

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No. DOMHCV2023/0115

BETWEEN:

ATHENE SHILLINGFORD Claimant
as the PERSONAL REPRESENTATIVE OF THE ESTATE OF IDILINE JOHNSON

- and -

INFRASTRUCTURE SERVICES LTD. A “FIRM” 1st Defendant

ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA 2nd Defendant

APPEARANCES:

Ms Janae Jackson holding papers for Ms Cara Shillingford, Counsel for the Claimant

No appearance for or on behalf of the 1st Defendant

Mrs Vanica Sobers-Joseph, State Attorney for the 2nd Defendant

2024: October 3
December 4

RULING

Extension of Time, Relief from Sanctions, Disclosure of Documents

BACKGROUND

- [1] **JAWARA-ALAMI, J.:** By a Notice of Application filed on 7th June 2024, the Claimant herein applies to the Court for an order seeking
- (i) An abridgement of time;
 - (ii) extension of time within which to file the Claimant’s witness summary of Hillary Shillingford
 - (iii) The witness summary of Hillary Shillingford submitted on the 21st of May 2024 but filed on the 22nd of May 2024 be deemed as properly filed;
 - (iv) The claimant be granted relief from sanctions, if necessary;
 - (v) That the Second Defendant be ordered to disclose the following information to the Claimant:
 - (a) A copy of all ‘know your client’ documents which the State obtained prior to doing business with Infrastructure Services Ltd or Dominica Strong. This includes a copy of the certificate of incorporation or registration, notice of address, notice of directors and articles of incorporation of the said entities;
 - (b) Records of all payments made by the State for work done by vehicles and equipment registered in the name of “Infrastructure Services Limited” including copies of all cheques and/or wire transfer receipts showing the said payment;

- (c) Records of all payments made by the State to compensate for torts committed by vehicles registered in the name of Infrastructure Services Limited;
 - (a)[sic] Records showing which co-signee imported into Dominica the following vehicles and who paid the relevant taxes (import duties, environmental surcharge) – dump trucks with the following registration numbers: TN018, TN019, TN020, TN024, TN025, TN026, TN027, TN028, TN029, TN030, TN031, TN032, TN035, TN036, TN037, TN038 and TN039;
 - (d) All records related to the decision of the Government of Dominica to refund withholding tax to Infrastructure Services Limited, Dominica Strong or any company related to Dominica Strong showing (1) who made that decision, (2) when the decision was made and (3) who or which entity the monies were paid to”.
- [2] In support of the application, the Claimant filed an affidavit on 7th June 2024, sworn to by Nahriah Tavernier, Legal Clerk of Shillingford and Associates Inc. The Claimant also filed a Supplemental Affidavit in Support of Application with two exhibits attached, Exhibit NT1 and NT2. In response the 2nd Defendant, filed a Notice of Opposition to the Claimant’s application for extension of time and specific disclosure on 14th June 2024.

Background Facts

- [3] From the court file, written and oral representations of the parties I find as facts, the following;
1. On the 18th January 2024 the court ordered the parties to exchange witness statements or summaries on or before 20th May 2024. The 20th of May 2024 was Pentecost Monday in the Commonwealth of Dominica which is a public holiday. The court office was therefore closed along with the Claimant’s solicitor’s office.
 2. The Claimant’s Counsel claims that its office being inundated with work, was only able to file three (3) witness statements/summaries prior to 4pm on the 21st of May 2024. The fourth witness summary which the solicitor intended to file was submitted at 4:41 pm on the electronic portal on the 21st of May 2024. The solicitor was therefore 42 minutes late in submitting the document.
 3. Almost immediately after filing the fourth witness statement, counsel for the Claimant sent an email to counsel for the 2nd Defendant seeking her consent to the extension of time to file the fourth witness statement. Counsel for the 2nd Defendant indicated that Attorney-at-law Kevin Julien now had conduct of the matter and that he would respond to the request. On the 4th of June 2024 Mr. Julien responded by stating that he will not be consenting to any application for an extension of time.
 4. The Claimant also claims that the delay in submitting the fourth witness statement on the e-litigation portal was very short, less than an hour, and submits that the Defendants will suffer no prejudice if the document is deemed properly filed. The Claimant claims that it will suffer significant

prejudice if this application is not granted since important evidence which the Claimant intends to rely on would be left out.

