

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCV 2022/0012

BETWEEN:

[1] CLARIVEL VARGAS MATEO

Claimant

and

[1] GERON PHILIPS

[2] CLINTON LINDSEY

Defendants

Appearances:

Mr. Sylvester Carrott for the Claimant (via zoom)

Ms. Jean Dyer for the Defendants (via zoom)

2023: NOVEMBER 28

2024: FEBRUARY 1

JUDGEMENT

FITZPATRICK [AG.]:

The Court considered the following:

- [1] The parties are engaged in ongoing litigation commenced in June, 2022 disputing ownership of land and other property all located in Montserrat, which property now forms the estate of the late Clinton “Alfred” Lindsey. The Claimant alleges she was in a common law relationship with the deceased during which she contributed monies and labour to the residence and a restaurant/bar located on the subject

property. She seeks a determination of that interest. The Defendants are Mr. Lindsey's next of kin (cousin and son respectively).

- [2] The Claimant brought an application filed October 9, 2023 (the "Initial Application") seeking leave to extend the time permitted for her to file witness statements in this proceeding. The Claimant filed an Amended Application on November 27, 2023 (the "Amended Application") with the only addition being one line seeking relief from sanctions.
- [3] The Defendants oppose all relief sought by the Claimant.
- [4] The determination of the Claimant's Initial Application and Amended Application requires a review of the recent history for this litigation.
- [5] This case was before the Court on April 1, 2023 for a case management hearing. On that date and with the agreement of both counsel, Justice Morley made an order requiring the parties to file their respective witness statements by June 6, 2023, exchange documentation by July 17th and set July 27, 2023 for the commencement of trial. Justice Morley did not impose any sanctions for failing to comply with these deadlines.
- [6] This case was next before Justice Morley on July 7th for a pre-trial review. The Claimant failed to file her witness statements or anything else as of that date, including a pre-trial memorandum. The Court was told that the delay was due to the Claimant's counsel being ill and an extension to file the witness statements was sought. As a result, the Claimant was given until July 24th to file an application.
- [7] This matter next returned before the Court on July 26th. Again, the Claimant had not filed her witness statements or any application. Again, the illness of her counsel was referenced as the explanation. The Court gave the Claimant a further extension to

August 23rd to file an application with November 30, 2023 set for the commencement of trial.

- [8] This matter was next back before Justice Morley on September 29th. Again, the Claimant had not filed her witness statements or any application. She, again, referenced the illness of her counsel as the explanation. Again, the Court gave the Claimant more time until October 9, 2023 to file an application. Justice Morley did not impose any sanctions for failing to comply with this deadline.
- [9] The Claimant did file her Initial Application on the October 9th deadline. The only substantive relief sought by the Initial Application was for the extension of time to file the Claimant's witness statements. Notably, there was no request for any relief from sanctions. The only affidavit advanced in support of the Initial Application was sworn by Anthony Greer and filed October 9, 2023. Mr. Greer is the principle counsel in the chambers where the Claimant's counsel practices.
- [10] The Claimant electronically filed her witness statements on October 27th subject to obtaining permission from this Court to do so.
- [11] On October 27th, the Defendants filed an affidavit, sworn by the executive legal assistant from the office of their counsel, opposing the Initial Application (the "Opposition Affidavit").
- [12] This matter next returned before the Court on each of October 27th and November 1st for case management. On the latter date, November 28th was set for the hearing of the Initial Application.
- [13] On November 27th, the Claimant filed an amended application (the "Amended Application") along with a supplemental affidavit sworn by Mr. Greer. The Amended Application, for the first time, asked for relief from sanctions. The Amended Application did not seek leave to file the Amended Application.

[14] During the hearing of this matter on November 28th, the Claimant made an oral application for leave to be granted for the filing of the Amended Application or, failing that, an extension of time for such filing. The Claimant did not meaningfully advance her oral, alternative request for an extension of time to file the Amended Application and this was not, therefore, responded to by the Defendants beyond submitting that relief should be denied along with all others. As such, the hearing proceeded only focussing on the oral request for *post facto* permission for the late filing of the Amended Application.

[15] As noted, the Defendants opposed the relief requested in the Initial Application and took the position that the Court should deny leave for filing the Amended Application.

[16] To begin this analysis, we need to review the applicable sections of the Civil Procedure Rules ("CPR") in effect since July 31, 2023. The narrative in this matter engages several.

Rule 1 addresses the primary objective that the court must promote:

1.1 (1) The overriding objective of these rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the –

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues; and (iv) financial position of each party;

- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application of overriding objective by the court

1.2 The court must seek to give effect to the overriding objective when it – (a) exercises any discretion given to it by the rules; or (b) interprets any rule.

