

**COMMONWEALTH OF THE BAHAMAS**

**2013**

**IN THE SUPREME COURT**

**CLE/gen/00152**

**Common Law & Equity Division**

**B E T W E E N**

**JOY ANN JIBRILU**

**Plaintiff**

**AND**

**DR. CHARLES W. DIGGISS**

**Defendant**

**AND**

**DR. EUGENE MARCUS COOPER**

**Second Defendant**

**AND**

**TRAUMA & EMERGENCY MEDICAL SERVICES LTD**

**Third Defendant**

**AND**

**SURGICAL ASSOCIATES LTD a.k.a.**

**SURGICAL ASSOCIATES BAHAMAS LTD**

**Fourth Defendant**

**Before The Hon. Mr. Justice Neil Brathwaite**

Sidney Cambridge, Palincia Hunter for the Plaintiff

Gail Lockhart-Charles, Candice Knowles for the First, Third, and Fourth Defendants

Jacy Whittaker for the Second Defendant

## **DECISION**

1. This action was commenced by a generally endorsed Writ of Summons filed 4<sup>th</sup> February 2013, seeking damages for personal injuries as a result of negligence, breach of contract, and breach of duty. The matter eventually proceeded to a case management hearing on 1<sup>st</sup> October, 2019 before Her Ladyship Justice Indra Charles, who gave full

directions for the progress of the matter which was scheduled for trial commencing 15<sup>th</sup> June 2021. None of the parties complied with those directions.

2. At a further hearing on 30<sup>th</sup> June 2020, leave was granted to withdraw against the Fifth Defendant, and the parties were ordered to agree an order for further directions in the matter.
3. Further directions were given on 5<sup>th</sup> May 2021, when the trial was fixed to commence on 25<sup>th</sup> October 2021, and the court ordered, among other things, that: (1) "The 1<sup>st</sup> as well as the 3<sup>rd</sup>/4<sup>th</sup> Defendants are to file and serve their List of Documents that they intend to rely upon at trial, the same to be filed with verifying affidavit by 14<sup>th</sup> May 2021. Should there be a default by any of these parties, their respective defence shall stand dismissed. (4) All witness statements including those of the expert witnesses (including any joint expert report) are to be filed and served by 15<sup>th</sup> September 2021, failing which the defaulting party's defence or claim shall stand dismissed with costs."
4. The Plaintiff applies by Summons filed 31<sup>st</sup> August 2021 to have that Order varied or set aside. The Summons is supported by the affidavit of Regina Bonaby filed 12<sup>th</sup> November 2021, in which she avers as follows:
5. The Summons is supported by the affidavit of Carolyn Charlton, also filed 16<sup>th</sup> August 2021, in which she avers as follows:
  - "8. In or about June 2021 on taking instructions from the Plaintiff in relation to the preparation of her Witness Statement in the subject matter, the Plaintiff instructed her counsel that she may be required to have surgery.
  9. In or about August 2021 counsel for the Plaintiff was informed by the Plaintiff that she was scheduled to have major surgery. On or about August 4<sup>th</sup>, 2021 the Plaintiff had major surgery and was on sick leave for the month of August. Exhibited and marked hereto "RB-1" is a true copy of the sick leave letter dated September 24", 2021.
  10. Mr. Wayne Munroe Q.C., at all material times was lead counsel and the Principal of the firm Messrs. Munroe & Associates. For the last two weeks in July 2021 and the first two weeks in August, Mr. Wayne Munroe, QC., illness and hospitalization was widely reported in local daily newspapers. Exhibited and marked hereto "RB-2" is a true copy of the newspaper article entitled "QC Wayne Munroe In Hospital With Covid" published on The Tribune's website and written by Tribune Senior Reporter, Rashad Rolle on August 5<sup>th</sup> 2021
  11. Further, upon Mr. Munroe's return to office it was pronounced on or about August 18 2021 that general elections were being held on September 16", 2021. At the time when the above announcement was made Mr. Wayne Munroe, QC., at the time was vying to be an elected Member of Parliament for the constituency of Free Town resulting in lead counsel taking leave from the third week in August up until September 16", 2021 when he was

elected as a Member of Parliament. Exhibited and marked hereto "RB-3" is a true copy of the newspaper article entitled "Prime Minister Announces General Election will be on 16<sup>th</sup> September" as published on the Tribune's website on August 20", 2021.

