

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
Civil Division**

ANGUILLA CIRCUIT

Claim No: AXAHCV2021/0050

BETWEEN:-

CUTHWIN WEBSTER

Claimant/ Respondent

-and-

GLENN RICHARDSON

Defendant / Applicant

Before Master Alvin Shiva Pariagsingh

Appearances: Navine Fleming for the Defendant/ Applicant; and
Tonae Simpson – Whyte for the Claimant/ Respondent

2023: February 27;
March 27.

DECISION

**Defendant's application for an extension of time to file witness
statements**

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application
for an extension of time to file witness statements.¹

[2] For the reasons set out below, the application is granted.

THE GROUNDS:

[3] Trial directions, including a direction for the filing of witness statements,
was given on October 04, 2022. These directions included that parties

¹ Application filed on January 16, 2023

were to make standard disclosure by November 30, 2022 and witness statements by January 14, 2023.² January 14, 2023 was a Saturday. The witness statements were therefore due on the next working day, January 16, 2023.

[4] The reason advanced for the extension sought is a conflict of Counsel's calendar and the witnesses³ and the illness of a witness.

[5] There will be no prejudice to the Claimant in granting the application as no trial date has been fixed.

[6] The application was made promptly, the Defendant has complied with all other relevant rules and orders and it is in the interest of justice to grant the extension sought.

THE EVIDENCE IN SUPPORT OF THE APPLICATION:

[7] In support of the application is the affidavit of Shearon Perkins.⁴ Her evidence is that after the order was made Counsel became heavily engaged in preparing for a matter before the High Court which involved eleven (11) witnesses and lasted two (2) weeks during the month of November 2022.⁵

[8] Counsel was unable to take instructions from the Defendant due to conflicting calendars between Counsel and the witnesses. In addition, one of the witnesses became ill with Covid requiring hospitalization.⁶

² Ground 1 of the application

³ Ground 2 of the application

⁴ Filed on January 16, 2023

⁵ Paragraph 5 of Affidavit of Shearon Perkins

⁶ Paragraph 6 of the Affidavit of Perkins.

[9] On January 12, 2023 before the deadline for the filing of witness statements, Counsel for the Defendant wrote to Counsel for the Claimant requesting her consent to an extension of time.⁷ There was no immediate response to this letter and on the following day, Counsel for the Defendant followed up her request with a phone call at 10:00 am but was unable to speak to counsel for the Claimant.⁸ At 3:10pm on the same day, Counsel for the Defendant returned Counsel for the Claimant's call indicating that she would take instructions on the extension sought and revert.

[10] On January 16, 2022 at 9:20 am Counsel for the Claimant again telephoned Counsel for the Defendant indicating that the Claimant was not minded to consent to the extension sought. This was followed up by an email received by the Defendant at 10:46am. The instant application was filed at 3:55 pm on the due date for witness statements.

ANALYSIS:

[11] The parties are ad idem that the correct test to be applied is the one for the grant of an extension of time under **Rule 26.1(2)(k) CPR**⁹. This rule does not specify the criteria to be applied. The criteria comes from the Court of Appeal decision in **BBL Limited & Anor v Canouan Resorts Development & Anor**.¹⁰ The Court must consider four (4) factors, they are:

1. the length of the delay,
2. the reasons for the delay,
3. any prejudice to the respondent; and

⁷ Paragraph 7 of the Affidavit of Perkins

⁸ Paragraph 8 of the Affidavit of Perkins

⁹ Civil Proceedings Rules 2000 as amended

¹⁰ SVGHC VAP2019/0006

4. whether the applicant's pleaded case is, in any event, a hopeless one -the chances of success

[12] This list is not exhaustive of the matters to be taken into account; per Pereira JA (as she then was) in **Carleen Pemberton v Mark Brantley**.¹¹

The length of the delay:

[13] Counsel for the Claimant reconciled delay with the 3 months from the making of the order to the deadline date for filing witness statements. She contends that this period is not adequately accounted for. This is my view is incorrect. The relevant period to be considered is not from the date of the making of the order. It is the delay in making the application for an extension. In this case, the application was made on the due date for the filing of witness statements. The application was made before the sanction had bitten. This is similar to the facts in **BBL (Supra)** in which the application for extension was made 5 days before the sanction had taken effect. I adopt the position set out by Farara JA at paragraph 59. In my view, the application was made promptly and there was no delay.

The reasons for the delay:

[14] The Court has stated time and time again in numerous authorities that Counsel's workload and schedule are not good reasons for non-compliance. The reason of one of the witnesses being ill is deficient as it is not corroborated by any evidence. in my view, the Defendant has not set out a good reason for non-compliance.

