

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

SAINT VINCENT AND THE GRENADINES

SVGHCV2016/0235

BETWEEN:

KELLY GLASS

Claimant

and

NATASHA POTTER

Defendant

and

NEAL DE FLORIO

Added Party

Appearances:

Mr. Joseph Delves for the Claimant

Mr. Duane Daniel for the Defendant

Mr. Jomo Thomas for the Added Party

2022: September 21;

October 10.

RULING

- [1] **GILL, M.:** This is the court's ruling on the defendant's application for extension of time to file witness statements and for leave to call an expert.
- [2] At a case management conference on 29th March 2022, the parties were ordered, among other things, to file and exchange witness statements on or before 31st May 2022. The defendant failed to comply with this aspect of the order.

- [3] Instead, on the day of the court's deadline, the said 31st May 2022, the defendant made the instant application to extend the time to file witness statements to 30th June 2022, and in the same application, sought an order for leave to call an expert witness.
- [4] Two of three of the defendant's witness statements, were filed on 30th June 2022 as requested in the application, and the third was filed on 6th July 2022.
- [5] Whereas the added party did not put in an objection to the application, the claimant filed an affidavit and submissions objecting to both aspects of the application.

Extension of time

- [6] The application is made pursuant to Part 26.1(2)(k) of the Civil Procedure Rules 2000 as amended (CPR 2000) which reads:

(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 extension of time is made after the time for compliance has passed;

...

- [7] In such applications, the court has a wide discretionary power. However, this power cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well established principles.¹ In the exercise of its discretion, the court must undertake "an evaluation exercise by weighing all the relevant factors in the scale".² These factors include the nature of the failure and the consequential effect, the length of the delay, the reasons for the delay, the degree of prejudice if the application is granted, and whether there is a realistic prospect of success. This is not an exhaustive list.
- [8] Paragraphs 4 to 11 of the defendant's application grounds deal with this part of the application. I reproduce them in full as follows:

- 4. *Unfortunately, the Applicant has experienced some difficulties in securing the signatures of her witnesses because they live in Canada and communication with them has been difficult notwithstanding the fact that instructions were taken from all witnesses and drafts prepared. The finalisation and review of same, however, proves difficult.***

¹ See *Carleen Pemberton v Mark Brantley* HCVAP 20011/009, delivered October 14, 2011 at paragraph 12

² See *Lindsay F P Grant and Another v Tanzania Tobin Tanzil* [2020] ECSCJ No. 223, SKBHCVP2020/0004 at paragraph 17

5. *This Application is made as soon as reasonably practicable, that is, before the expiration of deadline for filing of the witness statements and as soon as the Applicant realised that it was impossible to contact her witnesses for finalisation and review of their witness statements and to secure their respective signatures on same.*
6. *The failure to comply with the Order is not intentional because; (1) the Applicant obtained the permission from her witnesses to be witnesses weeks in advance of the deadline; (ii) ensured that appointments were made for them to give instructions; (iii) instructed the preparation of their witness statements on her behalf; and (iv) made numerous efforts to reach out to the witnesses for them to review, provide further information and sign their witness statements.*
7. *There is a good and acceptable explanation for the failure to comply with the deadline, that is, the Applicant made every effort to ensure that all instructions were given by her witnesses and that they were available to sign their respective witness statements. However, the Applicant has been facing difficulties in contacting her witnesses, although draft witness statements were prepared and sent for them to review.*
8. *The Applicant has generally complied with all other relevant rules, practice directions, orders and directions of the Court.*
9. *The Applicant's claim has a real prospect of success.*
10. *The failure to comply with the Order was not due to the failure of the Applicant.*
11. *The extension of time itself would not cause any additional costs to be incurred that would not have been incurred had the witness statements been filed on May 31, 2022.*

[9] The application, filed on 31st May 2022, was supported by the affidavit of Otisha Nichols ("Ms. Nichols"). The affidavit gives evidence as stated in the grounds. Ms. Nichols subsequently swore 2 further affidavits, a supplemental affidavit on 2nd June 2022, and on 8th August 2022, an affidavit in reply to one filed on behalf of the claimant.

