

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS**

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

**Claim No. BVIHCV 2023/0067**

**BETWEEN**

**JAMOY ESTRIDGE**

**CLAIMANT**

**AND**

**THE COMMISSIONER OF POLICE**

**FIRST DEFENDANT**

**THE ATTORNEY GENERAL**

**SECOND DEFENDANT**

**Appearances:** Valerie Gordon for the Claimant  
Abayna Devonish, Crown Counsel and J'Nae Hopkins, Crown Counsel for the First and Second Defendants

-----  
**2024: May 13<sup>th</sup>  
May 14<sup>th</sup>**  
-----

**DECISION**

[1] **YOUNG J:** This is an application for extension of time and relief from sanctions. The brief background is that on the 27<sup>th</sup> July, 2023 the Master ordered that the parties were to file and exchange witness statements by the 19<sup>th</sup> October, 2023. The Claimant complied but the Defendants on the 13<sup>th</sup> October filed a document which is headed on it's face "Index to Hearing Bundle". It contained what was titled "First and Second Defendants' List of Witness Statements Pursuant to 'Order for Standard Disclosure'".

[2] The document continued:

This list is completed in accordance with an order for:  
Standard Disclosure made by Master Cybelle Cenac-Dantes dated the 27<sup>th</sup> day of July 2023, and is served on behalf of the First and Second Defendants ("the Defendants").

- [3] It then listed 8 names and concluded with the Crown Counsel Abayna Devonish's signature following the statement:
- I, Abayna Devonish, Crown Counsel for the Attorney, Legal Practitioner acting for and on behalf of the Defendants prepared this list of Witness Statements and believe the contents to be true to the best of my knowledge, information and belief.
- [4] What followed (among other documents) were witness statements seemingly taken from witnesses in a criminal matter (hand written and typed) and recorded by a police officer, paper committal, letters and depositions. This document was described on the portal as "List of Witness Statements and Supporting documents (revised)."
- [5] When the matter came up for pretrial review in March, 2024, the Court raised with the Defendants that there were no witness statements filed for them. Counsel insisted that there were such filings and directed the Court to the above document.
- [6] The Court informed again that there were no witness statements filed by the Defendants in these proceedings, although some form of Witness Statements may admittedly, have been included as part of another document filed. That document had clearly been filed for the expressed purpose of disclosure. This simply meant that the Defendants found those statements to be directly relevant to the matters in question in these proceedings (Rule 28.4). It did not mean that the maker of those statements were automatically and magically allowed to be called to give viva voce evidence at the trial. That is the effect of a witness statement filed pursuant to Part 29 of the CPR only.
- [7] In these proceedings the only persons who may do this according to the order of the Master and the Rules of Court would have been those persons who had filed witness statements or witness summaries pursuant to Part 29 by the 19<sup>th</sup> October, 2023.
- [8] A witness statement provided pursuant to Part 29 must conform to Rule 3.6 if it is to be filed. The witness statement must therefore be headed with the full title of the proceedings and the title of the document and it must state the party on whose behalf it is filed. These are but a few of the requirements and the ones most pertinent to the documents in issue.

[9] No witness statements meeting these mandatory specifications were received by the Court Office and accordingly could not have ever been filed pursuant to Rule 3.7. The Defendants are yet to show me a single witness statement with a filed stamp affixed. It was most alarming, therefore, that the affidavit in support of this application even now insists that witness statements had been filed by the Defendants and somehow “not accepted by the Court”. For clarify sake the Court again states that there was absolutely nothing filed which the Court could either accept or reject.

[10] For the Defendants to be able to file witness statements at this stage, where the time ordered has passed, they must be granted an extension of time and relief from sanctions. It is this application which concerns us today.

[11] **The Application:**

The pertinent parts of the CPR:

**Consequence of failure to serve witness statement or summary**

- “29.11 (1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.
- (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.”

[12] **CPR 26.8:**

**Relief from sanctions**

- (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.

[13] **Rule 26.1(2):**

“ Except where these rules provide otherwise, the court may - (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;”

**The Parties' Submissions:**

[14] The Defendants submitted that they have a good reason and they have been prompt in making this application. It was made “as soon as they were informed that the Court would not accept the witness statements filed on 13<sup>th</sup> October, 2023.” Additionally, they explained that their attempts to get an affidavit from the DPP's office failed.

[15] More importantly, they would be prejudiced greatly if they are not allowed to put in witness statements. They equate this prejudice with a denial of a right to a fair trial and rely on **Stephen First et al v Gregory Gilpin Payne et al**<sup>1</sup> (which does not support this contention at all). Finally, they asked the Court to have regard to the overriding objective and not allow the Claimant to have an unfair advantage.

