

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

Claim No: NEVHCV2022/0057

BETWEEN:

SHAWN FORBES

Claimant

-and-

KHALID GLASGOW

Defendant

Before Master Alvin Pariagsingh

Appearances: Patrice Nisbett for the Claimant; and
Emily Prentice – Blackett for the Defendant

2023: March 20;
May 02.

JUDGMENT

Defendant's application to strike out
Claimant's Claim for Non-Compliance with a rule, practice direction, order or
direction given by the court

INTRODUCTION:

[1] PARIAGSINGH, M: - This is a claim for damages for personal injuries based on an alleged physical attack on the Claimant by the Defendant. The Claimant has not complied with any directions given by the Court in this matter. The Defendant has now applied to strike out the claim.¹ In response, the Claimant has applied for relief from sanctions and an extension of time.²

¹ Application filed on January 23, 2023.

² Application filed on February 17, 2023.

DISPOSITION:

- [2] For the reasons set out below, the Claimant's claim is struck out and stands dismissed with costs.

REASONS:

- [3] Striking out is a draconian power that the Court only exercises in clear cases where no other options are available to the Court. It prevents a claim from being determined on the merits. It is one of, if not the most lethal weapons in the realm of procedural justice. Whilst the authorities have consistently and continuously commended the approach of substance over form and procedure being a slave and not a master, no doubt procedural justice is a real concept. Though the effect of a striking out is devastating, the Claimant is not left without a remedy.

- [4] The procedural history of this matter is embarrassing to commit to paper. It throws us back to the dark hole of the laissez-faire conduct of litigation which the CPR³ was geared to remove. These rules have now been in force for 23 years. The obligations and duties of Legal Practitioners run far and deep. Arguably more so under the new rules than it did under its predecessor.

- [5] A history of the Claimant's pattern of non-compliance is as follows:

— July 11, 2022 - Matter came up for the first CMC. Claimant absent. Claimant did not file a reply, pleadings not closed. Defendant consented to an extension of time to file a reply to July 25, 2022 and CMC adjourned to September 26, 2022.

³ Civil Procedure Rules 2000 as amended (CPR)

- July 25, 2022 - Claimant does not comply with order to file reply by this date. No application made for an extension of time

- September 26, 2022 - Date fixed for the second CMC. Claimant files a reply without consent and without leave on the morning of the hearing. Claimant ordered to pay costs of \$500 and directions given for Standard disclosure on or before October 31, 2022, Agreed List of Documents by November 21, 2022 and witness statements by December 16, 2022. Matter adjourned to January 23, 2023.

- October 31, 2022 - No compliance by the Claimant, no list of documents filed. Defendant complies.

- November 03, 2022 - Claimant's files disclosure late, without consent or leave of the Court.

- November 21, 2022 - No list of agreed documents filed by the Claimant.

- December 16, 2022 - No witness statements filed by the Claimant. Witness statements filed by the Defendant.

- January 20, 2023 - 36 days after the deadline for filing the agreed list, the Claimant files the agreed list without leave of the court. Claimant also files one witness summary without leave.

- January 23, 2023 - Matter again comes up a further case management conference. Defendant files an application to strike out the claim. The Claimant also files his own witness statement, again without leave. The Court made the following order:

- o The Claimant shall file any affidavit in response to the application on or before February 06, 2023;
- o The Defendant shall file any affidavit in reply on or before February 13, 2023;
- o This matter is adjourned to February 20, 2023 for hearing of the application filed on January 23, 2023. 20.

— January 23, 2023 - The Claimant did not file an affidavit in response to the application to strike as stipulated by the order, instead on February 17, 2023, the Claimant filed his application for relief from sanctions.

— February 20, 2023 - The Court gives direction as follows:

- o Parties are to file and exchange their written submissions on or before March 06, 2023;
- o Parties are to file and exchange any submissions in reply on or before March 16, 2023; and
- o The matter is adjourned to March 20, 2023 for hearing of the application filed on January 23, 2023 22.

— March 09, 2023 - The Claimant did not comply with the order of February 20, 2023. Instead, on March 09, 2023 the Claimant filed his submissions.

[6] From the above it must be emphasised that (1) the Claimant has managed not to comply with a single direction given by the Court in any of the four (4) orders made in this matter. Further, the Claimant has also managed not to comply with the one (1) rule which imposed a deadline that is Rule 10. 9 CPR which specifies a date for the filing reply.

[7] It is against this conduct of the Claimant by which he has managed to flout or disregard every single order of this Court that he now seeks relief after the Defendant has applied to strike out.

[8] Following the guidance in *Attorney General v Montrope*⁴ the Court indicated that it would determine the Defendant's application first.

[9] The Defendant's application is hinged on Rule 26.3 (1) CPR which states:

"Sanctions-striking out statement of case

- (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
 - a. there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings..."

