RELIEF FROM SANCTIONS - THE GRAVE CONSEQUENCES OF NON-COMPLIANCE WITH COURT ORDERS & RULES

This article is part of a longer paper written and presented in June 2015. The original paper focused on the robust approach the English courts currently take to relief from sanction applications, and compared it with the approach taken by the Jamaican courts. For the purposes of this shorter article, the writers focus mainly on relief from sanction applications in Jamaica, and seek to explain how (in their view) the local case law has developed in a way that may give rise to unjust results.

Relief from sanction applications - Jamaica vs England

Rule 26.8 of the Jamaican Civil Procedure Rules ("the CPR") governs relief from sanction applications. The rule is similar to rule 3.9(1) of the English CPR, as it stood before April 2013. The pre-2013 rule provided that:

> On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order, the court will consider all the circumstances including—
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
> (f) whether the failure to comply was caused by the party or his legal representatives;
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party.

In 2013, the English rule was amended to read:

> On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.

In light of the amendment, the English court now applies a three-stage test when deciding relief from sanction applications. In *Denton v TH White Ltd,*[1] the three stages were described in the following way:

[1] [2014] 1 WLR 3926

(a) First, the court should identify and assess the seriousness and significance of the failure to comply with the rule, practice direction or court order.

(b) Second, if the breach is non-trivial, the court should consider why the default occurred; and

(c) third, the court should evaluate "all the circumstances of the case, so as to enable it to deal justly with the application

Commentators have described this test as being more robust than the approach taken prior to 2013.

The Jamaican relief from sanction rules are similar to the pre-2013 English rules, in the sense that they require the court to consider the same factors when determining such applications. However, whereas the pre-2013 English rules give a long list of factors to consider, the Jamaican rules express some of the factors as pre-requisites to fulfil, rather than mere considerations to bear in mind.

Rule 26.8(1) starts by requiring the application to be made promptly and be supported by affidavit evidence. It states:

> (1) An application for relief from any sanction imposed for a deadline to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.

Rule 26.8(2) then requires the court to satisfy itself that the failure to comply was not intentional and that there is a good explanation for it. It states:

> (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.

Finally, rule 26.8(3) gives a list of factors the court must consider when deciding such applications. It provides:

> (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 attorney-at-law;

(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.

In *H.B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al,*[2] Brooks JA interpreted this rule as creating a step-by-step process. That is, a judge must consider whether an applicant has satisfied Rules 26.8(1) and 26.8(2) before considering the factors listed in Rule 26.8(3). The learned Justice of Appeal said:

> An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, *must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application*. Promptitude does, however, allow some degree of flexibility and thus, *if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). Should he fail to meet those requirements then the court is precluded from granting him relief***.** There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant.[3]

In that case, Master Lindo had ordered HB Ramsay and Associates Ltd and other applicants (collectively, "the Ramsay Applicants") to pay certain costs to Jamaica Redevelopment Foundation Inc. and the Workers Bank. They failed to obey that order.

At a later hearing, Master Lindo, in response to the non-compliance, made an unless order, requiring the Ramsay Applicants to pay the costs on or before June 18, 2010 at 2:00 p.m., or have their statement of case stand struck out.

The Ramsay Applicants paid their attorneys-at-law the money to settle the costs on June 16 (two days before the deadline) but the attorneys inadvertently did not do so until July 14, 2010 (a month after the deadline).

The Ramsay Applicants filed the application for relief from sanction on July 15, 2010. The application came before Fraser J. He did not consider it a prompt application in accordance with 26.8(1) and, therefore, dismissed it.

[2] [2013] JMCA Civ 1
[3] At paragraph [31]

The decision was appealed, but the Court of Appeal agreed with Fraser J that the application did not satisfy the need for promptness. In his judgment, Brooks JA advocated for a more stringent approach to dilatory applications,[4] and applied that stringent approach to the situation at hand. He said:

> It is inconceivable that it should have taken almost a month (15 July 2010) for the application for relief from sanctions to have been filed. The appellants' attorneys-at-law should have been eagerly expecting the monies and anxious to turn them over to their counterparts, on or before 18 June 2010. They should have been pressing their clients for the funds. In addition, the appellants, having made the payment, should have been anxious to have word from their attorneys-at-law, that the sum had been remitted and that their claim had been saved from the fatal axe…
>
> … In the circumstances, I find that the application was not made promptly and, for that reason, should not be considered. It should, therefore, fail."[5]

Although Brooks JA did not need to consider whether any other pre-requisites had been satisfied, he went on to do so anyway. He held that the application also failed to comply with Rule 26.8(2) because the Ramsay Applicants did not give a good explanation for non-compliance. He accepted the respondents' argument that the mere statement in the affidavit that the non-compliance was inadvertent was not an explanation. He then added that while an oversight by one's attorneys can be an explanation, it is not likely to be a good one.

