

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2019/CLE/gen/00156) heard together with 2019/CLE/gen/00157) and  
2019/CLE/gen/00158) but these matters are not consolidated.**

**BETWEEN**

**DARNELL OSBORNE  
NICOLA THOMPSON  
ROY NICHOLAS DEAN**

**Plaintiffs**

**AND**

**THE HONOURABLE THOMAS DESMOND BANNISTER**  
(In his capacity as the Minister of Public Works and the Minister charged with the  
responsibility for the Boards of BPL and BEC)  
**First Defendant**

**THE BAHAMAS ELECTRICITY CORPORATION**  
(“BEC”)  
**Second Defendant**

**THE BAHAMAS POWER AND LIGHT COMPANY LIMITED**  
(“BPL”)  
**Third Defendant**

**THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE  
BAHAMAS**  
(In a representative capacity)  
**Fourth Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Mr. V. Moreno Hamilton of Sears & Co. for the Plaintiffs  
Mrs. Krystal Rolle QC and Ms. Kendrea D. Demerritte of Rolle &  
Rolle for the First and Fourth Defendants  
Mr. Oscar Johnson Jr and Mr. Keith Major Jr. of Higgs & Johnson for  
the Second and Third Defendants

**Hearing Date:** 12 October 2021

**Practice – Order – Further Case Management Order - Non-compliance with Order - 'Unless' Order – Consequences for non-compliance unless act done within specified time-Relief from sanctions – Three mandatory conditions and criteria - Good explanation for failure to comply – Failure to comply unintentional – Plaintiffs have complied with previous orders of the Court - Additional factors to be considered – RSC O. 31A r.25 (2) and (3) – Interests of the administration of justice - Extension of time to file and serve List of Documents – Trial dates of seven days imminent – Vacation of trial dates**

By Summons filed on 8 June 2021, the Plaintiffs seek two orders following their failure to comply with an Unless Order made on 15 April 2021 to file and serve their List of Documents by the date stipulated by the Court. First, they seek an order for relief from sanctions pursuant to RSC O. 3 r. 4 and RSC O. 31A rr.18 and 25 (1) and/or the inherent jurisdiction of the Court for failing to file and serve their List of Documents. Second, they seek an order that the Defendants take no further steps in the three actions pending the determination of their Summonses. The respective Summonses were supported by the Affidavit of Marion Bethel filed on 9 June 2021.

The Defendants raised the issue that the actions stand dismissed by virtue of the Order and therefore, the applications for relief from sanctions are moot. The Defendants also submit that the only application for consideration is whether the Court will exercise its discretion to grant an extension of time in which case, the trial dates of seven days will have to be vacated.

**HELD: Granting the Plaintiffs' Summonses for relief from sanctions and extending time to 18 October 2021 for them to file and serve their List of Documents on the Defendants. The Second and Third Defendants are granted an extension of time with respect to the filing of their Verifying Affidavit filed herein on 1 June 2021 which is hereby deemed as duly filed. Costs to be costs in the cause.**

1. The Plaintiffs have satisfied the Court of the mandatory requirements of Order 31A rule 25(2) of the Rules of the Supreme Court (RSC O.31A r.25(2)). In particular:
  - a. The Court is satisfied that there is a good explanation for the Plaintiffs' failure to file and serve their List of Documents in accordance with the Order made on 15 April 2021;
  - b. The Plaintiffs have satisfied the Court that their failure to comply with the Order was not intentional and was due to the fact that lead Counsel had to travel out of the jurisdiction to attend his brother's funeral and also to seek medical attention;
  - c. The Court also considered that the Plaintiffs have generally complied with other Orders of the Court.
2. In addition, the Court has considered the factors set out in Order 31A, rule 25(3) and determined that even though the trial dates would not be met,

- a. it is in the interests of the administration of justice to provide relief from sanctions in these circumstances;
- b. the failure to comply was not due to any act or omission on the part of the Plaintiffs' counsel;
- c. the Plaintiffs were not solely to be blamed for the confusion as to which judge will hear their Summonses which were filed on 8 June 2021. The files were inadvertently sent back to the Listing Office by the then clerk. The misunderstanding led to the Summonses, though filed on 8 June 2021, not being brought to the Court's attention until the date set for the Pre-Trial Review hearing on 15 October 2021.