[10] The claimant's opposing affidavit and submissions were filed on 21st July 2022. At that time, the defendant's only evidence in support of the application was that in Ms. Nichol's affidavit filed on 31st May 2022.

The length of the delay

[11] The application itself was made promptly. It was filed on 31st May 2022 before the expiration of the deadline to file witness statements at the close of the court's business day. As to the witness statements, two of the defendant's three witness statements were filed on 30th June 2022 as requested in the application, and the third witness statement, on 6th July 2022, a delay of 30 days and 36 days respectively. This calls into question the reason for this delay.

The explanation for the delay

- [12] The main contention of the claimant is that the supporting affidavit of 31st May 2022 makes bald assertions, and that an application for extension of time must provide cogent, compelling and fulsome information on which the court can act, and must not leave the court to fill in blanks, make inferences, or bridge gaps.
- [13] The claimant submits that the material in the affidavit raises more questions than answers, and the claimant poses the following questions as examples:
- When were the instructions given?
 - When were all the witnesses contacted?
 - When were the appointments?
 - When were the drafts sent out?
 - By the words “these preparations started May 9th 2022”,³ does the applicant mean the instructions were taken at that time?
 - If “the applicant obtained permission from her witnesses to be witnesses weeks in advance of the deadline”,⁴ why did the applicant take 52 days (from 9th May) days to file two of the witness statements and 58 days to file another?
- [14] The claimant quoted extensively from the decision of the Court of Appeal in **Adam Bilzerian v Gerald Lou Weiner and Another**⁵ where Pereira CJ, in dealing with the issue of whether the lower court’s discretion in refusing relief from sanctions should be overturned, issued guidance on the type of evidence required of applicants for such orders. The onus is on an applicant to show by credible and particularised evidence that he has met the threshold warranting the grant of relief.⁶ It behoves a litigant to put forward fulsome and cogent information which will assist the court in the proper exercise of its discretion and in furthering the overriding objective to deal with cases justly.⁷

³ Paragraph 4 of the affidavit of Otisha Nichols filed on May 31, 2022

⁴ Paragraph 7(c) of the affidavit of Otisha Nichols filed on May 31, 2022

⁵ SKBHC VAP2015/0015, delivered January 27, 2016

⁶ Ibid at paragraph 15

⁷ Ibid at paragraph 17

- [15] Ms. Nichol's affidavit in reply filed on 8th August 2022 purports to explain why the defendant's third witness statement was filed on 6th July 2022, 6 days past the date of 30th June 2022 proposed in the application. The explanation is that the witness emailed her signed witness statement on Saturday 2nd July 2022, but Monday 4th July 2022 and Tuesday 5th July 2022 were public holidays so that the earliest possible date for the filing and serving of the witness statement was 6th July 2022.
- [16] The claimant posits that by the affidavit of 8th August 2022, filed after the claimant's submissions, the defendant is trying to plug holes, and this is tantamount to "shifting the goal post", a practice frowned upon by the court.⁸
- [17] In any event, the defendant has not put forward any good reason for the tardiness of the witness in submitting her statement to be filed in time for the requested new deadline. Further, I am in agreement with the submissions of the claimant that the information provided by the defendant for the failure to file all the witness statements on time is not fulsome and cogent enough to allow the court to determine that the defendant had good and proper reasons for the delay. Therefore, I hold that the defendant has failed to show any good reason for the late filing of witness statements in this case.

Prejudice

- [18] Notwithstanding the claimant's arguments on the defendant's explanation for the delay, the claimant submits that no party was disadvantaged by the late filings as all parties essentially exchanged their witness statements at or around the same time, 1st July 2022, that is, save and except for the defendant's third witness statement filed on 6th July 2022. The claimant states that this witness statement was filed – and presumably prepared – after the defendant had been served with the claimant's evidence, and that cannot be fair, especially in the absence of any or any proper explanation by the defendant. The claimant reminds the court that prejudice to a party is always a critical factor in applications for extension of time.
- [19] The defendant counters that the third witness statement did not benefit from review of the claimant's witness statements for the following reasons:

⁸ See *The Attorney General of Saint Lucia v Darrel Montrope* SLUHCVP2019/0021, delivered July 9, 2020 at paragraph 36

- (a) The content of the third witness statement speaks to the claimant's relationship with the defendant and her state of mind around the period when the transactions in question were performed. The information requested of this witness was captured in an email dated 24th May 2022.
- (b) The endorsement in the email for the witness statements of the claimant shows that they were received on Friday 1st July 2022 at 12:45 p.m.
- (c) The witness responded by email with her signed witness statement on Saturday 2nd July 2022.