One could argue that applying rule 26.8 in this way creates a robust regime that dwarfs the perceived stringency of the English three-staged test. At least under the three stage test, a trivial breach will likely be forgiven, and a relatively late application for relief may be considered on its merits. After the *HB Ramsay* decision, there seems to be very little scope in Jamaica for excusing inexplicable trivial breaches, or relatively late applications for relief.

Take, for example, the frequent occurrence of a party filing a list of documents after the date set by the case management judge. Rule 28.14(1) imposes an automatic sanction for such a breach, in that, any document not disclosed by the scheduled date may not be relied on. Very often the non-compliant party never files a written application for relief from sanctions. Rather, his/her attorney appears in chambers at the pre-trial review (which is usually months after the date set for disclosure) and asks for relief orally, without filing an affidavit that gives a good explanation. Alternatively, an order is sought that the list of documents "stands as if filed in time"[6].

Adopting the stringent approach Brooks JA advocates in *HB Ramsay*, would mean that the court would seldom (if ever) grant relief under rule 26.8 in those circumstances. Even if a non-compliant party had a good explanation for filing a list of documents a day or two late, an application for relief would likely fail if it is not made shortly after the breach occurs. It most certainly will fail if there is no explanation for the missed deadline.

[4] At paragraph [13]
[5] Paragraphs [16] to [18]
[6] Sometimes no order is sought at all, and the breach is ignored!

If the writers are correct in their assessment of the inflexibility of the "HB Ramsay approach", they believe that the Jamaican courts must be careful not to facilitate the unpleasant situation that Dyson MR and Vos LJ describe in *Denton v TH White Ltd*[7]. The learned Justices of Appeal warned against litigants opportunistically opposing relief from sanction applications, hoping to take advantage of minor mistakes by opposing parties. They said:

> [41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage.

To dissuade the opportunism mentioned in this passage, their lordships encouraged judges to penalise opportunists as severely as they would non-compliant parties. They said:

> [43] The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions[8]

What one can glean from this passage, and other English authorities, is that the English courts are attempting to draw a delicate balance between having a strict approach to relief from sanctions applications (on the one hand) and ensuring justice is done (on the other). It is questionable whether the *HB Ramsay* approach achieves that balance.

Application of the *HB Ramsay* approach by first instance judges

The writers have not been able to gauge whether the *H.B Ramsay* approach has been followed faithfully by first instance judges. They note that Laing J. purported to apply it in *HDX 9000 Inc v Pricewaterhouse (A Firm)*[9], but in their view, the learned judge displayed leniency that was inconsistent with Brooks JA's interpretation of rule 26.8. In that case, the claimant ("HDX") failed to comply with certain unless orders, and its claim was automatically struck out. HDX applied for relief from sanctions more than six months after the sanction took effect. The court held that HDX's application was not prompt, and that its explanation for breaching the unless orders was not a good one.

[7] Supra
[8] At paragraph [43]
[9] [2015] JMCC Comm 3

Despite failing to satisfy both rule 26.8(1) and 26.8(2) Laing J. went on to consider the factors in rule 26.8(3) and granted relief. This was exactly what Brooks JA said *could* not be done[10]. It is possible that other first instance judges are similarly circumventing the *H.B. Ramsay* decision in an effort to prevent unduly harsh outcomes.

Conclusion

It is clear from the English authorities that, even under their robust regime, the courts are wary of unjust results caused by an unnecessarily harsh approach to relief from sanction applications. We in Jamaica should take care not to allow our arguably harsher regime to deny claimants with strong cases the opportunity to have their cases heard, merely because they (or their attorneys) may have committed a minor procedural mistake.

Sidia Smith and Sundiata Gibbs

[10] *H.B. Ramsay & Associates ltd et al v Jamaica Redevelopment Foundation Inc. et al* [2013] JMCA Civ 1 at paragraph [31]