¹¹ [2011] ECSCJ No. 229

Any prejudice to the respondent:

[15] The prejudice to the Claimant is minimal. No trial date has been fixed and the matter has not been set down for a pre-trial review as yet. The sum total of the prejudice is resisting this application and the attendant costs.

Whether the applicant's pleaded case is, in any event, a hopeless one -the chances of success:

[16] The Claimant took the point that the Defendant led no evidence on this point. I find no merit in this argument. The strength of a party's case can be ascertained by their pleadings alone in interlocutory proceedings. This approach was confirmed in **BBL (Supra)** where the Court stated the test in relation to applications for extension of time to file witness statements.

[17] Without going into the merits of either party's case on paper, neither party has presented a case without merit. Ultimately, this claim will be resolved largely on findings of fact. In the absence of an admission, the issue of whether the sums alleged to have been paid to an alleged partnership between the parties or whether the sums were received by the Defendant under the alleged partnership are central factual issues for determination. Further, there are other tangential issues regarding whether a document purported to be executed in the presence of a legal functionary was in fact done so.

[18] Having considered both party's case and in particular the Defendant's defence I am unable to conclude that it is hopeless. This is sufficient for the purpose of this limb to be resolved in favour of the Defendant.

Overriding objective factors:

[19] It must be remembered however that this is not an application that the more stringent test for relief from sanction is being applied. As stated in paragraphs 64 and 67 of **BBL (Supra)**, per Farara JA:

[64] I am mindful that when the court is considering an application under CPR 26.1(2)(k) to extend time for compliance with an order or rule, it is not applying the more stringent requirements of CPR 26.8(2). It is not called upon necessarily to determine whether the failure was or would have been intentional, but whether the appellants have proffered evidence amounting to a good explanation for the delay. However, where the evidence shows a blatant disregard for the applicable court order or rule this would be a relevant factor in the exercise of the court's discretion.

[65]

[66]

[67] However, the matter does not end there because, even where an applicant for relief pursuant to CPR 26.1(2)(k) has failed to satisfy one of the considerations for the grant of an extension of time to comply with an order of the court, such failure is not immediately fatal to the application, as is the case where a defaulting party fails to satisfy any one of the conjunctive criteria for relief from sanctions under CPR 26.8(2). In discharge of its duty to do justice to the parties, the court must consider all the factors and circumstances put before it, including the effect which a refusal will have on the applicant and its case; whether the failure can be remedied

within a reasonable time; what effect the extension sought would have on the litigation including on any trial date; what, if any, prejudice an extension would cause to the other party or parties to the litigation; the proportionality of refusing to grant the extension sought in relation to any failure to comply with the court's order; and that, in the interest of the proper administration of justice, the orders of a court, especially unless orders, must be obeyed, unless there is some good reason for excusing the non-compliance. Put another way, the court must apply the overriding objective in determining which way to exercise its discretion and, in doing so, the relevance of the factors relied on and the weight to be attached to each such factor, is a matter for the court to decide in all the circumstances. In **Roland James and The Attorney General of Trinidad and Tobago, Civil Appeal No. 44 of 2014 (TT Unreported)** Mendonca JA stated:

“...on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case”

[20] The overriding objective does not favour the refusal of the application in my view for the following reasons.

1. The effect of refusing the extension will result in the Defendant being unable to defend this claim in circumstances where all directions have now been fully complied with;

2. The failure to comply has been remedied within a reasonable time, witness statements were filed by the Defendant four (4) days after it was due;
3. The effect on the litigation is not pronounced. By the adjourned date not only was the application for an extension made but the Defendant had remedied its breaches fully;
4. It is disproportionate to refuse the application given the effect of same, now that both parties have now fully complied and no trial date has been set.
5. The interest of the proper administration of justice favours cases being determined on their merits. Whilst Court orders are meant to be observed, there has to be a balance between the granting of an extension of time to comply with an order and ensuring the objectives of justice and fairness are not lost. The Court does not condone fragrant breaches or disregard for rules or Court orders but does not apply a mechanical approach without all the circumstances being considered.

[21] Taking all the circumstances in account, the application is granted.

COSTS:

[22] The general position is that where party is given an extension they are liable for costs caused by extension. I see no reason to depart from this position. The Defendant shall therefore pay the Claimant's costs of this application to be summarily assessed by this Court in default of agreement between the parties on the application of either party.

ORDER:

[23] It is hereby ordered that:

1. Time is extended for the Defendant to file witness statements to on or before January 20, 2023 and all statements filed on behalf of the Defendant by that date are deemed properly filed;
2. The Defendant shall pay the Claimant's costs of this application to be summarily assessed by this Court in default of agreement on the application of either party.

Alvin Shiva
Pariagsingh
High Court Master

By the Court,

Registrar