

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2020/CLE/gen/00662

BETWEEN

ANDREW SMITH
SOPHIA SMITH

Claimants

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED
First Defendant

AND

INSURANCE MANAGEMENT (BAHAMAS) LIMITED
Second Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Beryn Duncanson for the Claimants
Michelle Deveaux and Berchel Wilson for the First Defendant
Viola Major for the Second Defendant

8 February 2024

DECISION

WINDER, CJ

[1.] This is my decision on the application of the First Defendant (FCIB) for Judgment against the Claimants following upon their alleged non-compliance with the case management directions order of 17 August 2023. The case management directions were made in the nature of an unless order.

[2.] The background to this matter is more fully set out in my 9 August 2023 written decision. That written decision concerned an application by the Claimants for relief from sanctions and for new case management directions. In granting the Claimants the relief sought, the Court gave new case management directions on 17 August 2023. These were the third such trial directions given by the Court in this action. The alleged non-compliance with those directions are the subject of this application.

[3.] The 17 August 2023 case management directions provided, in part, as follows:

1. The Defendants' Expert Reports in response to the Claimants' expert evidence shall be filed and served on or before Monday 18th September 2023.
2. The Claimants shall provide the Specific Disclosure listed in the Schedule attached to this Order and shall file an Affidavit verifying the Disclosure, on or before Monday 18th September 2023.
 - 2.1 Unless the Claimants comply with the direction at paragraph (2) above, the Claimant's Statement of Claim and Writ of Summons filed herein on 29th July 2022 shall be struck out and this action stand dismissed, with costs to the Defendants to be taxed if not agreed.
3. The Claimants shall file and serve an Agreed Bundle of Documents on or before Friday 13th October 2023. If necessary the parties may file and serve bundles of Non-Agreed documents on or before Friday 13th October 2023.
4. The parties shall serve and exchange Witness Statements on or before Monday 20th November 2023.

...

[4.] The FCIB complaint is captured in its written submissions as follows:

4. In summary the action which was begun in July 2020 has been the subject of 3 case management orders, two of which were unless orders which the Claimants have breached:
 - The Claimants did not comply with the first CMC order of 21 June 2021 and took no steps for almost a year.
 - The Claimants did not comply with the second CMC Order of 31 May 2022 which included an Unless Order provision with the sanction that upon failure to file Expert Witness Statement the Claimants' Statement of Claim would be struck out and Action dismissed.

- The Claimants obtained relief from sanction by judgment of 19 July 2023.
- The Claimants did not comply with the third CMC Order of 17 August 2023 which included an Unless Order provision with the sanction that upon failure to file provide specific disclosure and file an Affidavit Verifying the disclosure the Claimants' Statement of Claim would be struck out and Action dismissed.
- The Claimants have also not complied with paragraphs 3-6 of the case management directions in preparation for the trial dates of 24 – 26 February 2024.

5. Paragraph 2 of the Order dated 17 August 2023 [TAB 1] directed the Claimants to file an Affidavit Verifying the disclosure and to provide such disclosure by 18 September 2023 and included the unless order sanction of strike out of the Statement of Claim and dismissal of the Action for failure to do so.

6. The Claimants have not complied with the unless order terms and did not file an Affidavit Verifying the disclosure by 18 September 2023.

...

19. The Order of 17 August 2023 provided at paragraph 4 for the filing of Witness Statements by 20 November 2023 and at paragraph 4.1 recites the CPR29.11 sanction for failure to do so.

20. The Claimants have failed to file and serve Witness Statements on 20 November 2023 and have in fact have not filed and served any Witness Statements for witnesses of fact to date.

21. FCIB's Witness Statements were filed under sealed envelope on 20 November 2023 pursuant to CPR29.7(2).

22. FCIB therefore seeks an order enforcing the sanction which attaches pursuant to CPR29.11 if the matter is to go to trial.

[5.] The Second Defendant (IM) supports the application of FCIB.

[6.] CPR 26.5 provides:

26.5 Judgment without trial after striking out.

(1) This rule applies where the Court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.