5. The Claimant prays to the court that it is in the interest of justice for the Court to consider all of the evidence which the parties wish to reply on rather than shut out evidence.
6. The 2nd Defendant contends that the application which also includes relief from sanctions, was not made promptly by the Applicant/Claimant and therefore is a factor that should be taken into consideration by the court in the court's exercise of its discretion. The application was filed on the 7th of June 2024, which is 18 days after the 20th of May, 2024 which is the date stipulated by the court for filing of witness statements.
7. The 2nd Defendant also contends that The failure to comply with the court order was due to the Claimant's solicitor being "inundated with work" which does not constitute a sufficient excuse and is not a good reason for delay and therefore should not be granted."

Issues

- [4] **1. Whether the Claimant's Application for an Extension of time should be granted?**
- 2. Should the Court order the 2nd Defendant to disclose the information requested by the Claimant at paragraphs a, b, c, a, d?**

The law

- [5] Counsel for the 2nd Defendant contends that that no cogent reasons were offered for the failure to file on time and that the Claimant provided no evidence that steps were taken prior to the deadline of 20th May 2024 to do anything. The 2nd Defendant relied on paragraphs 4, 5 and 6 of the decision in **Kelvin Mann and Lorden Warrington**¹ and paragraph 14 of **Michael Laudat and The Attorney General vs. Danny Ambo**². It is worth noting that that these cases concerned an application under the CPR of 2000 and not the amended 2023 Rules. under CPR 2000, an applicant was required to satisfy the court that the failure to comply was not intentional; that there is a good explanation for the failure; and that s/he has generally complied with all other relevant rules, practice directions, orders and directions.
- [6] The Amended Rules of 2023 expand the conditions from 3 to 8 which in my view has expanded the discretionary powers of the court. **Rules 26.7 and 26.8 of the Eastern Caribbean Supreme Courts' Civil Procedure Rules (Revised Edition) 2023** being the relevant rules herein are instructive on the Court's powers in cases of failure to comply with rules or directions and state as follows;

- "26.7 (1) *If the court makes an order or gives directions, the court must whenever practicable also specify the consequences of failure to comply.*
- (2) *If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or*

¹ DOMHCVAP2023/0003

² DOMHCVAP2010/0016

order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.

(3) *If a rule, practice direction or order –*

(a) requires a party to do something by a specified date; and

(b) specifies the consequences of failure to comply,

The time for doing the act in question may not be extended by agreement between the parties.” [emphasis supplied]

26.8 (1) *An application for relief from any sanction specified for a failure to comply with any rule, order or direction must be supported by evidence on affidavit.*

(2) *In considering whether to grant relief, the court must have regard to –*

(a) the effect which the granting of relief or not would have on each party;

(b) the interests of the administration of justice;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the failure to comply was due to the party or the party’s legal practitioner;

(e) whether the trial date or any likely trial date can still be met if relief is granted;

(f) whether there is a good explanation for the failure;

(g) whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions; and

(h) whether the application for relief was made promptly.

(3) *The court may not order the respondent to pay the applicant’s costs in relation to an application for relief unless exceptional circumstances are shown.”*

[7] Thus, under the Rules, a party seeking an extension of time must satisfy the eight (8) foregoing conditions and in considering whether the claimant has satisfied the above conditions the court must look to the evidence filed in the affidavit of the claimant. The justification the Claimant’s Counsel offers is that the witness summary was filed less than an hour past the deadline; that there will be no prejudice to the Defendants if the extension of time is granted; that it is in the interest of the administration of justice; that no trial date has been fixed for this matter; and the Claimant has generally complied with the Court’s orders.

[8] In considering the claimant’s submission, I turn to the English case of case of **Denton v White**³ wherein the Court of Appeal considered the application of the later version of CPR Rule 3.9 to three separate cases in which relief from sanctions was being sought in connection with failures to comply

³ (2014)EWCA CIV 906

with various rules of court. The Court took the opportunity to “restate” the principles applicable to such applications as follows (at [24]):

“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 the “failure to comply with any rule, practice direction or court order” which engages rule 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 circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]⁴.”

[9] I will now apply the foregoing principles to the facts of this case beginning **with identifying and assessing the seriousness and significance of the failure to comply with the order of the court.**

On the 18th January 2024 the court ordered the parties to exchange witness statements or summaries on or before 20th May 2024. The Claimant contends that on 20th of May 2024, Pentecost Monday in the Commonwealth of Dominica was a public holiday and the court office was therefore closed along with the Claimant’s solicitor’s office. Pursuant to Rule 3.2(5) the new deadline for filing witness statements was the 21st of May 2024. Three (3) witness statements/summaries out of 4 were filed prior to 4pm on the 21st of May 2024. The fourth witness summary was to be filed at 4:41 pm on the electronic portal on the 21st of May 2024. The solicitor was therefore 42 minutes late in submitting the document. the Claimant Counsel also contends that almost immediately after filing the fourth witness statement, she sent an email to counsel for the 2nd Defendant seeking her consent for extension of time to file the fourth witness statement.