Rule 27.8 addresses the situation where a change in the case management timetable is sought:

27.8 (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –

- (a) a case management conference;
- (b) a party to do something where the order specifies the consequences of failure to comply;
- (c) a pre-trial review;
- (d) the return of a listing questionnaire; or
- (e) the trial date or trial period.

(2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.

- (4) A party who applies after that date must apply for –
- (a) an extension of time; and,

(b) relief from any sanction to which the party has become subject under these Rules or any court order.

Rule 29 provides the following consequences for failing to serve a witness statement:

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.

Rule 26.7(2) requires a defaulting party to apply for relief from sanctions:

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

Rule 26.8 details the factors the court must consider when a defaulting party applies for relief from a sanction imposed by the CPR:

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.

Rule 11.13 addresses deadlines for filing amendments to an application:

11.13 (1) An applicant may amend an application once, without the permission of the court, not less than 7 days before the date fixed for hearing.

(2) Any amendment to an application made within 7 days of the date fixed for the hearing of the application must be made with the permission of the court.

Rule 11.16 outlines the consequence for failing to ask for an order in an application:

11.16 An applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission.

[17] The Defendants are frustrated. That is understandable and unsurprising. They met the original filing deadlines set by Justice Morley. There has been several months of delay since then and the case is at a standstill.

- [18] The Defendant's lead argument is that the Initial Application must be dismissed for failing to explicitly seek relief from the sanctions set forth in CPR 29.11(1). In support of this position, they reference the mandatory language found in CPR 26.7(2) and 27.8(4).
- [19] The Defendants also filed caselaw supporting their argument that the Claimant was required to make an application specifically seeking relief from sanctions. One of the cases provided by the Defendants was directly on point with respect to the Initial Application, namely, the case of *David v. Attorney General Commonwealth of Dominica et al*, DOMHCVAP2013/0004 where the Court of Appeal at paragraph 6. stated that:
- [20] The appellant made no application for relief from sanctions. An application for an extension of time simpliciter is not an application for relief from sanctions. Extensions of time are dealt with by CPR 27.8 which deals with the variation of the case management timetable.
- [21] The Claimant did not present any case to challenge the Court of Appeal's pronouncement above or the related mandatory CPR language.
- [22] The Defendants did not argue that this Court should not consider the oral request for leave for late filing. The Defendants took the position that the Court could consider but should reject the Claimant's oral request for leave to file the Amended Application in the context of her other, prior breaches and on the basis that there is no evidence or even explanation in submissions by counsel on behalf of the Claimant explaining her failure to file the Amended Application by the October 9th deadline set by Justice Morley or the deadline mandated for amended applications stipulated by the CPR.
- [23] This case is unique where the Court is called upon to consider not one but multiple breaches and related requests for remedial permission made by a defaulting party. The Claimant late filed her witness statements, she late filed her Amended Application

and she failed to include a written request for leave to file her late filed Amended Application with the result that she had to make an oral request for that leave during the hearing of this matter on November 28th.

- [24] The fundamental starting point is to determine the interrelationship of the applicable CPR sections and the related process to analyse the Claimant's multiple asks.
- [25] It is attractive, for simplicity if nothing else, to consider the Claimant's request for an extension of time to file her witness statements first given that relief was sought in the Initial Application filed by the October 9th deadline set by Justice Morley. However, that approach ignores the undisputed fact that the Claimant was mandated to seek relief from sanctions in her application based on the unambiguous language of CPR 29.11(1), 26.7(2) and 27.8(4) along with the decision of the Court of Appeal in *David v. Attorney General Commonwealth of Dominica et al* quoted above. The Claimant did not do so until her Amended Application was late filed on November 27th. As such, the first question that must be addressed is whether leave should be granted for the filing of the Amended Application.

What should the Court consider when deciding whether to grant leave to file the Amended Application?

- [26] CPR 11.13(2) requires the defaulting party to seek leave where filing an amended application within 7 days of the scheduled hearing, as happened here with the Amended Application. That Rule does not stipulate any sanctions for failing to file more than 7 days in advance of the hearing.
- [27] Rule 11.16 states that a party may not ask for an order not sought in an application unless permission is given by the court. The Amended Application did not request leave of the Court for late filing. There is no sanction identified where a party fails to ask for relief in an application and is left to seek permission for such omitted relief orally, as is the case here.

[28] Given no sanctions are stipulated, this oral request for leave to late file the Amended Application does not engage the framework set forth in CPR 26.8, which is only engaged where sanctions are imposed.