[10] The Court's attitude towards this type of disregard for the Court's rules and orders was stated in *Saint Lucia Furnishings Limited v Saint Lucia CoOperative Bank Limited* et.by Byron C.J.(as he then was) as follows:

'[11] The main concept in the overriding objective of the new rules set out in CPR Part 1.1, is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The flexible approach that should be adopted by the Court was discussed in the case of *Biguzzi v Rank Leisure* (1999) 1 WLR 1926 . The Court has wide powers for imposing appropriate sanctions. It is therefore possible to formulate suitable sanctions for breach of rules and directions without immediately resorting to draconian responses such as striking out. I particularly mention the provisions relating to "unless orders" which are intended to be used as a preliminary step to the imposition of sanctions.

[12] There will be situations, however, where striking out without the intermediate step is an appropriate order. There are two relevant concepts in the overriding objective. One is saving the litigant's expense and the other

⁴ SLUHCVP2019/0021

allotting an appropriate share of the Court's resources. The ultimate solution would, therefore, be a proper exercise of discretion where failure to strike out would cause a waste of expenses and resources. This means that repeated non-compliance with a rule or non-compliance combined with a weak case would justify the striking out of the case.'

[11] The two main orders which were not complied with in time are the orders for disclosure and the order for the filing of witness statements. Both these directions have sanctions attached to them in the rules. There is no need to express any further sanctions in the order. If a party does not comply with an order for standard disclosure the sanctions is that he may not rely on any documents unless the Court grant's permission.⁵ Similarly, if a party does not serve a witness statement or summary by the time specified in an order, the witness may not be called unless the court permits.⁶

[12] The Claimant has breached the orders of this Court with impunity. The Claimant has not been proactive in this litigation but always reactive. His belated application for relief from sanctions was only filed almost a month after being served with the application to strike out.

[13] Whilst the Claimant makes the submission that all documents are now filed and the matter can proceed I find this submission to be overconfident and presumptuous. The Claimant is in contempt of the Court. It does not fall on him to direct what is fair or say that no prejudice arises by his conduct. The Claimant's conduct must be balanced with any other alternatives the Court can consider except striking out the claim. The Court notes that the documents have been filed albeit without leave. The Defendant has made an application for relief from sanctions and an extension of time. It is to be noted that the application for relief from sanctions is in respect of witness statements only and this application was filed almost a month after the application to strike out was made.

[14] In this Court's view the Claimant simply did too little too late. Litigation is not driven by parties or their Attorneys. Gone are those days. Court orders are to be strictly complied

⁵ Rule 28.13 (1) CPR.

⁶ Rule 29.11 (1) CPR.

with. If there is to be an extension, the parties ought to make the appropriate applications. A party cannot arrogate unto himself the power to not comply, comply when it is convenient to him and do not seek the leave of the Court.

[15] For these reasons the Claimant's claim is struck out. The effect of this order is that the claim is determined. The Defendant cannot recover both the costs of the application and the costs of the claim. The Defendant shall therefore recover his prescribed costs of this claim.

[16] The Claimant's claim is a mixed claim. The Claimant sought both quantified special damages and unquantified general damages. This claim will therefore be treated as having a value of \$50,000.00 for the purpose of prescribed costs.

[17] All case management directions up to witness statements have been complied with by the Defendant. I am prepared to allow 60% of the prescribed costs to be recovered by the Defendant.

CLAIMANT'S APPLICATION FILED ON FEB 17, 2023

[18] For completeness, the Court has considered this application and wishes to record that in any event, the same would fail. This is because the Claimant has not satisfied the criteria of promptitude nor has the Claimant's satisfied the requirement of a good reason.

[19] In his affidavit in support, the Claimant merely says when he became aware that his witness statements were not filed, he acted with promptitude and had a witness summary filed on January 20, 2023. No explanation is given for the delay other than this statement. In this Court's view this is not sufficient cogent evidence at any rate to assess promptitude.

[20] The Claimant also gives as his reason for non-compliance that he was unable to communicate with his Attorney throughout the month of December. The reason for his

inability was not stated. Again, the evidence in support of this reason is lacking for the Court to conclude that it was a good reason.

[21] Accordingly, the Claimant's application of February 17, 2023 would have failed in any event.

ORDER:

[22] It is hereby ordered that:

1. The Claimant's statement of case filed on May 04, 2022 is struck out;
2. The Claimant's claim filed on May 04, 2022 is dismissed;
3. The Claimant shall pay the Defendant's costs of this claim on the prescribed scale quantified at 60% of the prescribed costs recoverable on a claim having a value of \$50,000.00 in the sum of \$4,500.00; and
4. The Claimant's application filed on February 17, 2023 is dismissed with no order as to costs.

Alvin Shiva Pariagsingh
Master

By the Court,

Registrar