[16] The Claimant, on the other hand, asked the Court not to exercise its discretionary power to extend time or relieve sanctions since the applicants have presented no good or substantial reason for their failure to comply with the Master's order. Rather, their failure to comply was deliberate. The application was not filed promptly and if leave is granted it would greatly prejudice the Claimant. This prejudice stems from the Defendants having had sight of their witness statements since October and could easily tailor their own responses to suit.

---

<sup>1</sup> SKBHC VAP 2019/0028

- [17] The Defendants say that the Claimants never filed a notice of opposition in response to their application in accordance with Rule 11.12. This failure to comply with the Rules should be fatal to their ability to oppose.

**The Court's Consideration:**

- [18] We will begin with the preliminary issue of the Claimant's failure to file a notice of opposition. The intent of the notice of opposition is to give the applicant a brief indication of the respondent's position. If the affidavit in response is filed within the time for the filing of the notice, this Court can see no sensible way to hold that there was some non compliance where that affidavit clearly gives notice that there is opposition and its nature. The Claimant's affidavit was filed one day outside the seven clear days given to file the notice of opposition and well within the time given to file an affidavit. It is also quite interesting to observe the Applicants' full reliance on the overriding objective but their insistence that a day and a document ought to prove fatal to the other side. This Court finds the Defendants' objection to be without merit and requires no further attention.
- [19] Now to the real matter at hand. A party may not call a witness at trial if the witness's witness statement has not been served in accordance with the order made (Rule 29.11). There is no gainsaying that there has been no filing so there could have been no service of the Defendants' witness statements.
- [20] Both parties agree that the Court has the discretionary power to make an order as prayed. By Rule 26.1(2)(k) the Court has the power to extend the time for compliance with any rule or order. The Court may also grant relief from sanctions under Part 28.8. The test for the extension is less rigorous than that for relief from sanctions with good reason.
- [21] The parties also agree that for the extension of time the applicant must present good and substantial reasons (**John Cecil Rose v Anne Marie Uralic Rose**<sup>2</sup>).

---

<sup>2</sup> Civil Appeal No.19 of 2003

[22] A good explanation is also a consideration for granting relief from sanctions but the court must also consider promptitude, the effect the relief would have on the parties, the interest of justice, fault (the party's or its practitioner), the applicant's general compliance, time in which failure can be remedied and the effect on any trial date. These must all be considered and a general determination made. Under the rules no one consideration is to be given more weight than another.

[23] There is no trial date to consider as one has not yet been set.

A good explanation:

[24] The explanation offered by the Defendants is that the Court did not accept their witness statements. For the reasons outlined above there was nothing to accept or reject.

[25] The Defendants added that efforts had been made (4<sup>th</sup> August and again on 1<sup>st</sup> September, 2023 with follow up calls) to get an affidavit in time for the ordered date of filing but this was not forthcoming from the office of the Director of Public Prosecutions (DPP). There is, noticeably, no other proof of these attempts than the affiant's bald statement based on information received and not personal knowledge.

[26] It also appears that Counsel handling the matter in the DPP's office had resigned and "follow up with another Counsel in that office also proved futile." There is no indication of when that person left, when someone else took over and when the efforts were revived. There is no explanation given either of why an application had not been made then for an extension of time citing those very issues.

[27] This attempt to secure an affidavit assures that the Defendants' Counsel was well aware that a document other than disclosure had to be filed. However, her reason for seeking an affidavit is beyond comprehension since the clear and quite ordinary order of the Master during case management was for witness statements to be filed and served. The allegation, therefore, that Counsel had filed witness statements "on behalf of the Defendants with the intention of complying with the court order of Master Cybelle Cenac-Dantes..." simply does not ring true.

- [28] When coupled with the fact that the statements were obviously filed as part of disclosure days before the witness statements were due to have been filed and exchanged makes it even more clear to this Court that they were never honestly intended to be filed in compliance with the Masters order relating to witness statements.
- [29] Even more convincing is a perusal of the Defendants' original disclosure. At Part 1 it states "All pleadings, witness statements and affidavits and other filings made in these proceedings and the criminal proceedings....." That document was also signed by Abayna Devonish. How was Counsel aware then that there were witness statements made in both proceedings but later assumed that the criminal witness statements were also somehow civil witness statements. This seems less to be an unintentional error and more a deliberate act.
- [30] This Court agrees with Counsel for the Respondent that the explanation given has not been full and candid. What Counsel for the Defendants does bring to the Court's attention is the Claimant's seeming non objection to the filing she had made and his agreement to the list of documents which included the criminal witness statements. This is a mere distraction.
- [31] This Court states, firstly, that the fact that the documents disclosed were agreed by the other side as documents in the matter is of no moment. That simply means they are considered relevant and admissible by both sides. It affords no right to anyone to testify in these proceedings as the filing of witness statements does.
- [32] That there was no objection to the filing is equally of no moment. It is certainly not for Counsel on the other side to guide or assist in this manner. Perhaps the Claimant could have gone into his arsenal and made an application, but that is an entirely different matter.
- [33] The Court is aware that the Claimant did not take any action until the matter had been raised by the Court (by belatedly filing a strike out application but referred to it in submissions as an application for summary judgment). That certainly carries some weight of its own.

