

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2020/0598 formerly SLUHCV2018/0118
heard together with:
SLUHCV2018/0119 and SLUHCV2018/0120

BETWEEN:

DR. IFTEKHAR AHMED SHAMS
ASHWIN PATEL
GURJEET SINGH VILKHU

Claimants

and

THE ATTORNEY GENERAL

Defendant

BEFORE:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

APPEARANCES:

Ms. Diana Thomas for the Claimants

Mr. Rene Williams with Mrs. Antonia Charlemagne for the Defendant

PRESENT:

Claimants

2021: November 16;
2022: January 4.

DECISION

(Application for variations to case management timetable-Relief from sanctions)

- [1] **CENAC-PHULGENCE J:** On 20th April 2021 the defendant, the Attorney General (“the AG”) filed an application supported by affidavit seeking an order that (a) the date for filing and service of standard disclosure be extended and (b) the date for filing and exchange of the further witness statements of the defendant be varied and extended to a date to be determined by the Court. Having had the benefit of both oral and written submissions from the claimants and defendant, I have determined that the application for extension of time to

file and serve standard disclosure and further witness statements and relief from sanctions should be dismissed with costs to the claimants in the sum of \$500.00 each for the reasons set out below.

Procedural History

- [2] It is important to place this application in the context of its procedural history thus far. On 27th February 2018, the claimants, Dr. Iftexhar Shams, Ashwin Patel and Gurjeet Singh Vilkhur filed three separate claims, SLUHCV2018/0118, SLUHCV2018/0119 and SLUHCV2018/0120 against the AG claiming damages for malicious prosecution. The Court ordered that the three claims be heard together given that the matters emanated from essentially the same set of facts. The matters were later migrated to the E-litigation Portal as SLUHCV2020/0598. The claims continued to be heard together.
- [3] Case management directions were given in the matter on 21st June 2018 with standard disclosure to be filed by 30th September 2018 and witness statements filed and exchanged by 15th November 2018. Subsequently, there were four joint applications for variation of the case management timetable as it related to the filing of standard disclosure and witness statements.¹ The order made on the last joint application was for the filing of standard disclosure by 28th February 2020 and filing and exchange of witness statements by 23rd March 2020. The claimants had by that time filed their list of documents on 18th March 2019.
- [4] The Corona virus pandemic intervened, and the matter next came up for hearing on 13th October 2020 when the Court granted the AG an extension to 23rd October 2020 to file standard disclosure. The claimants and defendant were also granted an extension to 31st December 2020 to file and exchange witness statements. The AG filed a list of documents on 23rd October 2020.

¹ Orders on first three joint applications-

Order dated 6th December 2019-disclosure to be filed by 15th January 2019; witness statements by 15th February 2019.

Order dated 7th March 2019-disclosure to be filed by 18th March 2019; witness statements by 31st May 2019.

Order dated 17th June 2019-disclosure to be filed by 19th July 2019; witness statements by 9th September 2019.

- [5] The claimants in compliance with the 13th October 2020 order filed three witness summaries under seal on 31st December 2020. On 2nd February 2021, the AG was granted an extension to 23rd February 2021 to file and serve witness statements. All of these extensions granted to the AG after the last joint application were done with no objection from the claimants. On 23rd February 2021, the AG filed one witness summary of Deputy Director of Public Prosecutions, Stephen Brette and a witness statement from him on 24th February 2021. On 16th March 2021, the Court granted a final adjournment to 20th April 2021 as counsel for the AG had indicated that he wished to have some time to have discussions with his client based on information which he had recently received.
- [6] On 19th April 2021, the AG filed three witness statements from Burtley Ferdinand Daryl Evans and Shervon Mathieu along with a supplemental list of documents containing a list of 31 documents which appear to be the exhibits to the witness statements of Burtley Ferdinand and Daryl Evans. Then on 20th April 2021, the AG filed two witness statements from Dwayne Octave and Shervon Mathieu, a witness summary from Daryl Evans and a supplemental list of documents now containing 45 documents appearing to be exhibits to the witness statements of Dwayne Octave and additional exhibits to that of Daryl Evans. The application which is the subject of this decision was also filed on 20th April 2021 and the Court gave directions to facilitate the hearing of the application.
- [7] Since the filing of the application, there have been changes in the legal representation of both the claimants and the AG.

