

GRENADA

IN THE COURT OF APPEAL

HCVAP 2010/011

BETWEEN:

ANTHONY CLYNE

Appellant/Claimant

and

**THE GUYANA AND TRINIDAD MUTUAL
INSURANCE COMPANY LIMITED**

Respondent/Defendant

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mde. Clare Henry

Justice of Appeal [Ag.]

Appearances:

Mrs. Celia Edwards with Ms. Corina Johnson for the appellant/claimant

Ms. Dia Forrester for respondent/defendant

2010: May 5.

REASONS FOR DECISION

- [1] **EDWARDS, J.A.:** On 5th May 2010, we heard this interlocutory appeal against the ruling of the learned judge made on 30th April 2010. The learned judge ruled upon hearing a contested application by the respondent for relief from sanction and permission to file a witness statement out of time. The judge granted the application and ordered that the defendant file the witness statement of Mrs. June Belmar-Church within 7 days of the date of the order and there be no order as to costs. We allowed the appeal, set aside the ruling of the learned judge with costs agreed at \$1,500.00 to the appellant and promised to give written reasons for our decision.

Background Facts

- [2] The appellant who operates a rental car service, was the owner of motor vehicle registered RM898 which was involved in an accident on a public road on 12th March 2003, whilst being driven by Mr. Alban James. This accident resulted in a third party Mr. Thomas Baker sustaining loss and damage. This motor vehicle was insured by the respondent at the material time under a policy of insurance wherein the respondent undertook to indemnify the appellant for any damage to property including costs and expenses arising as a consequence of the vehicle being used on the road. Mr. Thomas Baker who sued the appellant for damages in Claim No. 346 of 2006, obtained default judgment against the appellant for the sum of \$18,932.15 together with interest thereon at 6% per annum.
- [3] The appellant thereafter, brought an indemnity claim against the respondent to satisfy the judgment in Claim No. 346 of 2005. The respondent in its defence to this claim alleged that it is entitled to deny the claim because the appellant in breach of the conditions of the insurance policy:
- (a) failed to provide full details of the accident and complete a Claim Form;
 - (b) failed to co-operate with the respondent in defence of the Claim No. 346 of 2005; and
 - (c) having failed to notify the respondent of the accident immediately or at all, failed to give any full particulars of anything thereof.

The respondent pleaded also that the appellant did not present to the respondent Claim No. 346 of 2005 which was instituted on 27th July 2005, and served on the respondent by the legal representatives of Mr. Thomas Baker on 14th September 2005. Consequently, the respondent was not obligated to indemnify the alleged loss as the claim was not served within 7 days as required by section 14 of the **Motor Vehicles Insurance (Third Party Risks) Act** Cap. 202.

- [4] The appellant in his reply denied these allegations of the respondent, and pleaded at paragraph 1(a) to (c) that he accompanied the driver Mr. Alban James to the respondent company to make a report; that Mr. James in a written statement given to Mr. Baker (an employee of the respondent) admitted that the accident was his (Mr. James') fault; that subsequently a female employee of the respondent contacted him and indicated that the respondent needed more information from Mr. James; that the appellant tried to contact Mr. James who had returned to the United Kingdom; and so informed the respondent. The appellant's subsequent witness statement supports these pleaded allegations.
- [5] At a case management conference held on 16th April 2008, the Master made an order that witness statements were to be filed by 30th September 2008. The respondent filed the witness statement of Johnson Cornwall and a witness summary for Cyril Phillip on 30th September 2008. The appellant who was abroad on the deadline date, sought an extension of time to file his witness statements by an application filed on 10th October 2008. This application was granted and the appellant filed his witness statement on 20th October 2008. On 21st October 2008 the appellant filed his Pretrial Memorandum which indicated that one of the three issues to be determined at the trial is: "(a) Whether the Claimant failed to perform his obligations under the contract of insurance with the Defendant vis-à-vis the accident."
- [6] A Pretrial Memorandum filed by the respondent on 29th January 2009, identified 3 issues to be determined at the trial:
- "(i) Whether the Claimant failed to perform his obligations under the contract of insurance with the Defendant vis-à-vis the accident;
 - (ii) Whether, in the circumstances the Defendant is entitled to avoid liability under the contract of insurance.
 - (iii) Whether or not the Defendant is exempt from indemnifying the Claimant for damages as awarded against them in CLAIM NO. GDAHCV 2005/0346, due to the Claimant's failure to comply with the section 14 of the Motor Vehicles Insurance (Third Party Risks) Act Cap 202 as amended (Act No. 39 of 1994)."

