

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division  
2018/CLE/gen/FP/00371**

**BETWEEN**

**STEPHEN B. WILCHCOMBE  
Plaintiff**

**AND**

**FREDERICK R. M. SMITH  
Defendant**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Stephen B. Wilchcombe Pro Se  
Mr. Garth Philippe for the Defendant

HEARING DATE: February 17, 2022

**RULING**

**Hanna-Adderley, J**

**Introduction:**

1. By way of a Summons filed September 23, 2021 the Defendant seeks, pursuant to Order 24, Rule 16 of the Rules of the Supreme Court ("RSC"), Order 31A, Rule 21 of the RSC and the Court's inherent jurisdiction an Order that this Action be dismissed for the Plaintiff's failure to comply with the Order made on June 17, 2021 and filed on July 20, 2021 giving directions for Discovery and costs. The application is supported by the Affidavit of Shekeria Hudson also filed September 23, 2021 and her Supplemental Affidavit filed September 29, 2021, the Affidavit of Deandra Jones filed March 8, 2022 and the 2<sup>nd</sup> Affidavit of Deandra Jones filed March 21, 2022. The Plaintiff opposes the application and seeks to rely on his Affidavit filed on January 24, 2022 and his Affidavits filed February 17, 2022 and March 1, 2022, along with the Affidavit of Hesley Rolle filed March 1, 2022. The Defendant relies on his Submissions filed February 15, 2022 and Supplemental

Submissions dated March 8, 2022. The Plaintiff relies on oral Submissions made on the date of the hearing and Submissions filed on March 30, 2022.

### **Statement of Facts**

2. The parties appeared before the Court on a Case Management Conference on June 17, 2021. The Court made the following Order ("**the Order**"):
  - "1. That each party file and serve a List of Documents on or before the 15<sup>th</sup> July, 2021.
  2. That there be mutual exchange and inspection of documents on or before the 29<sup>th</sup> July, 2021.
  3. That an agreed statement of facts and issues be filed on or before the 26<sup>th</sup> August 2021.
  4. In the event items the parties are unable to agree on the statement of facts and issues, each party to file their own on or before the 2<sup>nd</sup> September, 2021.
  5. That the parties file and exchange Witness Statements on or before the 1<sup>st</sup> November, 2021.
  6. That an agreed bundle of pleadings and an agreed bundle of documents be filed on or before the 1<sup>st</sup> December, 2021.
  7. That in the event the parties are not able to agree the bundle of documents, each party shall file its bundle of documents on or before the 8<sup>th</sup> December, 2021.
  8. That the Listing Questionnaire is to be filed on or before the 17<sup>th</sup> February, 2022.
  9. That a pre-trial review be on the 17<sup>th</sup> February, 2022 at 10:00 o'clock in the fore-noon.
  10. That the final pre-trial review be on the 7<sup>th</sup> April, 2022 at 10:00 o'clock in the fore-noon.
  11. Trial, Place: - Freeport, Grand Bahama Mode: - Judge alone – before the Honourable Mrs. Justice Petra Hanna-Adderley at the Supreme Court, Garnet Levarity Justice Centre, Freeport, Grand Bahama.
  12. Estimated length for Trial:- Two (2) days on the 2<sup>nd</sup> and 3<sup>rd</sup> day, May, 2022 at 10:00 o'clock in the fore-noon.
  13. The parties have liberty to agree on one occasion if necessary, a short extension. Further extensions shall be by leave of the Court.
  14. Costs of and occasioned by this hearing are in the cause."

3. By September 23, 2021 the only pleading filed by the Plaintiff pursuant to the Order was a List of Documents filed July 20, 2021, 5 days outside of the date for the filing and service of the same on the Defendant. On January 24, 2022 the Plaintiff filed an Amended Plaintiff's List of Documents and on February 11, 2022 a Statement of Facts and Issues and his Witness Statement filed February 18, 2022. It was not until the date of the hearing that the Plaintiff filed an Affidavit of Service, sworn by the Plaintiff himself, stating that he personally served the Chambers of Callenders & Co with the Amended List of Documents on January 24, 2022. There is no evidence that the Statement of Facts and Issues or the Witness Statement have been served on the Defendant by the Plaintiff.