The Application

- [8] The application is stated to be made pursuant to CPR 11 and 27.8. The grounds of the application are as follows:
- (a) The AG wishes to vary the date for filing supplementary standard disclosure and filing and exchange of additional witness statements which has become necessary based on information and instructions recently received after the case management directions had been given (CMC was given since 21st June 2018);
 - (b) The application is being made in as timely a manner as could have been done upon discovery of new information and the delay is not inordinate; the information obtained is relevant to the issues in dispute; the reason for the delay is reasonable and credible given the circumstances; there is no prejudice to the claimants and the extension of time is in the interest of the proper administration of justice;
 - (c) The failure was not intentional as the AG, not being the prosecuting authority, was not aware of the extent of documentation which existed in relation to the charges by the Office of the Director of Public Prosecutions;
 - (d) The AG has a good explanation for the failure to file the supplementary disclosure and the witness statements;
 - (e) The AG has generally complied with all other trial directions;
 - (f) The failure to file the witness statements is more permission to file additional witness statements; it has been remedied and will not compromise the trial date as none has been set as yet;
 - (g) The grant of an extension of time will not prejudice the claimants.
- [9] Whilst the application cites CPR 27.8 as its basis, the affidavit in support says it is in support of 'the application for relief from sanctions pursuant to CPR 26.8'. CPR 26.8 is alluded to in the grounds of the application although it is not expressly stated there. CPR 27.8 deals with variations to the case management timetable. CPR 27.8(1) states that a party must apply to the court if that party wishes to vary the date fixed for (a) a case management conference; (b) a party to do something where the order specifies the consequences of failure; (c) a pre-trial review; (d) the return of a listing questionnaire; or (e) the trial date or trial period.

- [10] CPR 27.8(2) provides that '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)'.
- [11] CPR 27.8(3) states that 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 a party must do so before that date.
- [12] CPR 27.8(4) states that a party who applies after that date must apply for an extension of time and relief from any sanction to which the party has become subject under the rules or any court order.
- [13] It is very clear that the AG is not seeking to vary any of the dates listed in CPR 27.8(1). The dates for which an extension is being sought are in relation to filing of standard disclosure and additional witness statements. A variation of these dates would not affect any of the dates specified in sub-rule (1) and therefore CPR 27.8(2) is not applicable. The parties have not agreed to the variations sought and in any event the application is being made after the date set for filing of standard disclosure and witness statements. The date for standard disclosure was 23rd October 2020 and the AG complied with that date. The date for filing witness statements had been extended in relation to the AG to 23rd February 2021 and the AG filed one witness summary on that date.
- [14] The dates for the filing in relation to both directions have passed. Therefore, it is CPR 27.8(4) which is applicable as the AG is making this application after the dates stipulated for the filing of standard disclosure and witness statements. Counsel for the defendant, Mr. Rene Williams in oral submissions admitted that the application was really an application for relief from sanctions under CPR 26.8 having regard to CPR 29.11.

List of Documents

- [15] CPR 28.13(1) states that a party who fails to give disclosure by the date ordered may not rely on or produce at the trial any documents not so disclosed.
- [16] CPR 28.12(1) and (2) states:
- “(1) The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded.
- (2) If documents to which that duty extends come to party’s notice at any time during the proceedings, that party must immediately notify every other party and serve a supplemental list of those documents.”
- [17] It would appear from the affidavit in reply and was confirmed at the hearing of this application by counsel for the claimants now on record, Ms. Diana Thomas, that the claimants are not objecting to the part of the application seeking an extension of time to file standard disclosure. Despite this, I feel it necessary to make some observations about the documents termed supplemental list of documents.
- [18] It is clear that there is a duty of continuing disclosure where documents come to the attention of a party during the proceedings. However, the rule requires that the other party be notified of this and that a supplemental list of those documents be served on the other party. Whilst I agree that there is a duty of continuing disclosure, I note in this case that the supplemental list of documents was filed on 19th and 20th April 2021, together with the witness statements and summaries filed on the respective dates. The lists also state that they are being made in accordance with the Order of the Court dated 2nd February 2021, but it will be noted that the Court never made an order in relation to filing of disclosure on that date but rather granted an extension to the AG to file witness statements by 23rd February 2021. The manner in which these supplemental lists were filed hardly appears to be part of continuing disclosure but rather an attempt to put in documents which relate to the witness statements now filed. That is not what is contemplated by the rules as the claimants are now seeing these documents for the first time as exhibits to witness statements.