[29] There are a number of factors that this Court could consider when determining whether to grant leave. For example, the Court could ponder the length of the delay and what explanation is offered for the delay in filing the Amended Application, what are the facial merits of the amendments sought, the prejudice caused to the responding party resulting from the late filing of the Amended Application and the conduct of the defaulting party in the litigation in whole or any other relevant context. This is not a closed or mandatory list. Ultimately, the court needs to weigh all relevant factors to achieve a just determination that promotes the overriding objective directed by Rule 1. The challenge for the court is to find the appropriate balance in each case between the need to enforce court rules/orders designed to ensure timely, efficient, consistent justice and the need for flexibility where circumstances are such to direct forgiveness of failings towards having the disputed issues determined on the merits.

[30] So, where does this Claimant's leave request fall along the balance spectrum?

Is the amendment(s) sought meritorious?

[31] As repeatedly noted, the material difference between the Initial Application and the Amended Application is the one sentence added to the latter seeking relief from sanctions. Is this amendment facially meritorious? Without question. It is unchallenged that a defaulting litigant in the Claimant's circumstances **must** make application for and be granted relief from sanctions to facilitate the intended reliance on the witness statements and witness testimony at trial. This is not a case where the sought amendment is frivolous or otherwise without merit amounting to a waste of court resources. If it were then the leave request should be denied without further consideration.

[32] This factor favours granting leave to the Claimant.

What is the length of the delay that related to the leave request?

[33] Clearly, the Claimant should have included a request for relief from sanctions within the Initial Application by the October 9th court ordered deadline given the mandatory and unambiguous language of CPR 29.11(1), 26.7(2) and 27.8(4). Mr. Carrot is experienced counsel and, in any event, is expected to know the requirements set by the CPR. This deadline was itself four months after the Claimant's seminal breach of failing to file her witness statements by the June 6th deadline she and her counsel had agreed to. She did not apply for relief from sanctions by the October 9th deadline. The Claimant filed her Amended Application along with a second affidavit sworn by Mr. Greer 49 days later and one day before the November 28th hearing date. The filing cast in the light most favourable to the Applicant was in breach of Rule 11.13(1) by 6 days and just before the hearing date. This was not a situation where the filing deadline was narrowly missed by any view.

[34] This factor favours denying leave to the Claimant.

What is the Claimant's explanation for the delay in late filing the Amended Application?

[35] As stated above, there is no doubt that the Claimant and her counsel should have applied for relief from sanctions by the October 9th deadline set by Justice Morley.

[36] Having failed to include a claim for relief from sanctions in the Initial Application, the Claimant and Mr. Carrott should have done so on the heels of reading the Defendants' Opposition Affidavit filed on October 27th given that document specifically argued that the Claimant's failure to ask for relief from sanctions was fatal to her application. They did not then respond. The Claimant and Mr. Carrot waited a further month until the day before the scheduled hearing date to do so.

[37] The affidavits filed by Mr. Green were largely focussed on the ill health of the Claimant's lawyer especially during the first six months of 2023 towards offering an explanation for the breaches leading up to the Initial Application. The affidavits from Mr. Greer did not address the delayed filing of the Amended Application or otherwise discuss why the Claimant failed to seek relief from sanctions in the Initial Application filed 49 days prior. There is no evidence on this issue before the Court. Mr. Carrot did not offer any details in submissions. Simply stated, I have no information as to why the Amended Application was late filed. I am left with no explanation whatsoever.

[38] This factor favours denying leave to the Claimant.

Did the Defendants suffer any prejudice arising from the late filing of the Amended Application?

[39] I do consider the late filing to be a matter of significance.

[40] The fundamental issue to be determined was not properly before the Court until one day before the hearing, namely whether the Court should grant the Claimant relief from sanctions.

[41] The Initial Application sought only an extension of time for the filing of much delayed witness statements. Based on the CPR and caselaw noted above, we know that request alone does nothing to advance this litigation even if it could somehow be granted in isolation. The Claimant would still need to make application for and be granted relief from sanctions. Failing that relief the witness statements could not be relied upon at trial and the witnesses could not be then called to provide evidence. Requesting relief from sanctions was fundamental to the progress of this stalled litigation and not a mere "technicality".

[42] The related difficulty presented by the Claimant's last minute filing of the Amended Application is that the Defendants, understandably, prepared their responding materials and submissions for the November 28th hearing on the basis of the materials

filed by the October 9th deadline set by Justice Morley, namely the Initial Application and the original affidavit from Mr. Greer.

[43] As stated above, the fundamental issue of relief from sanctions was not before the Court based on the Claimant's materials filed on October 9th. The Defendants' materials addressed the only request then made by the Claimant, namely an extension of the timeline to file her witness statements. The Defendants when faced with the last minute filing of the Amended Application and second affidavit from Mr. Greer were forced to make a choice between two prejudicial options not of their making. One, they could ask for an adjournment to file further affidavit and other materials in response to the Claimant's late filed materials. Obviously, choosing option one means more delay in a case that has experienced little else. Two, proceed with the November 28th hearing as scheduled relying on the materials filed in response to the initial materials filed by the Claimant with the risk that Claimant's late materials would be relied upon by the Court without answer.