### **Evidence**

4. Ms. Shekeria Hudson states, in part, in her Affidavits that in compliance with the Order the Defendant filed and served his List of Documents on July 15, 2021 but that the Plaintiff did not file his List of Documents until July 20, 2021 in breach of the Order. That the Defendant is aware of Supreme Court Actions FP/CLE/gen/325/2001 and FP/CLE/gen/264/2011 ("**the Philico Actions**") which he states touch and concern the subject Lot 23, Block ZZ, Section One, Bahamia South Subdivision, Freeport Grand Bahama and that the Plaintiff's List of Documents did not mention any of the documents from the Philico Actions. That on July 27 and August 23, 2021 the Defendant wrote to the Plaintiff requesting discovery of the relevant documents in the Philico Action and that it was not until August 24, 2021 that the Plaintiff responded by stating "you will get your Amended List". On August 27, 2021 the Defendant's Counsel had a teleconference with the Plaintiff who agreed that it would be difficult for the Defendant to prepare his Statement of Facts and Issues without the benefit of the Amended List of Documents. The Plaintiff undertook to file and serve the same during the week of the August 30, 2021. As at the date of the swearing of Ms. Hudson's Affidavit the Plaintiff had failed to provide discovery as requested.
5. Ms. Deandra Jones states, in part, in her Affidavits that on February 17, 2022 that she was informed by Mr. Garth Philippe, Counsel for the Defendant that at the Hearing the Plaintiff stated that he personally served the Amended List of Documents and his Affidavit filed on January 24, 2022 on Callenders & Co. That after the hearing she received instructions from Mr. Philippe to make checks of the Firm's records and employees as to



whether the Firm was served with the Plaintiff's List of Documents, Amended List of Documents and Affidavit of Stephen Wilchcombe filed January 24, 2022. She made enquires of the Receptionists and Legal Assistants as to whether any of them had been served or received these documents. The answer was no, the documents had not been received. That the Plaintiff's Amended List of documents omits a number of documents filed in FP/CLE/gen/325/2001. She stated that the Firm had previously conducted a Cause List Search of the Philico Actions and she set out a List of 30 documents filed in Action 325 of 2001 which the Plaintiff's Amended List of documents had failed to include in breach of Discovery and of the Order made on June 17, 2021. That on February 25, 2022 the Plaintiff served his Amended List of Documents on Callenders & Co. but failed to serve his Affidavit filed January 24, 2022. On February 25, 2022 Mr. Philippe informed the Plaintiff that he had not received the Affidavit. The Plaintiff told him that he would get it by February 28, 2022. By March 2, 2022 the Defendant had still not been served with the Affidavit filed January 24, 2022. The Plaintiff then served the Defendant with his Affidavit filed March 1, 2022. The Defendant has yet to be served the January 24, 2022 Affidavit. That the Plaintiff's failure to serve the Defendant with the January 24, 2022 Affidavit and the failure to make discovery were prejudicial to the Defendant and was causing the Defendant to expend time and resources in order to successfully defend the action. The Defendant asks for the dismissal of the Action.

6. On March 1, 2022 the Plaintiff filed an Affidavit Supporting Dismissal of Application in which he stated, in part, that the Defendant's Application was scandalous. He admitted that he did file his List of Documents 5 days late but that the late filing did not constitute a ground for dismissal. That the delay was excusable. That before the Court considers dismissing the action it should make an Unless Order. He acknowledged the request by the Defendant for an Amended List of Documents and stated that by letter dated August 24, 2021, he told the Defendant that he would get the Amended List but that it would take time. That he had to go back 20 years and the files was at RAM. That the 5 days delay in filing the List of Documents was not prolonged. That the Amended List was now filed and served. That the Defendant had failed to appear for inspection despite the request of Plaintiff. That as a Senior Counsel he has no intention of disobeying a Court's Order and apologizes for the late filing. That the Defendant's application should be dismissed as the late filing did not merit a dismissal.