[20] The defendant relies on the recent decision in **Olfred Sharpe v Anthony Dascent**⁹ as being extremely instructive. On a second application for extension of time and relief from sanctions, the court accepted, as reasonable justification for the failure to meet the court's deadline, the respective untimely illness and hospitalization of counsel's parents. Henry J opined that any prejudice to the respondent could be met by granting time to the respondent to file further witness statements. At paragraph 20 of the decision, Her Ladyship stated:

“The court reminds itself that in its bid to further the overriding objective, it must seek as far as possible to facilitate the parties in presenting their case. In the premises, any advantage which may accrue to [the applicant] by a further extension of time can be cured by the grant of time to [the respondent] to respond by filing further witness statements to address any new matters which arise from [the applicant's] filings.”

[21] Clearly, even though a narrow margin, there was opportunity between 1st and 2nd July, or between the 1st and 6th July 2022 for the third witness statement to be fashioned in such a way as to answer or challenge issues raised in the claimant's witness statements. With the state of mind of the defendant being a part of the defence, it is reasonable to conclude that some degree of prejudice arises here. Given the instructions to the witness since 24th May 2022, and the evidence of the contents of the witness statement, I consider the prejudice to the claimant to be minimal and insufficient, by itself, to warrant a refusal of the application as regards the third witness statement. On the reasoning in **Olfred Sharpe**, the claimant, if aggrieved can be granted time to file further witness statements to cure any prejudice he feels arises from the third witness statement.

⁹ SVGHCV2017/0109, delivered April 11, 2022

Real prospect of success

- [22] On this issue, the claimant points out that the defendant makes only the bald statement that her “claim has a real prospect of success”. This is a contractual claim seeking equitable remedies of specific performance and injunctive relief. The defendant relies on the finding of Moise M, as he then was, earlier in the life of this claim that “[T]here is more than a real prospect of success here; at least as it relates to the request for specific performance”.¹⁰ This was in a decision on the defendant’s application to set aside default judgment entered on 18th December 2017. It appears that the defendant did not feel it necessary to provide this court with any evidence, outside of the holding of the learned master, to demonstrate that there is a real prospect of the defendant succeeding on the claim. The decision of the learned master was not appealed. Notwithstanding the fact that the defendant has not put forward evidence to this court, even if she had so done, in my view, it would not be proper for this court to find that the defendant has no real prospect of success in the same circumstances in which a court of concurrent jurisdiction found that there was.

Expectation of reciprocity

- [23] On 26th May 2022, the claimant filed an application for extension of time to file his witness statement and/or witness summaries. The defendant’s evidence reveals that before filing that application, counsel for the claimant called and indicated to counsel for the defendant that he was having challenges with respect to meeting the filing deadline of 31st May 2022. He enquired whether the defendant would object to same and whether the defendant would sign a consent to the extension of time. Without seeing the application or draft order, counsel for the defendant expressed no objection to the claimant’s intended application. Though it was not discussed, the defendant states that there was an expectation of reciprocity in respect of the filing of applications for the extension of time for the filing of witness statements, as both parties were craving the indulgence of the other. The defendant expected reciprocity in the interest of fairness for the missed timeline, and submits that in applications for extension of time, a party is entitled to expect that the discretion relevant to

¹⁰ *Kelly Glass v Natasha Porter* (sic), SVCHCV2016/0235, delivered March 27, 2019 at paragraph 28

such an application will be exercised judicially in accordance with established principles of what is fair and reasonable.¹¹

[24] At the hearing, learned counsel for the claimant alleged that he was wrongly accused, and that at no time did any counsel for the defendant or for the added party tell him that they were going to apply for an extension of time and in fact, he was surprised to see such an application by the defendant.

