COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/GEN/00304

BETWEEN

MYLES BRENNEN

Claimant

AND

STAFFORD PRINCE FERGUSON

Defendant

Before: The Honourable Justice Camille Darville Gomez

Appearances: Mr. Norwood Rolle for the Claimant
Mr. Gary Z Russell for the Defendant

Hearing Date: 20th March, 2024

RULING

DARVILLE GOMEZ, J

[1.] I gave my decision and promised to put my reasons in writing later. I do so now.

[2.] The action was commenced by the Claimant against the Defendant, a contractor for loss and damage alleged to have been caused by unsatisfactory work or work not done in a workmanlike manner.

[3.] At the first case Management Conference ("CMC") both parties were represented. However, difficulties arose between the Defendant and his Counsel resulting in the first trial date scheduled for June, 2023 being vacated.

[4.] Eventually, Counsel for the Defendant withdrew and the Defendant remained unrepresented. However, he personally participated in the hearings post the withdrawal of his Counsel in June, 2023 save for the hearing on 22nd August, 2023 (the "August hearing"). However, he had been made aware of the new trial dates scheduled for 18th September and 19th September, 2023.

[5.] At the August hearing which was a pre-trial review, the September trial dates were vacated because it was obvious that it could not proceed because the Defendant was absent. Therefore, the hearing was adjourned to 25th September, 2023 (the "September hearing") and the Defendant served via email.

[6.] At the September hearing the Defendant had retained Counsel and the Court gave an "Unless Order" in the following terms:

> *"Unless the Defendant complies with the Order of his Lordship the Honourable Mr. Justice Braithwaite made the 18th day of January, 2023 and filed herein on the 3rd day of April, 2023 by the 1st December, 2023 the Defence will be struck out and dismissed and judgment entered for the Claimant for 80,526.88 plus interest and costs.*

[7.] The Defendant in compliance with the Unless Order filed his List of Documents and Witness Statements on 30th November, 2023. However, the Unless Order also required that the documents be served by 1st December, 2023. They were not served by this date due to an issue in locating the Claimant's Counsel office. The documents were eventually collected by Counsel for the Claimant on 5th December 5, 2023.

[8.] By a Notice of Application filed on 8th December, 2023 the Claimant sought the following reliefs on the ground that the Defendant failed to comply with the Unless Order given in the September hearing:

(i) A declaration that the defendant failed to comply with the provision of the order given on 25th September, 2023;

(ii) An order that the Defence be struck out by the operation of that order on 1st December, 2023;

(iii) An order that the Plaintiffs have permission to enter judgment against the Defendant for the amount of $80,526.88 with interest together with costs to be paid to the Plaintiff by the Defendant to be taxed if not agreed.

[9.] At the hearing on 19 December, 2023 (the "December hearing") the Court set the hearing of the Claimant's Notice of Application to 27 February, 2024.

[10.] The Defendant applied by Notice of Application filed on 21st December, 2023 for relief from sanctions pursuant to Rule 26.3 of the CPR for failure to comply with the Unless Order.

[11.] The Court has considered the applications bought by both parties and the submissions by the Claimant.

[12.] The case of **Belgravia International Bank & Trust Co. Ltd. v Sigma** SCCivApp No. 75 of 2021 established that once there is failure to comply with an unless order, the sanction imposed by the unless order is automatic and the order cannot be varied by a judge. For the sanction to not take effect, the defaulting party will have to apply for relief from sanctions.

[13.] The decision in **Belgravia** *supra* followed the decision of **Marcan Shipping (London) Ltd. vs Kefalas** [2007] EWCA Civ 463 in which Moore-Brick LJ said that "*the sanction takes effect without the need for any further order once the party failed to comply with it in any material respect*".

[14.] The result of non-compliance with the Unless Order by 1st December, 2024 was that "*the Defence will be struck out and dismissed and judgment entered for the Claimant for 80,526.88 plus interest and costs.*" Therefore, on 2nd December, 2024 this sanction took effect as a result of the failure to comply with the terms of the Unless Order. If the Defendant failed to apply for relief from sanctions, the Court's only function was limited to deciding what order should properly be made to reflect the sanction which had already taken effect. **Marcan Shipping (London) Ltd.** supra

[15.] Therefore, the Court must decide whether it ought to grant the Defendant relief from sanctions.