## **RULING**

**Charles J:**

### **Introduction**

- [1] At a Further Case Management Conference held on 15 April 2021, the Court ordered and directed, among other things, that the parties are to file and serve on one another their List of Documents with verifying Affidavits on or before 31 May 2021. The Court further directed that if any party defaults with this Order, that Party's Statement of Claim or Defence (as the case may be) shall stand dismissed with costs ("the Order").
- [2] The Plaintiffs did not file and serve their List of Documents on 31 May 2021. However, on 8 June 2021, they filed three identical Summonses seeking the following Orders:
1. Pursuant to Order 3 rule 4 and Order 31A rules 18 and 25(1) of the Rules of the Supreme Court ("RSC") and/or under the inherent jurisdiction of the court for relief from sanctions and that the time limited for filing and serving the Plaintiffs' List of Documents in these three actions be extended notwithstanding that the time limited for doing so has expired under the Order and;

2. For the Defendants to take no further steps in the actions pending the determination of the Summonses.

[3] Each of the Summonses was supported by an Affidavit of Marion Bethel, a partner in the firm of Sears & Co which was sworn to on 8 June 2021 and filed on 9 June 2021. The Plaintiffs also filed a Certificate of Urgency on 14 June 2021.

[4] In paragraphs 6 and 7 of her Affidavit, Mrs. Bethel deposed that there was an unintentional failure to comply with the Order of the Court which was predominantly due to the fact that she and Mr. Alfred Sears QC, lead Counsel in these actions, had to travel overseas due to the death of Mr. Sears' brother and they overlooked the deadline for filing the List of Documents without appreciating the sanction to that specific order of the Court. I do not believe that it is disputed that Mr. Sears QC was out of the jurisdiction from 27 May to 4 June 2021 but, in fairness to Counsel for the Defendants, I do not believe that they were aware of this fact.

[5] Mrs. Bethel also pointed out that they have been accommodating to other Counsel of record when those other Counsel had challenges with complying with the Court's Order and they have never made any applications to the Court raising the issue of non-compliance. She asserted that none of the Defendants will be prejudiced by the late filing of the List of Documents since the trial of these actions was five months away.

#### **Chronology of event after 31 May 2021**

[6] On 7 June 2021, learned Queen's Counsel for the First and Fourth Defendants, Mrs. Rolle, wrote to Mr. Sears QC and, copied to Barron Musgrove, then Clerk of Court and Mr. Oscar Johnson Jr., lead Counsel for the Second and Third Defendants stating:

**“...As you are aware, the Case Management Order dated 15 April 2021 provided as follows:**

**“The Parties are to file and serve on one another a List of Documents on or before May 31<sup>st</sup>, 2021 with verifying Affidavits. If any party defaults with this Order, that Party’s Statement of Claim or Defence (as the case may be) shall stand dismissed with costs.”**

**The First and Second Defendants filed and served their List of Documents on 31<sup>st</sup> May, 2021 as per the Order but note that as of the date hereof we have not been served with the Plaintiffs’ List of Documents. By reason of the aforesaid Order and the Court’s firm and unequivocal position regarding the same we take the position that the Plaintiffs’ actions herein now stand dismissed with costs to the First and Fourth Defendants.**

**We shall be proceeding shortly with the filing and service of the First and Fourth Defendants’ Notices of Taxation, Bills of Costs and Statements of Parties relative to the costs of these actions.”**

[7] As already stated, the Plaintiffs’ Summonses for relief from sanctions and extension of time were filed on 8 June 2021.

[8] On 8 June 2021, Mr. Hamiton visited my Chambers armed with the Summonses but was informed by the then secretary that these matters were returned to the Listing Office to be assigned to a new judge. It is accurate that a number of matters were returned to the Listing Office including these matters which were inadvertently included in the List.