[19] I find this practice employed by the AG unacceptable and the Court cannot continue to condone this kind of practice which seems to have become the norm in this jurisdiction. The whole point of disclosure is to give the other side an opportunity to inspect the documents which have been disclosed. In light of this, I am not minded to allow the filing of the supplemental list of documents filed on 19th and 20th April 2021 which are more akin to a list of exhibits accompanying witness statements.

Witness Statements/Summaries

[20] CPR 29.11 provides that 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*. The rule provides that the court may not grant such permission at the trial unless the party in default has a good explanation for not previously seeking relief from sanctions in accordance with CPR 26.8. As we are not at the trial, the application must be considered in accordance with CPR 26.8.

Whether the Court has power to grant an extension of time to file further/ additional witness statements?

[21] The application filed by the AG is really for an extension of time and relief from sanctions to file additional/further witness statements since they have already filed one witness summary by the deadline date of 23rd February 2021.

[22] Counsel for the claimants, Ms. Diana Thomas (“Ms. Thomas”) submits that the Court has no power to grant this application as the **Civil Procedure Rules** do not allow for the filing of further witness statements. In support of this submission, Ms. Thomas relies on the decisions of **Nandalal Balroop v Trinidad and Tobago Mortgage Finance Company Limited**² and **Roychand Singh v Michael Ramnarinesingh**³ where the High Court held that it had no power to grant an extension of time to file additional witness statements after the date for filing of witness statements had passed because there was no

² CV2007-00535, delivered 28th July 2009.

³ CV2016-00938, delivered 23rd November 2018.

provision in the Trinidad rules allowing this. Ms. Thomas was of the view that these cases should apply in Saint Lucia.

[23] The cases relied on by Ms. Thomas were discussed in the case of **Kerron Hutchinson v Nu-Iron Unlimited**.⁴ The court was of the view that these cases were all distinguishable from the case in **Kerron Hutchinson**. **Kerron Hutchinson**, the court noted was not a case where the claimant had sight of the defendant's witness statements and then went on to file and serve supplemental evidence to address matters raised by the defendant. In **Kerron Hutchinson**, the claimant filed his principal and 'supplemental' witness statements 'together' and within the court's specified deadline for the filing and exchange of witness statements. Therefore, there was no need for an application for extension of time or for relief from sanctions.

[24] However, both **Singh** and **Balroop** involved applications to file further witness statements in circumstances where witness statements had already been exchanged. In **Singh**, after having sight of the other side's witness statements, the applicant sought permission to file further witness statements from persons who had not given witness statements to begin with. Moreover, the applications in **Singh** and **Balroop** were made long after the date for the filing and exchange of witness statements had passed. The Court in **Singh** noted at paragraphs 11 and 12 that:

"An examination of Part 29 of the CPR discloses that, following the filing and exchange of witness statements, parties are allowed to add to their evidence in only two ways: by filing a supplemental witness statement by a witness whose statement has already been filed and by amplifying at trial. ...

As observed by Stollmeyer['s] in **Nandalal Balroop**, the CPR omitted altogether, the possibility of additional or further witness statements. It was my view that this omission was part of a larger scheme to require parties to exchange witness statements rather than file them sequentially, as in matters where affidavit evidence is used. One of the effects of this scheme is that parties are not allowed to see the evidence of the opposing side before filing their witness statements. They are therefore not allowed to tailor their evidence in order to contradict the opposing side...."