[25] The instant application was made before the expiration of the deadline for the filing of witness statements. Therefore, there was no need for the defendant to apply for relief from sanctions and the defendant correctly applied for an extension of time only.¹² There is no specified sanction for the defendant's failure to comply with the court's order. The requirements in the non-exhaustive list for an application for an extension of time pursuant to CPR 26.1(2)(k) are not conjunctive as in the strict regime provided for relief from sanctions under CPR 26.8.

[26] This was a timely application. The defendant's witness statements have been filed. There is no disadvantage to the claimant in respect of the witness statements exchanged on or about 1st July 2022. Any prejudice that may arise from the filing of the witness statement on 6th July 2022 can be cured by further filings by the claimant. Whereas I am of the view that the information put forward for the defendant's delay is not fulsome and cogent, the failure to satisfy this requirement is not fatal to the application. In an earlier application, the court ruled that the defendant has a real prospect of success. No trial date has been set. No consequence of the defendant's failure is specified in CPR 26.1. In these circumstances, I am satisfied that this is a proper case for the court to put matters right¹³ and grant an extension of time to the defendant for the filing of all his witness statements.

Expert witness

[27] Pursuant to Part 32 of CPR 2000, the applicant also seeks an order for leave to call Ms. Marilyn Piccini Roy ("Ms. Roy") of Robinson Sheppard Shapiro, lawyers and advocates (of

¹¹ See *Jurkowska v Hlmad* [2008] EWCA Civ 231 at paragraph 19

¹² See *Vanroy Romney v Sheridan Smith* AXAHC VAP2015/0002, delivered September 14, 2016 and *BBL Limited et al v Canouan Resorts Development Limited et al* SVGHC VAP2019/0006, delivered January 12, 2021

¹³ CPR 26.9

Quebec, Canada), as an expert witness on foreign law. This is on the basis that a legal opinion concerning the validity and enforceability of documents signed by the defendant with respect to the assets of the Estate of Thomas Potter, deceased, is relevant and necessary to assist the court in determining what relief, if any, is appropriate in this claim, and the proposed witness, Ms. Roy is qualified and competent to be deemed an expert witness. The defendant submits that Ms. Roy's evidence and expertise would greatly assist the court in determining fundamental issues in this case. Ms. Roy's qualifications are before the court.

[28] Part 32 deals with the provision of expert evidence to assist the court. CPR 32.2 stipulates that the expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.¹⁴

[29] The claimant strenuously objects to this part of the application. The claimant alleges that Ms. Roy previously took on the role of an advocate of the defendant and the added party, and her opinion in support of the case for the defendant and the added party was attached to the defence filed on 11th April 2019. A cover letter dated 10th July 2018 to the opinion showed that the opinion was for the benefit of "Ms. Williams and Mr. De Florio", and not the court. The claimant contends that it was intended to serve the defendant, hence its attachment to the defence. On an application by the claimant, the then master, on 25th July 2019, struck out the report/opinion. By the instant application the defendant seeks to comply with the procedural requirement under CPR 32.6.

[30] The claimant points out that the opinion was included in the added party's list of documents dated 29th April 2022 at Item 22 and also in the defendant's list of documents at Item 12. It is also attached to the defendant's witness statement filed on 30th June 2022.

[31] The claimant submits that the court is very scrupulous and particular about opinion evidence and pays strict regard to the requirements of Part 32. In particular, in an application to adduce expert evidence, any conflict of duty must be disclosed. The claimant contends that putting an opinion in the list of documents is not sufficient. Mentioning the qualifications of Ms. Roy in passing in an affidavit without a full explanation and disclosure of the history of

¹⁴ See also *John Oliver Dyrud v Palmavon Jasamin Webster and Another* AXACVAP2021/0011, delivered April 27, 2022, at paragraph 60

the opinion is not sufficient. The claimant further submits that whether an expert is impartial is a question of admissibility and not weight. The claimant accuses the defendant (and the added party) of inviting this court to act in breach of the rules by asking that the opinion be now deemed an unbiased, independent opinion, whilst failing to disclose the history of the so-called opinion to date.