[9] On 9 June 2021 at 11:27 a.m., Mr. Hamilton emailed the Listing Office inquiring of the name of the new judge. He stated in that email:

**“We understand from chambers of Justice Charles that the Osbourne, Dean and Thompson matters are being assigned to a new judge. Are you able to confirm name of new judge.**

**We have filed an urgent application for relief from sanction and want to know who we should communicate with in order to set our application down for hearing.”**

[10] On the same day at 11:30 a.m., the Listing Office promptly responded stating that *“those matters have not been assigned yet. Thanks.”*

[11] On 10 June 2021, Mr. Hamilton emailed Mrs. Rolle QC informing her that “...Justice Charles no longer has carriage of these matters.”

[12] On Sunday 13 June 2021 at 2:12 p.m. , Mr. Hamilton again wrote to the Listing Office. He stated:

**“Dear Ms. Archer,**

**Good afternoon.**

**Please see the attached Affidavits for your records. You already have our Summons for relief from sanction. We will prepare a certificate of urgency and also submit a covering letter to you now that we have heard from the other attorneys on their available dates.”**

[13] On 21 June 2021 at 2:22 p.m., Mr. Hamilton again emailed the Listing Office to inquire whether “*this matter has been assigned a new Judge as yet.*”

[14] On 2 July 2021, these three actions were returned to my Chambers after it was discovered that they were inadvertently sent to the Listing Office.

[15] On 29 July 2021 at 10:18 a.m., I emailed all Counsel to advise them that the Pre-Trial Review which was previously fixed for 7 October 2021 at 10:00 a.m. will now be held on 12 October 2021 at 11:00 a.m. Counsel for the Plaintiffs as well as for the Defendants confirmed that the new date and time were convenient. The following day, I thanked all Counsel for their prompt responses.

[16] During the intervening period, both my secretary and clerk moved on and I acquired a new clerk of court and a new secretary.

[17] Despite my two emails to all Counsel, I was not advised that there were any extant applications to be heard.

### **The issue**

[18] The issue which now confronts the Court is whether, at this late stage, it should grant relief from sanctions and/or exercise its discretion to extend the time for the Plaintiffs to file and serve their List of Documents.

[19] It is beyond question that if the Court grants the Order sought by the Plaintiffs, the trial dates fixed for 15 to 23 November 2021 will have to be vacated. This is in sharp conflict with the position taken by our courts that trial dates are not to be easily vacated: see paragraph 17 of **Bank Havilland (Bahamas) Ltd v Christophe Mazurier and ors** [2017/CLE/gen/00323] - Bahamas Judiciary Website - 27 July 2021.

### **‘Unless’ orders**

[20] Paragraph 5 of the Order made on 15 April 2021 is essentially an “Unless’ Order. In **Robert Adams (a beneficiary of the Estate of Raymond Adams) v Gregory Cottis (as Executor of the Estate of Raymond Adams)** [2018/PRO/cpr/00035], this Court dealt with Unless Orders. At paragraph 21, I stated:

“Learned Counsel Mr. Jenkins submits that the leading case in this jurisdiction on Unless Orders is **Mega Management Limited v Southward Ventures Depository Trust et al v E. Dawson Roberts and Lori Lowe SCCivApp No. 4 of 2007**, a case decided after the introduction of RSC O.31A, but which did not consider the effect of that Order. However, the case is of some assistance in the following paragraphs:

#### **Paragraph 39**

“Where a party to an application before a court seeks to persuade that court to exercise its discretion in that party’s favour and where the law requires that party to adduce cogent evidence on which the court may be invited to exercise that discretion, it is unacceptable to make general averments as the only evidence on which the court is expected to decide. This, I think, is particularly so, where the party is ex facie, in breach of a peremptory order of the court.”

#### **Paragraph 70**

“70. The justification for [the power for the Court to make Unless Orders] was stated by Roskill LJ., in **Samuels v Linzi Dresses Ltd** [1981] QB 115 is the principle that “orders are made to be complied with not ignored” at page 126 – 127.