⁴ Trinidad and Tobago Claim No. CV2017-04344 delivered 1st July 2020.

- [25] The court in **Singh** went on to note that this was precisely why the rules made provision for a party who was willing and able to exchange witness statements but was not able to because the other party was not prepared to exchange, to file their witness statements in a sealed envelope.
- [26] Unlike Trinidad, where provision is made in their **Civil Proceedings Rules** for filing of supplemental witness statements by a witness who has already filed a witness statement, our **Civil Procedure Rules** do not speak to either the filing of supplemental or additional witness statements. According to Ms. Thomas this is a bar to an application for extension of time to file additional witness statements. The rules simply do not provide for it.
- [27] Whilst I understand the rationale as espoused in the Trinidad cases, I am of the view that our CPR 29.11 is broad enough to allow for the filing of an application for the filing and service of additional or supplemental witness statements. CPR 29.11 is clear that if a witness statement in relation to a proposed witness is not served within the time specified by the court, the witness would not be able to be called as a witness unless the court permits. The rule goes on to say that the court may not give such permission at trial unless the party asking for permission has a good reason for not previously seeking relief from sanctions. This suggests that an application for relief from sanctions can be filed prior to the date of the trial. It would then be for the court to decide whether CPR 26.8 has been satisfied. I am of the view that there would have to be very strong and cogent reasons and circumstances which would permit additional or supplemental witness statements to be served after the deadline has passed especially in circumstances where the witness statements have already been exchanged.

CPR 26.8

[28] In relation to the filing of the witness statements, the application is correctly stated in the affidavit in support of the application as an extension of time and relief from sanctions under CPR 26.8. CPR 26.8 states:

“26.8

1. An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
a. made promptly; and
b. supported by evidence on affidavit.

2. The court may grant relief only if it is satisfied that –
a. the failure to comply was not intentional;
b. there is a good explanation for the failure; and
c. the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

3. 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; and
e. whether the trial date or any likely trial date can still be met if relief is granted.

4. The court may not order the respondent to pay the applicant’s costs in relation to any application for relief unless exceptional circumstances are shown.

Whether the Application was made Promptly? (CPR 26.8(1)(a))

[29] In the affidavit in support of the application deposed to by Mr. George K. Charlemagne (“Mr. Charlemagne”), Crown Counsel in the Attorney General’s Chambers, he avers that the application was made in as timely a fashion as could have been accommodated upon discovery of the new information and the delay is therefore not inordinate.

Submissions and Analysis

[30] The AG submits that at first glance two months may not seem prompt. Counsel for the AG refers to the case of **Nevis Island Administration v La Copropriete**

Du Navire J 31 et al⁵ where counsel had made the submission that promptness of an application for the purposes of CPR 26.8(1) is not an “absolute concept” and must be assessed by reference to the circumstances of the particular case.

[31] The AG submits that the following factors must be considered in assessing whether the application was made promptly: (i) that counsel for the AG only became aware of the existence of additional information on 24th February 2021; (ii) counsel was not informed that the additional information had been located until 24th March 2021; (iii) counsel only received the documents on 3rd April 2021 and (iv) thereafter time had to be taken to examine the thousands of pages handed over by the DPP.

[32] Counsel for the AG further submits that on 23rd February 2021, the AG would not have been aware of the nature of the additional information which was in the DPP’s possession and it would therefore not have been reasonable to file an application at that point. That application they say could only have been properly made after 3rd April 2021 when the additional evidence was received and assessed to determine its relevance.

[33] In the affidavit in support of the application at paragraph 4, the AG says that it was upon interviewing the Deputy DPP for the purpose of recording his witness summary and statements filed on 23rd and 24th February 2021 respectively that new information was obtained which led to new lines of enquiry with the DPP and new additional information. No where in the affidavit does the AG disclose when the Deputy DPP was interviewed for the purposes of taking instructions for the preparation of his witness statements. It had to have been before they were filed so that it cannot be correct that this existence of additional information only came to light on 23rd or 24th February 2021.

