the event that security was paid) to 12th January 2011. The matter however did not come on for further hearing until 1st February 2011. On 13th January 2011 (outside the time ordered for payment) the appellant was then in a position to pay in the requisite funds into court. The evidence reveals that the funds had been wired to the attorneys for the appellant and that a cheque dated 13th January 2011 had been issued by the bank in favour of the Registrar of the Court for the said sum on the instructions of the said attorneys. On 28th January 2011 the appellant applied for relief from sanctions in respect of the late payment of the security ordered.

The Application for Relief from Sanctions

[4] The appellant stated in his application that he was employed in Switzerland and had to make arrangements for payment out of his account in the UK. That this involved conversion from Swiss Francs to English pounds and then to EC dollars; that the transfer of funds was concluded by 11th January 2011 and a cheque prepared and released on 13th January 2011.

[5] The affidavit in support was sworn to by Dane R.A. Hamilton who essentially deposed to the matters set out in the application and also to the fact (uncontroverted) that the appellant had hitherto complied with all previous rules, orders and directions of the court. He further indicated that in any event there was no prejudice occasioned to the respondent by the delay.

[6] The application was opposed by the respondent who contended that no explanation had been given for the 6 week delay in making the application; therefore it was not made promptly. The respondent also challenged the explanation for the late arrival of the funds asserting that it was lacking in specificity and documentary proof supporting the delay in effecting the wiring instructions.

The Master's Ruling

[7] The application for relief from sanctions came on for hearing before the Master and on 7th April 2011 she dismissed the application and further ordered that the claim remain struck out for non-compliance with the order of 17th November 2010 and ordered the appellant to pay costs of $1,000.00 to the respondent in any event before filing further legal proceedings in relation to the subject matter of the same claim.

[8] The learned Master, in her written ruling[1] considered that the requirement for promptness was a requirement of an application for relief from sanctions although she reminded herself of the statements made by Edwards JA in the case of Irma Paulette Robert v Cyrus Faulkner et al[2] in which she made clear that Civil Procedure Rules ("CPR") 26.8(3) "does not direct the Court to have regard to whether or not the application has been made promptly in considering whether to grant relief..."

[9] She also expressed dissatisfaction with what appeared to be the breach, by counsel appearing, of a cardinal principle relating to the swearing of an affidavit by the same counsel;[3] and concluded thus, "the weight and admissibility to be given to this affidavit should be minimal if at all."

[10] At paragraph 10 she stated thus:

> "At some point before the time expired it must have become manifest to the Applicant that he needed to make an application for an extension of time upon the clear and obvious realization that the date ordered by the court would not be met. … It appears at least capricious and given the conjoined requirements of Part 26.8(2)

[1] At paras. 7 and 8.
[2] St. Lucia Civil Appeal No. 29 of 2007 (delivered 25th October 2007).
[3] At paras. 5 and 6.

necessary to satisfy the court, even though the applicant has complied with all other directions, rules and orders of the court the application must fail."

[11] These statements have led to the complaints made by the appellant that the learned Master:

(a) failed to apply her mind to the relevant considerations embodied in CPR 26.8;

(b) erroneously concluded that counsel appearing had sworn the affidavit thus giving it little or no weight and thus taking into account irrelevant matters;[4]

(c) arrived at the decision to refuse relief which was wrong in law.

Discussion

[12] The relevant starting point is the rule which directs the imposition of a sanction. CPR 24.5 says in effect that on making an order for security for costs the court must also order that, 'if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out.' It is worthwhile to consider the objective of this sanction if one is to put the application for relief from the consequence of it into proper context. The objective of this sanction is clearly to ensure that if a claimant fails in establishing his claim that a respondent who has been put out in incurring costs in defending the claim does not find himself in the position where it is well-nigh impossible to recover those costs. The security given provides a fund to ensure against that eventuality at the end of the trial. Where a claimant is ordered and fails to provide the security, then it would simply not be in the interests of justice to allow him to pursue his claim to the likely detriment of a defendant who successfully defends. Thus the court's coercive powers are brought to bear on such a claimant, imposing in the first instance a stay of the claim during the period limited for compliance, and importantly, for the claim to be struck out on failure to comply.

[4] The affidavit in support had not in fact been sworn to by or before counsel appearing.

[13] The next point to consider is the position where relief is sought to relieve against that consequence which on any view is a draconian one although a proportionate and justifiable response as explained above. Where one applies for relief from the sanction, all the factors and circumstances must be taken into account. A relevant consideration must be whether the mischief which the order sought to protect against is curable. Notwithstanding that relief is sought after the sanction is said to have taken effect it is still open to the court, as it should be, in recognition of and giving full effect to the broad and fundamental principles of access to justice, to grant relief where the justice of the case requires.