### **Affidavits of Service**

7. On February 17, 2022 the Plaintiff filed an Affidavit of Service sworn by him in January of 2022 in which he states that on Monday January 24, 2022 he served Callenders & Co. with the Amended List of Documents. The Affidavit does not exhibit a Service Receipt. On March 1, 2022 the Plaintiff also filed an Affidavit sworn by Mr. Hesley Rolle attesting to the fact that he, on January 24, 2022 served Callenders & Co. with the Amended List of Documents. The same did not exhibit a Service Receipt. There is no evidence that the January 24, 2022 Affidavit was ever served on the Defendant and so the Court will disregard it.

### **Submissions**

8. Mr. Philippe states, in part, that the Plaintiff knowingly omitted listing certain documents in his list of documents which are or have been in his possession, custody or power relating to matters in question in this action between him and Smith. The Plaintiff admitted that he had in his possession, custody or power documents in Supreme Court Actions FP/CLE/gen/325/2001 and FP/CLE/gen/264/2011 between Philco Development (Bahamas) Limited and the Wilchcombe (**"the Philico Actions"**) which touch and concern the subject Lot 23 Block ZZ, Section One (1), Bahamia South Subdivision situate in the city of Freeport on the island of Grand Bahama (herein referred to as **"the Subject Lot"**) in this action. However, the Plaintiff failed to list the Philico Actions documents and other relevant documents. The Defendant has been left in the dark as to the facts and legal issues canvassed in the Philico Action, which Smith submits was by design on the part of the Plaintiff and thereby suffers prejudice. The Plaintiff requested an amended list of documents from the Plaintiff by letter dated July 27, 2021, setting out documents (primarily filed in the Philico Actions) that are relevant and necessary to proceed in this action because the documents concerned the Subject Lot in this action.
9. Mr. Philippe states that the Plaintiff agreed with Counsel for the Defendant that the Defendant would have difficulties preparing his statement of facts and issues without the benefit of the amended list of documents being filed and served. That the Plaintiff promised to file and serve an amended list of documents, but failed to do so, which prejudices the Defendant from successfully defending this action. That the Plaintiff mounted this action against the Defendant now 3½ years ago, creating a sword of Damocles over the Defendant's head, while the Plaintiff has been very familiar with the

documents in the Philico Actions where he was a party in those actions. Up to the date of filing these submissions, the Plaintiff has failed to make discovery of the said documents.

10. Mr. Philippe submitted that Order 24 rule 16 gives special status to discovery orders in recognition of the importance of discovery. It does so by providing discrete jurisdiction to dismiss an action where there has been non-compliance with discovery obligations. This jurisdiction is within the general jurisdiction in Order 31A where court orders have not been complied with. It also does so by specifying that a party failing to comply with an order for discovery is liable to committal (O 24 r.16 (2)).
11. Finally, the Plaintiff relies on the ruling of Bowe-Darville J in **Matthew Sewell v Attorney General** 2017/CLE/gen/01181 dated August 19<sup>th</sup> 2020 in which the court exercised its powers under Orders 24 rule 16 and 31A rule 20(1)(a) to strike out a defence due to the defendants' failure to comply with case management orders and provide discovery or produce witness statements. He argued that similarly this court should exercise its jurisdiction to dismiss the action for the Plaintiff's failure to comply under Order 24 rule 2 or under the Order, resulting in extreme prejudice to the Defendant.
12. Mr. Philippe submitted that the Plaintiff's March 1, 2022 Affidavit attempts to write into Order 24 Rule 16 a requirement for the wronged party to first obtain an 'unless order' before the court can dismiss the action. But the court's jurisdiction and powers under Order 24 rule 16(1) are not qualified in this way. That there is simply no requirement in the rule to first obtain an unless order. On the contrary, under Order 24 rule 16 the wronged party can seek to dismiss the action and seek an order for committal.
13. Mr. Philippe submitted that this Court ought to dismiss this action in the face of more evidence (Jones Affidavit) demonstrating that the Plaintiff had breach discovery, and the Order made on June 17, 2021 and the Order dated July 20, 2021; that he continues to breach the said Orders and that his conduct in these proceedings continually causes the Defendant and his attorneys time and resources in order to successfully defend this Action.
14. Mr. Philippe further submits that should the Court decide not to dismiss this action, the Defendant should be awarded costs for preparing this application even as the Plaintiff is now attempting to serve an amended list of documents (albeit still in breach of discovery and the Order) at this stage in the proceedings. In respect to this issue of costs, the Defendant relies on my ruling in **Jerkovich v Diamonds by the Sea Ltd. and**