12. It should be noted that the surgery carried out on August 4", 2021 impacts the instant case and resultantly a medical report was requested so that the same can be disclosed to all parties in the matter.

13. Due to the illness of the Plaintiff, the illness of lead counsel and the general election, counsel for the Plaintiff was unable to comply with the Directions Order as handed down on May 5th, 2021 and Counsel for the Plaintiff made an application for relief from sanction by Summons filed August 31<sup>st</sup>, 2021."

### **PLAINTIFF'S SUBMISSIONS**

1. The Plaintiff relies on *Order 31A r.25 (1) & (2)* of the Rules of the Supreme Court, which reads as follows:

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.

6. The Plaintiff submits that the application for relief from sanctions was made in a timely manner, and that there are good reasons for the failure to comply, as the Plaintiff was ill, as evidenced by the medical certificate exhibited to the affidavit of Regina Bonaby, and the Plaintiff's counsel was also ill.
7. Further, lead counsel for the Plaintiff was involved in a general election which was called at short notice, in which he was successfully elected as a Member of Parliament, subsequently being appointed to the Cabinet. The Plaintiff further submits that these facts necessitated the taking of instructions from the client to determine who would take carriage of the matter.
8. The Plaintiff relies on the case of *Darnell Osborne Nicola Thompson Roy Nicholas Dean* Plaintiffs v. *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) and *The Bahamas Electricity Corporation ("BEC") And The Bahamas Power And Light Company Limited ("BPL") And The Attorney General Of The Commonwealth Of The Bahamas* (In a representative capacity) 2019/CLE/gen/00156) heard together with 2019/CLE/gen/00157) and 2019/CLE/gen/00158), in which counsel for the Plaintiff made an application for relief from sanction. In determining whether to grant relief the court took into consideration the timing of the application, the fact that the trial dates would have to be vacated, the interests of the administration of justice, and the previous conduct of the Plaintiff in complying with the court's orders. The learned Charles J. at pg 2 granted relief, stating that:

"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..."
9. The Plaintiff further submits that they have generally complied with all other rules, practice directions, and directions. It is suggested that a failure to compile an agreed list of documents was due to the fact that the Plaintiff was not in receipt of a list of documents from the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants. They further submit that the application for relief was made promptly, although they rely on the case of *Darnell Osborne* cited above, at paragraph 28 as authority for the proposition that there is no requirement for the application for relief to be made before the non-compliance takes place.

## 2<sup>ND</sup> DEFENDANT'S SUBMISSIONS

10. The 2<sup>nd</sup> Defendant commenced by noting that the Plaintiff is a highly visible public official, and cited newspaper reports from June, July, August, September, and October

2021 of public engagements by the Plaintiff. It is submitted that these undermine the contention that the Plaintiff was not available to give a witness statement due to medical reasons. They also note that no draft witness statements have been provided, nor have any timelines been indicated for the provision of the same.

11. The 2<sup>nd</sup> Defendant further submits that the absence of lead counsel within the last 3 months of a 9 year period does not provide a good enough explanation, and suggest that this amounts to an administrative issue as there were other attorneys within the Chambers that could have assisted with the drafting of the necessary statements. They rely on *Attorney General v Universal Projects Ltd [2011] UKPC 37*, in which the Privy Council stated:

“If the explanation for the breach... connotes real or substantial fault on the part of the defendant, then it does not have a “good” explanation for the breach. To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.”

12. Finally, the 2<sup>nd</sup> Defendant submits that this matter has been pending for nine years, and to grant relief now would be unfair to the Defendants who have had the matter hanging over their heads for that period of time.

### **1<sup>st</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> DEFENDANT’S SUBMISSIONS**

13. Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants supports and adopts the submissions tendered on behalf of the 1<sup>st</sup> Defendant, and goes on to rely on the authority of *Robert Adams v Gregory Cottis SCCivApp & CAIS No. 23 of 2021*, upholding the decision of the learned Charles J., in which relief from sanctions was refused. In that case, Cottis sought relief from sanctions on the basis, and sought to explain the failure to comply by referring to a medical condition. Charles J found at paragraph 45 that, “notwithstanding the medical condition, Mr. Cottis has offered no explanation as to why he is unable to progress the work of drafting the List of Documents with the assistance of his own administrative staff. To date, Mr. Cottis has proffered not a shred of evidence as to when he intends to comply with the December 2019 Order.”
14. The 1<sup>st</sup> Defendant further submits that the explanation offered by the Plaintiff is insufficient, and that the submission that the lack of disclosure by the Defendants contributed to the delay is a red herring, as the Defendants had already submitted their lists of documents, each of which indicated that the documents were available for inspection. They therefore submit that relief should be refused.