[10] Having said this, I pose the question on whether this failure to comply is so serious and significant to warrant the refusal of this application? To determine this, I will consider some of the criteria provided in Rule 26.8 (1) *as follows* ;

[11] **(b) the interests of the administration of justice**

The overriding objective of the Civil Procedure Rules is to enable the Court to deal with cases justly⁵ by ensuring in so far as is practicable that the parties are on an equal footing⁶. And in saying this, would excluding the fourth witness summary be prejudicial to the Claimant’s case?

[12] **(c) whether the failure to comply has been or can be remedied within a reasonable time and (h) whether the application for relief was made promptly**

Counsel for the claimant was 42 minutes late in submitting the document and contends that almost immediately after filing the fourth witness statement, she sent an email to counsel for the 2nd

⁴ Ibid at paragraph [24]

⁵ Civil Procedure Rules (Revised Edition) 2023, rule 1.1(1)

⁶ Civil Procedure Rules (Revised Edition) 2023, rule 1.1(2)(a)

Defendant seeking her consent for extension of time to file the fourth witness statement. The 2nd Defendant's counsel responded to this request on 4th June 2024 refusing the request and the application was filed on 3th June 2024. Counsel for the Claimant's explanation for not filing the application soon after being notified of Counsel for the 2nd Defendant's non-consent was due to being out of state.

[13] **(d) whether the failure to comply was due to the party or the party's legal practitioner**

In this case the failure to comply was that of the Legal Practitioner of the Claimant but it is settled that the sins of counsel should not be visited on the parties.

[14] **(e) whether the trial date or any likely trial date can still be met if relief is granted**

A trial date has not yet been fixed as the claim came on for first hearing on 18th January 2024 and case management directives given.

[15] In considering all of the foregoing factors against the facts of this case, I can safely say that **the failure to comply with the order of the court is not so serious and significant**. I say so because, the breach is not so significant since a trial date has not been set to cause disruption to the trial. I do not intend to downplay the lack of compliance with court rules as it is trite that rules of court are meant to be obeyed, the breach would have been significant if a trial date was scheduled. With this said, I need not consider **the second and third stage in the case of Denton**.

[16] Furthermore, **rule 26.9(4) of the CPR** enjoins the court to "make an order to put matters right with or without an application" where a party has failed to comply with a rule. **CPR rule 1.2** enjoins the court to give effect to the overriding objective when it purports to exercise any discretion given to it by the rules and guided by this I resolve the issue in favour of the Claimant/Applicant.

RESOLUTION OF Issue 2: Should the Court order the 2nd Defendant to disclose the information requested by the Claimant at paragraphs a, b, c, a, d?

[17] **Rule 28.6 of the Civil Procedure Rules (Revised Edition) 2023** provides the criteria for ordering specific disclosure:

- | | |
|----------|--|
| "28.6(1) | <i>When deciding whether to make an order for specific disclosure, the court must consider <u>whether the specific disclosure is necessary in order to dispose fairly of the claim or to save costs.</u></i> |
| (2) | <i>The court must have regard to –
(a) the likely benefits of specific disclosure;
(b) the likely cost of specific disclosure; and</i> |

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) *If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.*

(4) *If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.*

(5) *The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed".*

[18] Where a party applies for an order under CPR 28.5 and 28.6 for specific disclosure, the Court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs, and the order may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings: **Multibank FX International Corporation vs. Von Der Heydt Invest SA**⁷.

[19] According to the **Caribbean Civil Court Practice**, the court has a discretion as to whether to make an order for specific disclosure and will need to be satisfied that the documents are directly relevant within the parameters of the rule. However, the test for relevance is not a matter for the exercise of discretion. What documents parties are entitled to is a matter of law, not discretion.

[20] The Eastern Caribbean case of **Harris v Douglas**⁸ Baptiste JA held that "the test for relevance is now more issue-oriented, thus avoiding the 'train of inquiry' cases...For the purpose of disclosure, the relevance of the documents is analysed by reference to the pleadings and the factual issues that would arise for decision at the trial. The critical question is whether the documents are directly relevant to those issues, and if they are, the court is enjoined to consider whether the order is necessary to dispose of the case fairly or to save costs. It is necessary to pay regard to the overriding objective of the CPR which is to enable the court to deal with cases justly; this also engages the issue of proportionality".