[7] However, the respondent identified in this Pretrial Memorandum the factual and legal contentions of the claimant to be:

“(i) That the Defendant is no longer liable to indemnify the Claimant for damages as ordered against them in CLAIM NO. GDAHCV 2005/0346 due to the Claimant's failure to serve the Defendant in accordance with the Motor Vehicle Insurance (Third Party Risks) Act Cap 202 as amended (Act No. 39 of 1994) within 7 days of the commencement of the suit.

(ii) That the Defendant is entitled to costs and further or other relief as the court sees fit.”

[8] The matter was set down for trial on 1st April 2009, following the Pretrial Review order with a trial window of May 2009; and the trial bundle containing the witness statements was filed on 1st April 2009. The respondent filed a supplemental trial bundle which contained a copy of the respondent's motor insurance policy. The trial date was postponed to 12th November 2009. The respondent filed an application on 11th November 2009 for permission to file the witness statement of Mrs. June Belmar-Church with the supporting affidavit of Mr. James Bristol counsel for the respondent; which alleged that an exhibited letter dated 11th January 2006 from the Operations Manager Mrs. June Belmar-Church to the Fire Manager – GTM Guyana reporting on Claim No. GDAHCV 2005/0346 was a statement that was inadvertently overlooked in the preparation for the trial as it was amongst the material in their file relating to Claim No. 2005/0346 and in preparation for trial on 12th November 2009 it was unearthed. Mr. Bristol asserted in this supporting affidavit that no prejudice would be caused to the appellant by the proposed unsigned witness statement of Mrs. June Belmar-Church but its absence from the trial would jeopardize the case of the respondent as it speaks directly to the defence. The respondent subsequently filed an amended application on 23rd November 2009 which added a request for relief from sanction. The learned judge in her ruling stated that the matter did not come on for trial on 12th November 2009 owing to circumstances not attributable to the parties. The respondent's application came on for hearing on 16th March 2010 before the learned judge.

[9] The gravamen of the appellant's objection to the application in the court below and before us is that the respondent narrowed its factual and legal contention to that stated in its pretrial memorandum, and having subsequently realized that the decision in **Jeffery Joseph v General Insurance Agency**¹ would undermine the defence connected to the factual and legal contention, the respondent is seeking to rely on the lack of notification defence to the obvious prejudice of the appellant. The appellant's affidavit contained evidence to support his opposition to the application and his contention of being prejudiced.

[10] In determining the application the learned judge at paragraphs 19 to 32 of her written ruling went through the exercise required by CPR 27.8(4); 29.11 and 26.8 and relevant case law relating to these rules. CPR 26.8 states:

- "(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 – the effect which the granting of relief or not would have on each party;
 - (a) the interests of the administration of justice;
 - (b) whether the failure to comply has been or can be remedied within a reasonable time;
 - (c) whether the failure to comply was due to the party or the party's legal practitioner; and
 - (d) whether the trial date or any likely trial date can still be met if relief is granted.
- (4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

¹Antigua and Barbuda Suit No. 67 of 1997 (Unreported) delivered by Joseph-Olivetti J

[11] The judge found that the application was made promptly once the respondent's counsel realized that the statement of Mrs. June Belmar-Church had not been filed; and that the failure to comply was not intentional. She stated further at paragraph 27 of her ruling as follows:

“[27] Having considered the explanation given by the Defendant as to the reason for the delay, I find merit in it. The statement was not in Defendant's possession in their offices but rather in the possession of their attorneys. The document in question was in a file in a related matter and not discovered until preparation for trial was underway.”

The judge also found:

“[28] In terms of CPR 26.8(3)....the effect of granting the relief sought would be of no prejudice to the Claimant in view of the fact that the Claimant makes reference to making a report to a female employee of the Defendant, this same employee whose statement it has sought to tender... [30] ...The original trial date has been vacated and no new date has been set. The witness statement can, in the opinion of the Court be filed and served in a reasonable time before the new trial date is set.”

The Grounds of Appeal and Submissions

[12] The several grounds of appeal while challenging the above-mentioned findings of the learned judge basically contend that the judge erred in granting the application on the basis that the error was that of the legal practitioner and not that of the client and that the appellant would not be prejudiced. The appellant complains that the judge erred in her finding of no prejudice based on the appellant's pleadings and witness statement in which the appellant made reference to making a report to an unidentified female employee of the respondent; and the judge made an erroneous assumption that that same female employee was Mrs. June Belmar-Church.