**Callenders & Co.** 2012/CLE/gen/FP/0250 dated 9 October 2020 [TAB 1]. In Jerkovich, the 1<sup>st</sup> defendant applied for discovery but the plaintiff said she did not have any further documents beyond what she had produced. The plaintiff then filed an affidavit verifying that position which effectively disposed of the 1<sup>st</sup> defendant's discovery application. The issue then was who would bear the costs of the 1<sup>st</sup> defendant's discovery application. Costs were awarded to the 1<sup>st</sup> defendant. In this case, even if the Court were to form the view that Plaintiff's Amended List of Documents (served after the Hearing) satisfies discovery (which the Defendant submits it has not), costs ought to be awarded to the Defendant for preparing this application; for appearing for the Hearing; for preparing the Jones Affidavit; and for preparing these supplemental submissions.

15. Mr. Wilchcombe states, in part, that it is not the intention of Order 24 to allow a party to ask for a dismissal of a substantive action because they already filed of document. That he did write to Mr. Philippe and gave him the excuse that the documents were at RAM. That if the Mr. Philippe had come for inspection all of this could have been sorted out. That Mr. Philippe's presentation is very vague. That he had to work over time to get the Amended List to Mr. Philippe because it involved a lot of the work. To go and talk about dismissal the substantive action because he served a document a little late was too extreme. There is something odd about that. That before seeking a dismissal there is another avenue. Mr. Philippe could get the Court to compel him to do what he wanted by seeking an Unless Order. Further , if you do not get the documents on time, you ask the Plaintiff for a next affidavit. That is the other alternative if you follow the letter of the law. That what he gave Mr. Philippe was a very reasonable, intelligent excuse. Mr. Wilchcombe asked the Court to allow the parties to get together and resolve the matter.

16. The Plaintiff further submits that costs should be in the cause.

### **Issues**

17. The issues are:

- (1) whether the Plaintiff has failed to comply with the Order;
- (2) whether the Plaintiff has made Discovery;
- (3) whether the injustice caused to the Defendants by the Plaintiff's failure to comply with the Order is more compelling than any injustice caused to the Plaintiff by the striking out of the Writ of Summons.

## **Analysis and Conclusions**

### **The Law**

18. Order 24 r 1 of the RSC provide as follows:

**“(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.”**

19. Order 24 Rule 2 of the RSC provides the means by which discovery must be made:

**“(1) Subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action. Without prejudice to any directions given by the Court under Order 16, rule 4, this paragraph shall not apply in third party proceedings, including proceedings under that Order involving fourth or subsequent parties.”**

20. Order 24 Rule 16(1) of the RSC provides as follows:

**“16. (1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, order that the defence be struck out and judgment entered accordingly.”**

21. Order 31A Rule 18 (2) (s) of the RSC provides as follows:

**“take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case.”**



22. Order 31A Rule 20 (1) (a) of the RSC provides as follows:

**“(1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —**

**(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings...”**

23. Order 31A Rule 21 (1) of the RSC provides as follows:

**“21. (1) Where 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 as defined in paragraph (7).”**

24. Order 31A Rule 24 (1) of the RSC provides as follows:

**“24. (1) Where the Court makes an order or gives directions the Court may whenever practicable also specify the consequences of failure to comply.”**

25. Order 31A Rule 26 (1) and (3) provides as follows:

**“26. (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or Court order has not been specified by any rule, practice direction or Court order.**

**(2) ...**

**(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, Court order or direction, the Court may make such order as it deems necessary.”**