[14] In the court's general case management powers set out in CPR 26.1(2)(k), the court may '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.' (My emphasis)

Relief from Sanctions – CPR Part 26.8

[15] This rule says in effect that an application for relief must be made promptly and be supported by affidavit. The relevant part of this rule which is critical to the court's exercise of its discretion to grant relief are contained in sub rules (2) and (3). Sub rule (2) states as follows:

> "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."

These may be termed the compendious conditions circumscribing or the prerequisites for the exercise of the discretion. Once these are satisfied, sub rule (3) then sets out the considerations by which the court is to be guided in exercising the discretion. It exhorts the court to 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.

[16] When the statements of the learned Master are taken in the round against the background of all the facts and circumstances of this matter it is accepted that the criticisms leveled by counsel for the appellant are fairly made. It is reasonable to infer that undue emphasis has been placed on what has been viewed as a lack of promptitude in applying for relief although this is not a prerequisite to the grant of relief. Further, it is clear that her view of counsel appearing and swearing an affidavit in the same cause led her to have little or no regard for the explanations contained in the affidavit and must be taken to have coloured her view as to the plausibility of the explanation. When this is added to the fact that undue regard appears to have been given to the fact that the application was not made prior to the time running out it leads ineluctably to the conclusion that the learned Master erred in having regard to irrelevant considerations in arriving at the conclusion as to whether the prerequisites for the exercise of her discretion had been satisfactorily met. She then precluded herself from effectually exercising the discretion.

[17] On the facts and circumstances of this case, it cannot be said that the failure to comply was intentional. There is no evidence for example, that he took the view that he ought not to comply or that he considered that the order was wrongly made or such like. Rather, the evidence is that the appellant is employed in Switzerland with job obligations requiring travel outside Switzerland; that notification was late, but nonetheless attempted over the holiday season to put bank transfers in motion. Delays were experienced and funds were put in place at a bank in Antigua for the purpose of meeting the security by 13th January 2011. This explanation, though not detailing every step and time stamp of the money trail from its origin to final destination, is

sufficient in my view to satisfy the second limb of sub rule (2). No issue arises as to full compliance with the third limb of sub rule (2). It cannot be said that efforts were not made to put the security in place, nor has it been challenged that the funds comprising the security have not been made available. This paves the way for the exercise of the court's discretion having regard to the matters set out in sub rule (3) whilst keeping in the forefront of my mind the mischief at which the sanction is aimed.

[18] The granting of relief would not have an adverse impact upon the respondent. He sought security for his costs. The appellant is now able to provide such security. The giving of security or lack thereof has no impact on the merits of the parties' respective cases. On the other hand, were relief not granted the appellant will be deprived of the ability to fight his case on the merits. He will have been driven from the judgment seat because he failed to provide the security within the time prescribed.

[19] The consideration at [18] above leads into the interest of the administration of justice. It would not be in the interest of the administration of justice to exact disproportionate punishment by denying entry through the door of justice for untimely compliance in the face of the ability and readiness to remedy that failure and which in so doing visits no prejudice upon the other party or in any way threatens the due administration of justice.

[20] The failure to comply has either been remedied or can be remedied within a reasonable time. The cheque has been released by the Bank on behalf of the appellant and so payment into court if it has not already been made can easily be made within days as may be directed.

[21] The failure to comply here may be said to be due to a combination of factors - lack of effective communication, intervening bank holidays and some lack of overall due diligence.

[22] No trial dates or case management schedules have been displaced. Indeed none were fixed.

[23] Had the learned Master not been guided by irrelevant considerations she would no doubt in having regard to the matters set out above, concluded that it was a fit case for the exercise of the court's discretion in favour of granting the relief sought.

Conclusion

[24] For the foregoing reasons, I allow the appeal and set aside the Master's Order of 17th January 2012. I further order as follows:

1. The appellant is hereby granted relief from sanctions. The security for costs paid into court on 13th January 2011 is hereby deemed to be duly paid in pursuant to the Order made on 17th November 2010 for giving of security for costs.

2. In the event that payment into court has not yet been made, the appellant shall make payment into court no later than Friday, 15th June 2012.

3. Upon payment into court, (with Notice of Payment served upon the respondent) the appellant's claim shall be deemed not to have been struck out and the claim shall proceed in accordance with the rules of court.

4. The costs occasioned on the application for relief from sanctions shall be paid by the appellant to the respondent fixed in the sum of $1,000.00.

5. There shall be no order as to costs on this appeal.

Janice M. Pereira
Justice of Appeal