[13] Dealing first with this last complaint, in answer to the respondent's request for information filed on 23rd April 2008, the appellant filed an answer on 11th July 2008, stating that within days of the accident which took place on a long weekend i.e. the week after the weekend, the claimant and the driver presented a claim and

reported to an unnamed female officer of the respondent aged 30s or 40s and that the driver Mr. James had signed a liability statement admitting that he was wrong. The appellant in that answer also stated that: "About 1 month after he had attended to make his report the Claimant was contacted by telephone by a female officer of the defendant who needed another statement. He indicated that he had not been present at the accident so did not know what happened and that the driver has returned to the U.K". The contents of the appellant's witness statement cover all of the appellant's case.

[14] Having regard to the answers given to the request for information which form part of the statement of case for the parties,² the contents of the exhibited letter signed by Mrs. Belmar-Church dated 11th January 2006, and the proposed unsigned Witness Statement of Mrs. Belmar-Church, her evidence would speak only to the events occurring after being notified about Claim No. GDAHCV/0346 on 14th September 2005 and the subsequent conversations she had with the appellant up to January 2006. Neither this proposed witness statement or the witness summary of the respondent's sales unit manager Mr. Cyril Philip address the appellant's answers given in response to the respondent's request for information, and paragraph 1(a) to (c) of the appellant's reply. There is therefore merit in the appellant's contention that the learned judge made an erroneous assumption that Mrs. Belmar-Church was the same female employee of the respondent to whom the appellant made the report. The learned judge erred also in our view in basing her finding of no prejudice on this erroneous assumption.

[15] Returning to the reasons given for the failure to file the witness statement on time, the question arising is whether the inadvertence of counsel in the circumstances explained by him provides a good explanation under CPR 26.8(b).

[16] This court has before and since the operation of the rules in **CPR 2000** made pronouncements from time to time as to what explanations proffered by a party will

² See Part 34 of CPR 2000 and the definition of "statement of case" in CPR 2.4 which includes "(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court."

not be regarded as providing a good explanation for excusing noncompliance with a rule or order. In **Richard Frederick and Owen Joseph and others**³ (at paragraph 15) and **Pendragon International Limited and others v Bacardi International Limited**⁴ (at paragraph 15) it was recognized that misapprehension of the law is unavailing as an excuse for such failure. In **Donald F. Conway and Queensway Trustees Limited**⁵ (at paragraph 22) one of the reasons for the court's refusal to exercise its judicial discretion in favour of the appellant included that the appellant's reason for the delay in making a timely application for leave to appeal an interlocutory order [mistake of law by the appellant's counsel] is legally unacceptable in this jurisdiction as a good reason. Sir Dennis Byron, CJ in **John Cecil Rose and Anne Marie Rose**⁶ also observed that "the lack of diligence of an attorney is not a good reason for delay, whether it is explained in terms of volume of work the attorney is maintaining, or as in this case the difficulties experienced in communications... In my judgment therefore there was no acceptable reason for the inordinate delay."

[17] In **Vena McDougal and Reno Romain**⁷ Thomas JA while considering the reason for delay advanced by the defendant/intended appellant: that her attorney was preparing for an appeal before this court, reviewed the principles relied on by this court in determining whether an explanation was a good reason for granting an extension of time. At paragraphs 36 to 38 of his judgment Thomas JA [Ag.] observed:

"[36] Even under the former rules the fact that a litigant's attorney was otherwise engaged was never accepted by this court or the Grenada Court of Appeal as a good reason for granting an extension of time. The leading case is **Mills v John**⁸. In this

³ St Lucia Civil Appeal No. 32 of 2005 (Unreported Judgment) delivered by a single judge Rawlins JA (as he then was) 16th October 2006

⁴ Anguilla Civil Appeal No. 3 of 2007 (Unreported Judgment) delivered by a single judge Rawlins JA (as he then was)

⁵ St Christopher and Nevis Civil Appeal No. 11 of 1999 (Un reported Judgment) of Satrohan Singh JA writing for the Court delivered 3rd April 2000

⁶ Saint Lucia Civil Appeal No. 19 of 2003 (Unreported Judgment of a single judge) delivered 22nd September 2003 at paragraph 4

⁷ Commonwealth of Dominica HCVAP 2008/003 (Unreported Judgment) delivered by a single judge Thomas JA [Ag.] on 7th April 2008

⁸ [1995] 3 OECS Law Reports 597

case, Liverpool JA made an extensive analysis of the Caribbean cases on the point “for the guidance of the profession. {37} At page 601 His Lordship said this:

“In **Casimir v Shillingford and Pinard**⁹, Lewis CJ delivering the judgment of the Court of Appeal of the West Indies Associated States held that ‘pressure of work’ was not a good and substantial reason to grant an application to extend the time within which to appeal and in answer to a plea [by] counsel for the applicant that the court should grant the application as a matter of indulgence the learned Chief Justice stated that:

‘If the court did that, then it would be tantamount to doing away with the rule and it would open the way to a flood of applications by solicitors who might not be diligent in the conduct of their client’s business, to apply for such indulgence of the court’.