The learned authors of the Supreme Court Practice (cited above) go on to point out that the power is not as harsh as might be thought because –

**“(a) mere failure to comply with a rule is not regarded as sufficient for its exercise; there must be disobedience of a direct peremptory order;**

**(b) it is unusual to make a peremptory order on the first occasion that the matter is before the court;**

**(c) if the defaulter has any reasonable explanation, he may obtain an extension of time even (though rarely) after the time expired;**

**(d) generally speaking, a defaulter can cure his default at any time before the order for dismissal is made (or, if postponed) takes effect.”**

In such circumstances, it is usually fair to conclude that a party who persists in his default either has no confidence in his case or has lost the desire to pursue it – at page 471 of the work cited. [Emphasis added]”

[21] Even with Unless Orders, a Court still retains the discretionary power to grant an extension of time.

### **Extension of time**

[22] It is undisputed that the Court has jurisdiction to extend time. That jurisdiction is derived from RSC O. 31 A rules 18 (1) and (2) (b). It states:

**“18. (1) The Court’s powers in this rule are in addition to any powers given to the Court by any other rule, practice direction or enactment.**

**(2) Except where these Rules provide otherwise, the Court may –**

**(a).....**

**(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for the extension is made after the time for compliance has passed.”** [Emphasis added]

### **Relief from sanctions**

[23] The principles governing the exercise of discretion when the Court is considering applications for relief from sanctions are set out in RSC O.31A r. 25. The Court may grant relief from a sanction if the defaulting party is able to satisfy the prescribed test, as set out below:

**“25. (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 counsel and attorney;**

**(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.”[Emphasis added]**

## **Discussion**

[24] Learned Queen's Counsel Mrs. Rolle submitted that the applications for relief from sanctions are now moot because, by virtue of the Order, the three actions stand dismissed with costs. According to her, the only issue for consideration is whether the Court will exercise its discretion and grant an extension of time to file and serve the List of Documents given that any extension of time now will mean that the trial dates will have to be vacated.

[25] Learned Counsel for the Second and Third Defendants, Mr. Major Jr. made brief oral submissions endorsing Mrs. Rolle's submissions.

- [26] Learned Counsel Mr. Hamilton, appearing for the Plaintiffs, submitted that he had filed his applications seeking relief from sanctions/extension of time since 8 June 2021 and as such, the Court should exercise its discretion of favour of the Plaintiffs and grant them the relief sought notwithstanding that the trial dates will be vacated. He argued that he was not responsible for the delay caused in the Court not hearing the applications at an earlier date. He insisted that he had made efforts to find out the name of the judge who was assigned to hear the applications.
- [27] It is my firm view that the applications for relief from sanctions are not moot. In any event, the Plaintiffs also seek an extension of time to file and serve their List of Documents.
- [28] With respect to applications for relief from sanctions, the first requirement is that such application must be made promptly. Promptly, to my mind, does not mean that the application must be made before the non-compliance takes place. It can be made after the date for compliance has expired as was evident in **Irma Paulette Robert (qua Administratrix of the Estate of her minor son Jermal aka Jamal Robert (deceased) v (1) Cyrus Faulkner (2) The Attorney General of Saint Lucia** (Civil Appeal No. 29 of 2007) – Judgment dated 25 October 2007: see paragraphs 24 to 42 and also **Wycliffe Baird v David Goldgar and Ors** HCVAP 2008/005 ( In the Court of Appeal of Saint Christopher and Nevis) at paragraphs 4 to 22.
- [29] In this case, the Plaintiffs’ applications for relief from sanctions were filed on 8 June 2021; shortly after Mr. Sears QC returned to the jurisdiction on 4 June 2021. It cannot be said that the applications were not made promptly.
- [30] Next, by RSC O. 31A, rule 25 (2), the Court may grant relief from sanctions if it is satisfied that (a) the failure was not intentional; (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other orders and directions. According to Mrs. Bethel, the failure to comply was unintentional

and there is a good explanation for it in that Mr. Sears QC had to travel abroad to attend his brother's funeral and for medical reasons. In addition, the Plaintiffs have generally complied with all other orders and directions of the Court.