(2) If the party against whom the order was made does not comply with the order, any other party may apply for a judgment to be entered and for costs to be assessed appropriate to the stage that the proceedings have reached.

(3) A party may obtain judgment under this rule by filing a request for judgment.

(4) The request must —

- (a) certify that the right to enter judgment has arisen because the Court's order was not complied with;
- (b) prove service of the "unless order"; and
- (c) state the facts which entitle the party to judgment.

....

(7) If the party wishing to obtain judgment is a defendant, judgment must be for assessed costs.

[7.] The first point to be made is that if the Claimants have breached the terms of the unless order made by this Court then the sanction took effect immediately and the action presently stands dismissed. In *Marcan Shipping (London) Ltd v Kefalas* [2007] 3 All ER 365, Moore-Bick LJ said at para 34:

34 In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect.

The only issue for determination would be whether judgment ought to be entered for FCIB with costs to be assessed.

[8.] In the case of *Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v. Apex Global Management Ltd.* [2015] 2 All ER 206 the UK Supreme Court provides a very useful discussion on the issue of non-compliance with an order of the Court. According to Lord Neuberger P. :

[23] The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction.

[24]Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place.

[25] One of the important aims of the changes embodied in the Civil Procedure Rules and, more recently, following Sir Rupert Jackson's report on costs, was to ensure that procedural orders reflected not only the interests of the litigation concerned, but also the

interests of the efficient administration of justice more generally. The Prince has had two very clear opportunities to comply with the simple obligation to give disclosure in an appropriate fashion,

In this case the UK Supreme Court upheld a decision to enter judgment against the appellant thereby enforcing the sanction for the appellants non-compliance with an unless order. The order required him to sign a disclosure statement personally. Similarly, in the Trinidad & Tobago case of *Charles and Mungal v NW Regional Health Authority and Atty.Gen. (2011) TT HC 199* the High Court granted judgment with costs to the Defendants for non-compliance of an unless order requiring the filing of witness statements in the form directed by the order, notwithstanding the statements filed were signed by the attorney and not the witness.

[9.] The Claimants say that they oppose the application for judgment but have filed no evidence to resist the application. Counsel for the Claimants sought to suggest from the bar table that the terms of the Order were not properly agreed to by his junior or that there was no time imposed for compliance. No evidence was advanced to support the assertion and in any event it ignores the fact that I perfected the Order. With the trial set to begin today, 26 February 2023, it is also difficult to appreciate when the Claimants would have expected that the Order required their compliance.

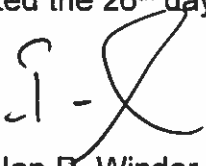
[10.] It is not seriously disputed that the Claimants have not complied with the 17 August 2023 Order of the Court and that the sanctions have therefore taken effect. The Claimants were required to execute and serve an affidavit verifying that they have disclosed, in order to complete the disclosure process. This has not been done. What is more troubling is that there has been no application by the Claimants for relief from the sanctions, some 4 months after the breach. In addition to the failure to complete the disclosure process, the Claimants have not filed witness statements to provide a factual basis for any of the claims alleged by them as required by the Order. They have also not filed any of the bundles required in the Order for the trial to proceed. Yet, there is no application for relief from sanctions.

[11.] This is not the first time that the Claimants have been in breach of my Orders. I would have expected that since the last instance of non-compliance with an unless order, which resulted in my 9 August 2023 written decision, the Claimants would have ensured that their obligations to the Court would have been met timely. This is now the case of a repeated breach of the Court's orders.

[12.] The orders of the Court must be obeyed. This is the Claimants' case and it has not been prosecuted with any measure of alacrity. In my view, FCIB has demonstrated in

accordance with Rule 26.5 an entitlement to judgment and as such I will accede to the application of FCIB and give judgment for costs to be assessed.

Dated the 26th day of February 2024

A handwritten signature in black ink, appearing to be 'I-R. Winder', written over the typed name below.

Sir Ian R. Winder
Chief Justice