[34] Further, even if I accept that at 23rd February 2021 counsel for the AG would not have known of the nature of the additional evidence, it is the case that as early as 16th March 2021, counsel had indicated to the Court that there was additional

⁵ SLUHCVP2005/0007, (delivered 3rd April 2006, unreported).

information which may have required further documents to be put in. Yet no application was filed even at that point. The information was finally obtained on 3rd April 2021, yet the AG waited another two weeks to file this application. It is also noted that at least three of the witness statements were filed on 19th April 2021 without any accompanying application for extension of time. Clearly, the need to file this application was not foremost in counsel's contemplation.

[35] Based on the evidence, I cannot find that the application was made promptly as it would appear that there was ample indication that this application may have been necessary especially when one examines the contents of the witness statements filed on 19th and 20th April 2021. They are substantial affidavits and speak to some of the elements required to prove malicious prosecution, which would have been known from the time the AG filed their defence.

[36] Despite this finding, counsel for the AG submits, and I agree, that this is not fatal to the application. This is supported by the dicta of Pereira CJ in **Adam Bilzerian v Gerald Lou Weiner et al**⁶ at paragraph 12 as follows:

“...This delay or lack of promptitude however, ..., is not fatal. It is however a factor to be weighed generally in the exercise of the discretion. The court must then look to the evidence put forward in support of the application in order to determine whether the cumulative conditions set out in CPR 26.8(2) have been satisfied.”

[37] I therefore move on to consider whether the conditions in CPR 26.8(2) have been satisfied.

Whether the failure to file the Witness Statements was intentional

[38] Mr. Charlemagne avers that the failure to file the witness statements was not intentional as the AG, not being the prosecuting authority, was not aware of the extent of the documentation which existed in relation to the charges by the office of the DPP.

⁶ SKBHCVAP2015/0015, (delivered 27th January 2016, unreported).

Analysis

[39] The AG refers to the case of **Barrow Toby v Mogavan Toby**⁷ where the Master said in relation to intentional failure to comply that a finding of intentional failure to comply with a rule or order requires evidence which is direct or inferred, of some conscious, deliberate decision not to comply.

[40] In the words of Jamadar JA in the Court of Appeal decision of **Attorney General of Trinidad and Tobago v Universal Project Ltd**⁸:

“...what must be shown is that the motive for failure to comply was a deliberate intent not to comply. It is accepted that this positive intention can be inferred from circumstances, but ...it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequence of every action or omission taken or choice made are intended. However, because the consequences of actions or omissions are not intended, does not necessarily exempt one from taking responsibility for them.”

This reasoning was accepted by the Privy Council.⁹

[41] I am of the view that the evidence does not show a conscious, deliberate decision not to comply. It may be the case that the consequence of the actions or omissions and choices made in this matter by the AG were not intended or done deliberately, but choices do have consequences. I am of the view that the AG has satisfied the first limb- the failure to file the witness statements was not intentional.

Whether the AG has a good explanation for the failure to file the additional Witness Statements

[42] In the affidavit in support of the application, the reason advanced for the failure to file the witness statements is that lead counsel, Mr. Mark Maragh (“Mr. Maragh”) upon interviewing Mr. Stephen Brette, Deputy Director of Public Prosecutions (“Deputy DPP”) for the purpose of filing his witness statement which was filed on 23rd February 2021, obtained new information which led to new lines of enquiry with the Office of the Director of Public Prosecutions (DPP)

⁷ SVGHCV2018/0087, (delivered 3rd March 2020, unreported) at paragraph 35.

⁸ Court of Appeal No. 104 of 2009, (delivered 26th February 2010).

⁹ [2011] UKPC 37.

and Corporal Evans which resulted in the discovery of new information additional to what Mr. Maragh's initial instructions were, which now necessitates this application to allow for the filing of further witness statements of Corporal Daryl Evans and WPC Burtley Ferdinand. I note that there were witness statements from Shervon Mathieu and Dwayne Octave filed on the 19th and 20th April 2021 but no mention is made of these other witness statements.