[32] In **South Asia Energy Limited v Hycarbex-American Energy Inc.**¹⁵ the Court of Appeal applied the principles laid down in **Toth v Jarman**¹⁶ as to what the court must consider in relation to the appointment of an expert. At paragraph 14 of the judgment, Pereira CJ extracted the essence of the decision of the Court of Appeal of England as follows:

- (a) An expert witness in the court should never assume the role of an advocate;
- (b) While the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is a sufficient condition. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced.
- (c) A party wishing to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should disclose details of that conflict at the earliest opportunity.
- (d) Similarly, an opposing party should disclose any objection it may have to the admission of expert evidence at the earliest opportunity.”

Her Ladyship went on:

“We are in full agreement with these guiding principles having regard to the overriding objective of dealing with cases justly declared in the CPR, and further buttressed by the safeguards contained in CPR Part 32 in respect of the receipt and use by the court of expert evidence.”

[33] The defendant submits that the fact that Ms. Roy acted as an advocate to the defendant is not a bar to her being called as an expert in this case. The defendant cites the High Court judgment in **Glory Advance International Limited v Merit Fortune Holdings Limited and Another**¹⁷ to make the point. At paragraph 66 of the judgment, Leon J (Ag.) stated:

“There may be circumstances in international commercial litigation where the exigencies of time and/or cost and/or available expertise may make it practical, if

¹⁵ SKBHCVP2017/0016, delivered April 13, 2018

¹⁶ [2006] EWCA Civ 1028

¹⁷ BVIHC(COM) 2015/0090, delivered July 8, 2016

not ideal, to consider receiving expert evidence on foreign law from a lawyer in a law firm representing the party, particularly if not on a central issue.... It may be that in such contexts evidence can be received from such a lawyer and given appropriate weight.”

- [34] The defendant further directs the court’s attention to paragraph 100 of **Toth v Jarman** where the court opined that the presence of a conflict of interest does not automatically disqualify an expert. The court explained that “the key question is whether the expert’s opinion is independent. It is now well-established that the expert’s expression of opinion must be independent of the parties and the pressures of litigation”.
- [35] The fact that Ms. Roy previously represented the defendant and the added party, a fact not disputed, is sufficient to raise the issue of a potential significant conflict of interest. The defendant’s bald assertion that Ms. Roy will be called merely to provide guidance on her legal opinion does not assist or convince the court that Ms. Roy will provide impartial, independent, objective or unbiased assistance to the court. There is no evidence before this court to allow it to determine that Ms. Roy’s opinion is “independent of the parties and the pressures of litigation”. The court was not provided with any material on which to carry out an assessment in order to decide whether the issues raised in the opinion are central to the issues in the case. Further, the defendant has not demonstrated any of the circumstances outlined in the passage cited in **Glory Advance International Limited v Merit Fortune Holdings Ltd and Another**.
- [36] The defendant submits that Ms. Roy, even though an advocate, would merely be acting in a professional capacity, and she will not be called upon to act in a representative capacity for the defendant but merely to provide guidance on her legal opinion.
- [37] As to disclosure, the defendant avers that she has never made it a surreptitious fact that she obtained an opinion from Ms. Roy. The defendant relies on the defence, the list of documents and her witness statement with the opinion attached to contend that there has never been a failure on her part to disclose any facts.
- [38] It is insufficient for the defendant to state that she never sought to or never failed to disclose any facts. In my view, it was incumbent on the defendant to expressly state in her application, and bring to the court’s attention, Ms. Roy’s previous representation of the defendant as an

advocate, and to convince the court that even in light of that fact, the opinion provided is independent, impartial and unbiased, and only used to assist the court on the issue of the foreign law component in this case.

- [39] The fact of Ms. Roy's previous representation of the defendant, together with the fact that this was not expressly disclosed by the defendant, is sufficient for me to exercise my discretion not to grant leave to the defendant to call Ms. Roy as an expert witness.

Order

- [40] Based on the foregoing, it is hereby ordered as follows:

- 1) The defendant is granted an extension of time from 31st May 2022 to 6th July 2022 for the filing of all witness statements in support of the defendant's case.
- 2) The defendant's application to call Ms. Marilyn Piccini Roy as an expert witness is refused.
- 3) The defendant shall pay the claimant costs of the application in the sum of \$1,000.00.

Tamara Gill
Master

By the Court

Registrar