[31] Besides the three mandatory requirements, the Court must also have regard to a number of other factors stipulated in rule 25(3) including the interests of the administration of justice. In my opinion, the interests of the administration of justice dictate that these three actions be determined on their merits. The actions are important to the parties as they were former high ranking employees of the Second and Third Defendants. They have sued the Second and Third Defendants for damages for wrongful dismissal and or the wrongful and unlawful removal from the Board of those defendants' companies. They have also sued the First Defendant, a former Minister of Government, for the misfeasance of public office and for slander.

[32] Even though the Plaintiffs should have been more proactive in ensuring that the orders of the Court are complied with, they are not solely responsible for the fact that their Summonses were not brought to the attention of the Court. At the hearing on 12 October 2021, I questioned Mr. Hamilton as to the reason(s) for not emailing me since, by 29 July 2021, he knew that I was the judge dealing with these matters. The Second and Third Defendants also had a Summons seeking relief from sanctions which was pending. They also could have advised the Court of their extant application. Under Order 31A, all parties have a corresponding duty to assist the Court to ensure that interlocutory applications are dealt with promptly in order to prevent protracted delays and more importantly, the vacation of trial dates.

[33] The paramount objective of Order 31A, Part 1 is to deal with cases actively by managing them, which may include - (i) **encouraging the parties to co-operate with each other in the conduct of the proceedings**; (ii) setting time standards or otherwise controlling the progress of the case; (iii) considering whether the likely benefits of taking a particular step will justify the cost of taking that step;

**giving directions to ensure that the trial of the case proceeds quickly and efficiently** and (iv) ensuring that no party gains an unfair advantage by reason of that party's failure to give disclosure of all relevant facts prior to the trial or the hearing of any application.

[34] The Plaintiffs' List of Documents are ready to be filed. They are exhibited to the Affidavit of Linette Nisbett. Once filed, the Court will give further directions on a way forward. The filing and serving of witness statements have not taken place. Many witnesses are slated to testify. Then there are other issues to be addressed including but not limited to the standing of the First Defendant as he is no longer a Minister of the Government and he was sued in that capacity. According to Mr. Rolle QC, he is no longer able to instruct her and, as it stands, she is only instructed by the Fourth Defendant, the Attorney General. This issue would have to be soberly considered.

[35] Having weighed all of these matters in the balance, I conclude that the Plaintiffs should be granted relief from sanctions so as to allow for a determination of the actions on their merit. Accordingly, I will extend time to Monday, 18 October 2021 for the Plaintiffs to file and serve their List of Documents on the Defendants. There shall be mutual inspection and exchange of documents on or before 10 November 2021. The Second and Third Defendants are also granted relief from sanctions and their Verifying Affidavit filed on 1 June 2021 do stand as duly filed.

[36] The trial dates fixed for 15 to 23 November 2021 are hereby vacated.

#### **Order**

[37] The Order of this Court is as follows:

- 1. The Plaintiffs as well as the Second and Third Defendants shall be relieved from sanctions for their failure to comply strictly with the Case Management Order dated 15 April 2021.**
- 2. The Plaintiffs are granted an extension of time to file and serve their List of Documents, with verifying Affidavit on or before Monday 18 October 2021.**

- 3. The Second and Third Defendants are granted an extension of time with respect to the filing of their Verifying Affidavit filed herein on 1 June 2021, which is hereby deemed as duly filed.**
- 4. The costs of and occasioned by this application be costs in the cause.**
- 5. The trial dates fixed for 15 to 23 November 2021 are hereby vacated.**
- 6. There shall be a Further Case Management Conference on 15 November 2021 at 11:00 a.m.**
- 7. Tentative trial dates are fixed for the week commencing Monday 6 February 2022.**

**Dated this 15<sup>th</sup> day of October 2021**

**Indra H. Charles  
Justice**