[18] Justice of Appeal Liverpool enunciated the principles emerging from the cases which for the purposes of the present appeal include that the applicant must supply the court with bona fide and cogent excuse for his failure to comply with the timetable set out in the rules [or in an order]; and pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence per se is not acceptable as an excuse for delay. Where an applicant has not really had a trial the court’s discretion will be more readily exercised in his favour. The inadvertence of a solicitor and his staff would also fit into the categories of excuses which would not avail a party in our view.

[19] These principles are applicable also when considering whether a good explanation has been given for a failure pursuant to CPR 26.8(2)(b). Though an explanation may have some merit as the learned judge found, the question is was it a good explanation. From some time after the date of the document i.e. 11th January 2006 this document which was directly relevant existed, and the respondent and or its attorneys would have had physical possession of it. Both the respondent and its attorneys ought to have realized that it should have been disclosed under

our rules, apart from being relied on at the trial. If they intended to rely on it at the trial, it seems reasonable to expect that with diligence, it would have been discovered before or while preparing for the first trial date on 1st April 2009. No explanation was given as to when the respondent's attorneys received the document; why it was not discovered before the first trial date on 1st April 2009; or why it was only discovered in preparing for the second trial date on 12th November 2009. We therefore do not know whether the respondent was blameless or was partly to blame for the failure.

[20] In one of the respondent's authorities **Irma Paulette Robert and Cyrus Faulkner and others**,¹⁰ the appellant's attorney Mr. Colin Foster swore to a supporting affidavit in the appellant's application to file a witness statement a little over 3 months out of time, and for relief from sanction. He gave several explanations for his failure to comply with the case management order, which clearly demonstrated that his failure to obey the order was partly due to extraneous circumstances outside of his control, apart from the pressure of work excuse that he gave. These explanations were obviously full and honest. The court found that he had satisfied the requirement in CPR 26.8(2)(b).

[21] This is not the case in the instant appeal. The explanation given was not full. There were no extraneous circumstances given for the failure that were beyond the control of the respondent and its attorneys. The absence of the explanations referred to at paragraph 19 above lends credence to the appellant's theory – which is borne out by the statement of facts and legal contention in the respondent's Pretrial Memorandum – that the respondent communicated to the appellant an intention to rely only on the defence of failure to serve the claim within 7 days of the commencement of the suit. Despite the valiant endeavour by learned counsel Ms. Forrester to convince us otherwise, we were not persuaded by her submissions that the respondent did not signal any intention to abandon the defence of lack of notification pleaded at paragraphs 7 to 9 of its defence.

⁹ [1967] 10 WIR 269

¹⁰ Saint Lucia Civil Appeal No. 29 of 2007

[22] The court's discretion should not be exercised in an applicant's favour unless the applicant provides the court with a full and honest explanation of the reason for the failure to comply. Applying the recognised principles from our jurisdiction in the previously decided cases, the learned judge ought to have rejected the explanation given in the respondent's application as it was not a good excuse. We were reminded by Ms. Forrester in her written submissions of the principles to be applied by us when reviewing the exercise of the judge's discretion.¹¹ Having applied those principles we were of the view that the learned judge erred in principle by not taking into account the matters which should be taken into account and her decision is plainly wrong. For the foregoing reasons the judge ought to have dismissed the application with costs to the appellant because the requirement in CPR 26.8(2)(b) is one of 3 mandatory requirements which must be satisfied before the court can grant the application.

[23] On the question of prejudice, having regard to the result of the appeal there is no need to elaborate further on this.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Clare Henry
Justice of Appeal [Ag.]

¹¹ See **Dufour and Others v Helenair Corporation Ltd. and others** Civil Appeal No. 4 of 1995 at page 3; **G vG** [1985] 2 All ER 225; **Attorney General and others V Andy Redhead**: Grenada Civil Appeal No. 10 of 2007 at paragraph 14