26. Having considered carefully the Submissions made by Counsel for the Defendant, the Court accepts for the most part the submissions by Mr. Philippe. The Court clearly has the power pursuant to Order 31A Rule 18 (2) (s) of the RSC to give orders to manage the case to ensure a just resolution, and pursuant to Order 31A Rule 20 (1) (a) of the RSC the authority to strike out this action for the Plaintiff's failure to comply with Directions Order, and pursuant to Order 31A Rule 21 (1) for any party to apply for an unless order, and pursuant to Order 31 A Rule 24 (1), and pursuant to Order 31 A Rule 26 (1) and (3) to rectify the failure of a party to comply with a Court order, and pursuant to Order 24 Rule (16) (1) for the Plaintiff's failure to make discovery.

27. There can be no dispute as to whether there has been non-compliance with the Order by the Plaintiff. But, with regard to Discovery, I have some difficulty accepting how the pleadings filed in Action FP/CLE/gen/325/2001 are relevant. The Plaintiff has attached a copy of the Judgment of Senior Justice Hartman Longley, as he then was, dated October 31, 2013 in the Action to his Amended Statement of Claim filed herein on September 24, 2020. The Judgment surely would assist the Defendant with preparing his Statement of Facts & Issues better than the pleadings in that action.
28. The Plaintiff has adopted a rather blasé attitude towards the Plaintiff's obligation to comply with Orders of this Court. He has even failed to make a formal application for relief against imposition of any sanctions. He has been late in filing and serving documents and he has in some cases he has not served the documents on the Defendant at all and he has not provided a valid excuse for failing to procure the requested documents from RAM. However, that said, the Court must not lose sight of principles set out above in Order 31A Rule 18 (2) (s) and Order 31A Rule 26 (1) and (3) of the RSC, that is, doing what accords with the interests of the administration of justice; considering whether the failure to comply has been or can be remedied within a reasonable time; whether the trial date or any likely trial date can still be met if an unless order is granted; and whether striking the Writ of Summons out would cause an injustice to the Plaintiff; further, whether the injustice caused to the Defendant by the Plaintiff's failure to comply with the Order is more compelling than any injustice caused to the Plaintiff by the striking out the Writ of Summons. The balance of the outstanding pleadings can be compiled, filed and served in short order by the parties and the trial can commence on the scheduled dates. More injustice will be caused to the Plaintiff by the striking out of the Writ of Summons than would be caused to the Defendant by having the matter continue to trial.

### **Disposition**

29. In conclusion, having read the pleadings herein, the Affidavits and submissions filed in this application, the provisions of the RSC referred to by the parties, having heard Counsel, and having accepted the submissions of the Defendant's Counsel for the most part, save for the Plaintiff failure to provide Discovery, I shall make an Unless Order, that unless the Plaintiff shall serve on or before April 14, 2022 on the Defendant the Plaintiff's Statement of Facts and Issues filed February 11, 2022, the Witness Statement of Stephen B. Wilchcombe filed February 18, 2022, the Affidavit of Stephen B. Wilchcombe Supporting

Dismissal of Application filed on March 1, 2022, the Affidavit of Service of Hesley Rolle filed on March 1, 2022 and the Submission of Plaintiff filed March 30, 2022; that the Plaintiff shall file and serve within 7 days an Affidavit Verifying the Amended List of Documents and the Parties shall file and serve all outstanding documents and exchange skeleton arguments on or before April 29, 2022, the defaulting parties pleadings shall be struck and judgment shall be entered in favour of the party in compliance.

**Costs**

30. Had Mr. Wilchcombe complied with the Case Management Order made and served all documents filed on the Plaintiff's behalf on the Defendant this matter would have proceeded further and this application would not have been necessary. There is now a possibility that the trial may have to be adjourned because of the number of documents filed but not served on and not seen by the Defendant. Therefore, the costs associated with and occasioned by this application shall be paid by the Plaintiff, and shall be taxed if not agreed.
31. The Defendant is granted leave to Appeal this Ruling.

Dated this 12<sup>th</sup> day of April A. D. 2022

  
**Petra M. Hanna-Adderley**  
**Justice**