[43] The discovery of this additional information required Mr. Maragh to have a conversation with the DPP after which the DPP indicated that the relevant files would need to be retrieved from the archives and were voluminous. The affidavit states that Mr. Maragh kept following up with the DPP's office until contact was made on 24th March 2021 informing him that the files had been retrieved and were at the DPP's office. Mr. Charlemagne further deposes that Mr. Maragh asked that copies of the documents be made and was told that the files consisted of seven bankers' boxes containing 53 files including electronic databases. It was then suggested that Mr. Maragh visit the office of the DPP to inspect the documents and determine what was required. On 3rd April 2021, (a Saturday) Mr. Maragh visited the office of the DPP and inspected six boxes containing 53 large files relating to the charges laid against the claimants. He exhibits a picture which he says was taken by Mr. Maragh which shows the boxes of files and the date of the visit.

[44] Mr. Charlemagne deposes that thereafter it took several weeks and several interviews with the DPP and Officers Evans and Ferdinand to fully understand and appreciate the documents obtained, which have now been reduced to disclosure of 43 documents in the supplemental list of documents and the discovery of the Mutual Legal Assistance Request (MLAT) obtained by virtue of the Mutual Legal Assistance in Legal Matters Act which comprises several pages.

[45] Mr. Charlemagne says that although the MLAT is in the possession of the AG, it cannot be disclosed without the permission of the Requesting State-the United States of America and that permission has been sought. He says the MLAT is a key piece of evidence for the defence in refuting the claims of the claimants.

- [46] The further witness statements of Officers Evans and Ferdinand were completed on Friday, 16th April 2021 and were uploaded to the E-Litigation Portal.
- [47] In response to the application, an affidavit was filed by Chelsea Laurencin, Legal Clerk in the firm of Theodore & Associates in which she deposes that she is authorised by each of the claimants to swear the affidavit.
- [48] The evidence revealed in that affidavit is that on or about 26th March 2021, Ms. Catty Renee, legal assistant to Mr. Mark Maragh, then counsel for the AG contacted counsel for the claimants, Ms. Sueanna Frederick at the time and requested copies of the witness summaries of the claimants which had been filed on the portal and sealed. Ms. Laurencin's evidence is that the said witness summaries were emailed to Mr. Maragh's legal assistant on 26th March 2021.
- [49] In their affidavit in reply, the claimants note that the AG admits that upon interviewing the Deputy DPP, Mr. Stephen Brette, for the purpose of recording his witness summary and witness statement filed on 23rd and 24th February 2021 respectively, that new information was obtained. Having obtained this new information prior to 26th March 2021 when the request for the claimants' witness summaries was made, the defendant ought not to have requested copies of their summaries. The AG had the benefit of their witness summaries for forty-nine (49) days before the witness statements of Burtley Ferdinand, Daryl Evans, Shervon Matthieu and Dwayne Octave and the supplemental list of documents were filed on 19th April 2021 and 20th April 2021 respectively. There is therefore no way to know whether the additional statements filed by the AG were influenced by the information contained in the claimants' witness summaries.
- [50] Ms. Laurencin on behalf of the claimants avers that the AG should have formally advised of their intention to file further witness statements. The AG, the claimants say ought to have known that the new information and ongoing investigations may have required the filing of further witness statements. Ms. Laurencin avers that the claimants will be greatly prejudiced if the application in

relation to the witness statements is granted and therefore request that the AG's application be refused.

Submissions and Analysis

- [51] The AG submits that the inability to obtain the evidence required to prepare the witness statements is a good explanation for the failure to comply with the case management directions. The AG further submits that the affidavit in support of the application details the cause for the failure to file the witness statements on time and outlines the steps taken to obtain the relevant information. The affidavit in support shows that upon learning that further information existed, counsel contacted the DPP to obtain it and took possession of the documents within days of being informed that the information had been located and the witness statements were filed within days thereafter.
- [52] The AG submits that they have not made bald statements and that all relevant details of the circumstances have been provided including dates, persons interviewed and difficulties encountered.
- [53] Ms. Thomas on behalf of the claimants contends that it appears that the evidence to support the AG's defence was not investigated until the time to file witness statements had passed several times, over more than two (2) years and ten (10) months. The lines of enquiry were only 'discovered', counsel submits when the Deputy DPP was interviewed and his witness statement filed in February 2021 to support a defence filed in April 2018. The AG chose to file only one witness summary on 23rd February 2021 and did not do attempt to file any other until almost eight weeks after. Ms. Thomas argues that this appeared to be a strategic decision and failure to file the witness statements was intentional. Counsel also argues that from the AG's evidence, it would appear that there was some inefficiency in the process of retrieving the evidence to support their defence and that cannot be a good explanation for the failure to file the witness statements.