[44] The Defendants' counsel chose not to ask for an adjournment and to proceed with the November 28th hearing relying solely on the Opposition Affidavit previously filed.

[45] At the conclusion of the hearing, Mr. Carrott asked for an indulgence following the hearing to file a case that he said supported his client's position with respect to the oral request for leave. The Defendants' counsel sought the same indulgence if granted to Mr. Carrott. I permitted both counsel to file further argument with case law by the day following the hearing. While this offered some buffer to the prejudice otherwise faced by the Defendants it did not place them in the position they would have been had the Claimant filed a proper application by the Court ordered October 9th deadline or even where she had done so ahead of the seven days leading up to the November 28th hearing date pursuant to Rule 11.13(1). In short, the Defendants were denied the reasonable time provided by the Rules to prepare full response and argument to all of the issues before the Court.

[46] This factor favours denying leave to the Claimant.

Is there any other conduct by the Claimant or other relevant context?

[47] The test for leave must be considered contextually. It is not a rigid exercise of checking off boxes.

[48] The Claimant was ordered to pay costs of \$750 to the Defendants for failing to file her pre-trial memorandum as ordered by Justice Morley. This costs order was unsatisfied at the date of the November 28th hearing. A failure to pay a \$750 costs order may seem trivial. It is certainly not the most severe failing. However, it is well established that a party seeking the discretion of the Court should attend with clean hands. This outstanding costs order is a material consideration when a party comes seeking the Court's discretion.

[49] There is other, instructive context here. The Claimant had been given repeated indulgences to file an application that addressed her failure to file witness statements by the June 6th deadline ordered on consent by Justice Morley. The Claimant failed to take any steps whatsoever for four months following that deadline. She was before this Court on three occasions over that four month period. On each attendance she requested and was given more time to file a remedial application. My point is that the context for the Claimant's oral request for leave is her antecedent, repeated failures to act and related, repeated indulgences by the Court.

[50] Even assuming a reasonable explanation for her inaction over the said four months, the Claimant and her counsel would know that they had to ensure to file a complete, comprehensive, rules compliant application by the October 9th deadline appreciating that any further indulgence of this Court would be problematic in the context of the significant forbearance already provided. I say this in particular reference to Mr. Carrot who knew he was representing a litigant in ongoing breach of deadlines seeking the Court's remedial discretion.

[51] This factor favours denying leave to the Claimant.

Conclusion

[52] Promoting the Rule 1 mandate to justly deal with cases requires a balancing of all relevant factors towards achieving overall fairness in the exercise of the court's discretionary powers, such as granting leave. Balancing the factors reviewed above inescapably directs this Court to deny the Claimant's oral motion for leave to file the Amended Application. As a result, the Amended Application is deemed not to be filed. This Court, therefore, has no request by the Claimant for relief from sanctions before it and relief from sanctions cannot be granted. The Claimant's Initial Application seeking an extension of time to file her witness statements cannot be granted in isolation. The Initial Application is dismissed for failing to explicitly seek relief from the sanctions set forth in CPR 29.11(1) as mandated by CPR 26.7(2) and 27.8(4). The sanctions stipulated by CPR 29.11 (1) remain in force prohibiting any witness who has authored a statement in support of the Claimant from being called to provide evidence at any trial in this case.

[53] In closing, I wish to say to the parties that this Court takes no pleasure in rendering this decision. This Court, like many I suspect, would prefer to craft some reasoning that would excuse the several defaults noted above towards allowing this litigation to move forward expeditiously to a determination on the merits. However appealing this objective is to the overall quest for justice it cannot automatically trump the values of litigation timeliness, efficiency and consistency. Cases must be dealt with justly balancing all relevant factors. At some point a defaulting party's right to have her claims decided on the merits must be forfeited in favour of enforcement lest the Rules lose all meaning and efficacy. Unfortunately for her, the Claimant here has left this Court with no credible alternative but to deny another indulgence.

IT IS HEREBY ORDERED THAT:

1. The Claimant's oral request for leave to file her Amended Application additionally seeking relief from sanctions is denied.

2. The Claimant's Amended Application is deemed not to be filed. This Court has no request by the Claimant for relief from sanctions before it and relief from sanctions cannot be granted.
3. The Claimant's Initial Application seeking an extension of the timeline to file her witness statements, is dismissed for failing to explicitly seek relief from the CPR 29.11(1) sanctions as mandated by CPR 26.7(2) and 27.8(4).
4. This matter shall return before me on a date to be scheduled to speak to the matter of costs of this application and any related matters.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

**By the
Court**

**REGISTR
AR**