## CONSIDERATION

1. The correct approach to the question of sanctions as a result of a failure to comply with an Unless Order was set out in the case of *Hytec Information Systems Limited v. Council Of City Of Coventry [1996] EWCA Civ 1099 (4th December, 1996)*, where Lord Woolf MR said as follows:
  - “1. An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;
  2. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;
  3. This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;
  4. It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;
  5. A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;
  6. The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;
  7. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two;”
2. The issue of relief from sanctions was again extensively considered in **Denton & Ors v TH White Ltd and Anor [2015] 1 All ER 880**. In that case, the Court of Appeal of England & Wales set out a three-stage test to be applied on an application for relief from sanctions. That test requires the court to:
  - 1) identify and assess the seriousness and significance of the non-compliance
  - 2) consider why the breach occurred
  - 3) evaluate all circumstances of the case so the application is dealt with fairly

3. The non-compliance in this case is the failure to comply with directions to file witness statements, which has resulted in the matter not being able to proceed to trial on the fixed dates. The breach is therefore significant.
4. In considering why the breach occurred, and the circumstances of this case, I accept that the application for relief was made in a timely manner, and there is no contention that the failure to comply was intentional. The main bone of contention in this case relates to the reasons for the delay.
5. In seeking to address the issue of the delay, the Defendants in written submissions referred to four publications indicating the activities of the Plaintiff, who was a public figure, and indicated that if there was any objection to reference to those articles, the same could be exhibited to an affidavit. There was no such objection. The court checked the reference articles, which are readily available digitally, and noted that the date attributed to one article is incorrect, as it is given in the submissions as August 2021, but the actual article was published in August 2020. This article is therefore not relevant to this application. The remaining three articles refer to a conference June 30<sup>th</sup> 2021 to July 2<sup>nd</sup> 2021; an interview on July 4<sup>th</sup> 2021, and an interview in October 2021. It can therefore be inferred that the Plaintiff was not incapacitated in June and July 2021.
6. Even if no reference is made to the mentioned articles, the Plaintiff's surgery, which is offered as an explanation for the failure to comply, occurred in August 2021, while the Unless order was made in May 2021. There was therefore a period of approximately two months for which there is no explanation.
7. The Plaintiff also refers to the illness of counsel, and the general election. It must be noted that the article which references the counsel's illness was published on 5<sup>th</sup> August 2021, again more than two months after the Unless order was made.
8. The affidavit relied upon by the Plaintiff also indicates that the Plaintiff advised counsel of her impending surgery in June 2021, and the surgery did not occur until August, coinciding with the illness of counsel. Yet despite the court's order and the impending surgery, nothing seems to have injected any sense of alacrity into the Plaintiff.
9. This matter must also be viewed in light of the fact that this matter was filed since 2013, and case management directions were initially given in October 2019, pursuant to which witness statements should have been completed by April 2020. I accept that the COVID 19 pandemic could have adversely impacted compliance with that date, but a further hearing in June 2020 again failed to create any sense of urgency.
10. Having regard to the facts, it appears that the events which are prayed in explanation occurred more than two months after the order was made. While there is no explanation for the failure to act in the initial two months, the uncontroverted illness of counsel, and the illness of the Plaintiff, do provide a reasonable explanation for the approximately

statements, it might in this case be even more important to have regard to any other expert witnesses who might be required. Such evidence would absolutely require the attentions of lead counsel, properly instructed, and well versed in the facts of the case.

24. In the circumstances of this case, I am of the view that justice requires that relief be granted. However, justice also requires that there be sanctions as a result of the time and costs wasted in this matter. I therefore order that the witness statements and expert reports to be relied upon by the Plaintiff be filed before the expiration of fourteen days from the date of this order, failing which the writ of summons will stand as struck out. I also award costs thrown away to the Defendants, to be taxed if not agreed.

Dated this <sup>24<sup>th</sup></sup> day of January, A.D. 2023



Neil Brathwaite  
Justice