**Fault:**

- [34] While some of the fault is stated by the affiant to be on the parties, it appears to this Court that the bulk of the fault lay with the legal practitioner. She knew she was having difficulty securing 'the affidavit', she must be taken to know the rules of court yet she proceeded to disclose criminal witness statements in alleged fulfillment of the order of the civil court for filing of witness statements. This begs the question of what consequences should really be visited on the clients? This is particularly so since there is no evidence whatsoever presented from the clients themselves. Consequently, their involvement or lack of cooperation remains virtually unknown.

**Promptitude:**

- [35] As to promptitude, it must have been evident to Counsel that her clients had not filed any witness statements and the deadline had passed. Yet it took five months for the application to be made. The Defendants maintain that they only became aware when the Court did not accept their filing. For reasons already stated this does not seem true.

**Remedied:**

- [36] There is no indication from the Applicant that witness statements have been prepared and are simply awaiting filing at this time as would have been expected. In fact, the affiant gives no indication at all of when the issue could be remedied.

**Effect of Relief:**

- [37] If the Defendants are unsuccessful, they will not be allowed to put in witness statements and will have no evidence in this matter. The Claimant says if the Defendants are granted relief their witness statements would be responsive since they have had sight of the Claimant's for months, which is not intended by the rules. This hits in two ways.
- [38] Since the Defendants filed first, the Claimant must have been able to see what had been filed and on noticing they were not witness statements the Claimant could have utilized the procedure under Rule 29.7. This Court is certain that his Counsel was well aware of this procedure since she referred to it in her submissions. That would totally have avoided this stated prejudice. I do not believe this to be a real or an unavoidable prejudice.

[39] Counsel for the Claimant goes on to state that her Client's case is strong and the Defendants' prospect at trial is extremely low. While this forms no part of the test, it too could cut both ways.

[40] Finally, Counsel for the Claimant stated that the Claimant would be deprived from obtaining summary judgment. There is no application for summary judgment now before the Court so this is not an accurate statement. Moreover no such or similar application had been made before March, 2024. That could not have been a serious consideration for the Claimant if he delayed in making it for as long as the Defendants delayed in making theirs.

**General Compliance:**

[41] The Claimant admitted that the Defendants have generally complied. The Court accepted this to be so.

**Overriding objective and Interest of Justice:**

[42] The Court considers the nature of the matter and that there may be no real justice if the parties are unable to ventilate at a full trial. It also considers that the Claimant took no action until the issue was raised by the Court. It is also unlikely that the matter would get to trial in a few months. So allowing the Defendants an opportunity to file the witness statements within a short period will really do no great injustice particularly if the Claimant's case is as strong as has been stated. The overriding objective seeks fairness. This Court lays blame squarely at Counsel's feet. Such failure ought not to be visited upon the client save where the circumstances so demand. The circumstances in this case to my mind do not so demand.

[43] For these reasons, the Court will allow the Defendant one month from today's date to file their witness statements. When the Court delivered its oral decision part of its order included an unless order in the following term: "Unless the witness statements are filed as ordered the defence will be struck out without further order of the court". The Court recognized afterwards that it ought not to have made such an order of its own volition unless it had given the parties an opportunity to be heard Rule 26.2(2). Since the order had not yet been perfected the Court relied on **Re L & B (Children)**<sup>3</sup> to vary the order by removing that provision.

---

<sup>3</sup> 2 ALL ER 294

[44] The Claimant's strike out application is now superfluous. They will be given an opportunity to withdraw it before this court makes any orders in relation thereto.

[45] The Claimants must have their costs. Rule 65.11(3) allows all circumstances to be taken into consideration when making an order for cost but where the application is one for extension of time specified for doing any act under the rules, direction or order the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

[46] There have been no special circumstances raised in this matter and the Court is willing to do a summary assessment having heard the parties.

[47] Order:

1. Time is extended to 13<sup>th</sup> June, 2024 for the Defendants to file their witness statements.
2. The Defendants are relieved from sanctions for failure to file their witness statements in accordance with the order of the Master dated 27<sup>th</sup> July, 2023.
3. Costs to the Claimant in the sum of \$2,000.00.

**Sonya Young  
High Court Judge**

**By the Court**

**Registrar**