[16.] **Denton and others v TH White Ltd. and another; Decadent Vapours Ltd. v Bevans and others; Utilise TDS Ltd. v Davies and others** [2015] 1 All ER 880 set out a three stage test when considering an application for relief from sanctions. I refer to it as follows:

> *"A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstance of the case so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'."* Per Lord Dyson MR and Vos LJ at paragraph 35

[17.] It was obvious that the Defendant had filed the list of documents and witness statements on 30 November, 2024, viz., before the deadline of 1 December, 2024. However, the reason for the failure to serve was addressed in the affidavit in support of the Defendant's application for relief from sanctions sworn by Donna McCoy:

1. That I filed on the 30th November, 2023, the Defendant's List of Documents, Witness Statements of Mr. Stafford P. Ferguson, Mr. Dion Newman and Mr Expresse Illodin at the Supreme Court Registry, Nassau, The Bahamas.
2. That subsequent to filing the said documents on Friday the 1st December 2023 I attempted to serve the same on the Chambers of Norwood A. Rolle & Co. whose

address is listed as 36B Duffus House Annex, Sears Road, Telephone number 361-0467.

3. That I dialed the phone number given to find out the exact location of the office and got no answer. I then used google maps on my cell phone to search for Sears Road and it indicated the same was located in the area of Boyd Road. I then ventured to that area but was unable to identify or locate any building with the name "Duffus House" or "Duffus House Annex". A printout of the google map from my phone is now shown to me marked and exhibited as "DM1".

4. That I tried the telephone number again to no avail and return to our offices with the documents as I was not successful in locating the said offices of Norwood A. Rolle & Co.

5. That on Monday the 4th December, 2023, I went again to the area of Sears Road seeking to locate the offices of Norwood A. Rolle & Co and was unable to do so. Upon my return to our office later that day, I was able to obtain a cell phone number (454-6915) from counsel in our offices which I believe was for Mr. Rolle and subsequently telephoned and go no answer. I then emailed him to notify him that we had a package which we were trying to deliver and if he can arrange to collect the same. Subsequently the said package was collected from our office on the 5th December, 2023."

[18.] As a result of the inability to locate the office of the Claimant's Counsel, the documents were received four (4) days after the date ordered by the Court.

[19.] The Court in applying the three stage test considered that the seriousness and significance of the breach was minimal because:

(i) The trial date was maintained viz., it could still proceed on the scheduled date, therefore, it did not need to be vacated.

(ii) there was no history of non-compliance with court orders by the Defendant.

(iii) The Defendant had in my view a good explanation for non-compliance.

[20.] Therefore, for these reasons I refuse to consider stages two and three of the test and I grant the Defendant relief from sanctions.

[21.] Accordingly, my Order shall read as follows:

(i) I declare that the Defendant has failed to comply with the provision with the provision in the Order of this court given on the 25th September, 2023;

(ii) I grant the Defendant relief from sanctions in accordance with Rule 26.8 of the Civil Procedure Rules, 2022 for failure to comply with the Order of this court given on 25th September, 2023.

(iii) I refuse to strike out the Defence and give permission to enter judgment against the Defendant for the amount of $80,526.88 with interest together with costs to be paid to the Plaintiff by the Defendant to be taxed if not agreed.

(iv) The Claimant is granted leave to file and serve its Reply and Defence to Counterclaim on the Defendant in the form as exhibited in its Affidavit filed on 9th July, 2024 by no later than 9th December, 2024.

(v) The Defendant may file a Reply to the Defence and Counterclaim within fourteen (14) days from the date of service of the Reply and Defence to Counterclaim.

(vi) The Court will schedule a Case Management Conference at a date mutually convenient to the parties within the next thirty (30) days.

(vii) The Defendant shall pay costs to the Claimant which the Court has summarily assessed in accordance with the CPR, 2022 in the sum of $500.00. These costs are to be paid on or before the date of the Case Management Conference.

Dated the 2nd December, 2024

C D Gomez

Camille Darville-Gomez
Justice