[21] The Fixed Date Claim Form filed by the Claimant on 5th June 2023 avers that the 1st Defendant, Infrastructure Services Ltd., an entity which is unregistered under the Companies Act or the Registration of Business Names Act but which is nonetheless operating in the Commonwealth of Dominica with the permission of the State and the 2nd Defendant is being sued in his capacity as Attorney General of the Commonwealth of Dominica pursuant the [sic] provisions of the State Proceedings Act Chap 7:80 of the Laws of Dominica. The Claimant alleges that between 2018 and

⁷ BVIHCMAP2021/0023, BVIHCMAP2021/0031, BVIHCMAP2021/0031

⁸ SKNHCVAP2019/0026 (9 December 2021)

present, the defendants have caused several dump trucks bearing the words “Dominica Strong” and several excavators to be parked on part of the Claimant’s land without her permission⁹.

[22] The Claimant, in making the case for trespass, alleges that the documents requested disclosure of “are all in the possession and control of the 2nd Defendant¹⁰”, the 1st Defendant is the registered owner of the vehicles which were illegally parked on the Claimant’s land.

[23] The Claimant requests A copy of all ‘know your client’ documents which the State obtained prior to doing business with Infrastructure Services Ltd or Dominica Strong. This includes a copy of the certificate of incorporation or registration, notice of address, notice of directors and articles of incorporation of the said entities; Records of all payments made by the State for work done by vehicles and equipment registered in the name of “Infrastructure Services Limited” including copies of all cheques and/or wire transfer receipts showing the said payment; Records of all payments made by the State to compensate for torts committed by vehicles registered in the name of Infrastructure Services Limited; Records showing which co-signee imported into Dominica the following vehicles and who paid the relevant taxes (import duties, environmental surcharge) – dump trucks with the following registration numbers: TN018, TN019, TN020, TN024, TN025, TN026, TN027, TN028, TN029, TN030, TN031, TN032, TN035, TN036, TN037, TN038 and TN039; All records related to the decision of the Government of Dominica to refund withholding tax to Infrastructure Services Limited, Dominica Strong or any company related to Dominica Strong showing (1) who made that decision, (2) when the decision was made and (3) who or which entity the monies were paid to”.

[24] How therefore are the above documents relevant to a case of trespass I ask? It would appear that the claimant is on a fishing expedition as I do not see the relevance of the forgoing documents in the determination of this case instant or to proving the cause of action or establishing facts in contention in the instant case and do not serve to assist the court in resolving the issues in dispute between the parties;

[25] The Claimant therefore failing to give any explanation as to why these documents are necessary to deal with the matter fairly, or to deal with the issues in dispute, or any basis for alleging that the requested documents are all in the 2nd Defendant’s possession and control, the application is denied.

Conclusion:

[30] The Application for Extension of Time is granted and the order for specific disclosure is denied. The general rule is that the unsuccessful party pays the costs of the successful party under **rule 64.6(1)**

⁹ Paragraph 4 of the Fixed Date Claim Form

¹⁰ Paragraph 6 of the Notice of Application filed on 7th June 2024

Civil Procedure Rules (Revised Edition) 2023, however I make no order as to costs **rule 64.6(2)** as the Defendant should not be rewarded for non-compliance with the duty of further the overriding objective of saving time and expense. Had the defendant simply allowed the request for extension of time to file the witness summary filed out of time by 42 minutes.

Costs:

[31] The general rule is that the unsuccessful party pays the costs of the successful party: **rule. 64.6(1) Civil Procedure Rules (Revised Edition) 2023**, however, I make no order as to costs pursuant to **rule 64.6(2)** for reasons that the Defendant should not be rewarded for non-compliance with the duty of furthering the overriding objective of saving time and expense. Had the defendant simply allowed the request for extension of time to file the witness summary filed out of time by 42 minutes, the time of the court would have been spent efficiently.

Disposition:

[32] In light of the foregoing reasonings, it is ordered as follows:

1. The Application for extension of time within which to file the Claimant's witness summary of Hillary Shillingford submitted on the 21st of May 2024 but filed on the 22nd of May 2024 is granted and be deemed as properly filed;
2. The Claimant is granted relief from sanctions;
3. The prayer for the Defendant to disclose the information as listed to the Claimant is denied;
4. There shall be no order as to Costs;
5. This matter is adjourned to **11th March 2025 for further directions**; and
6. The Claimant shall have conduct of this order.

Justice Zainab Jawara-Alami
High Court Judge

BY THE COURT

REGISTRAR