[54] In **Issa Nicholas v Time Bourke Holdings Limited (Grenada) Limited**¹⁰ the learned Chief Justice said:

“We have in numerous decisions of this Court been consistent in expressing the view that **the evidence adduced in support of an application for relief from a sanction must be cogent in the sense that it must be set out with sufficient particularity so as to satisfy the court that these three preconditions have been met.** In this regard, the decision of this Court in **Prudence Robinson v Sagicor General Insurance Inc.** (SLUHCVP2013/0009 (delivered 29th September 2014, unreported) as to the need for cogency and particularity as referenced in paragraph 10 of that judgment, is also instructive. This Court quite recently returned to this issue and made similar observations in the case of **Adam Bilzeraian v Gerald Lou Wiener et al** (SKBHCVAP2015/0015 (delivered 27th January 2016, unreported).”

[55] I note at the outset that the application seeks an extension of time to file further witness statements but does not identify the witness statements and in the affidavit in support, reference is only made to two witness statements, that of Daryl Evans and Burtley Ferdinand. The application seems not to relate to the other witness statements, which counsel for the AG, at the hearing, suggested must have been an oversight. Without an application in relation to the other witness statements there is no basis for the Court considering an extension of time to file them.

[56] Having reviewed and assessed the evidence provided by the AG in support of their contention that they have a good explanation for the failure to file the additional witness statements, I have concluded that the AG has not provided a good explanation for the failure to file the additional witness statements for the reasons which are set out below.

[57] The evidence of the AG does not reveal when the Deputy DPP was actually interviewed for the purposes of preparing his witness statement. I would hate to think that this was the first time the Deputy DPP was being interviewed but there are no dates to assist the Court to put the circumstances in context.

¹⁰ GDAHCVAP2015/0029, delivered 8th December 2015, unreported at paragraph 9.

Similarly, the evidence does not say when the discussions were had with the DPP and Corporal Evans or of the follow-up with the DPP's office. The duty of disclosure is that of the client and no account is given as to why these many bankers boxes were not forthcoming prior to April 2021 when this case was filed in 2018 and both counsel had been constantly speaking of the volume of the documentation in the matter.

[58] Contrary to what is stated in the affidavit in support of the application, the photograph exhibited does not contain any date stamp and I cannot make anything of the photograph. Without a date, it is impossible to ascertain when this photograph was taken. The email dated 24th March 2021 exhibited only shows that Mr. Maragh's secretary relayed to him that the secretary from the DPP's office had called in relation to the witness statements and asked that he return her call. There is nothing in this email to support the defendant's averment that this was when counsel was advised of the existence of the numerous bankers' boxes.

[59] It must be noted that the cause of action is malicious prosecution. The evidence filed in the witness statements filed on 19th and 20th April 2021 appears to relate to the investigation of the offences for which the claimants were charged. No good explanation has been provided as to why this information was not provided prior to the interview of the Deputy DPP when it would be an integral part of the case and necessary to prove one of the elements of the tort of malicious prosecution.

[60] The AG has failed to show that the information belatedly obtained was not within the knowledge of the DPP or could not have been obtained prior to the deadline for filing of witness statements.

[61] It is also worthy of note that counsel for the AG armed with the knowledge that he had received certain information after interviewing the Deputy DPP proceeded to request copies of the sealed copies of the claimants' witness summaries without even making it known that there was a possibility that further

witness statements would need to be filed. The Court cannot condone that manner of practice.

Whether the AG has generally complied with all other relevant rules, practice directions, orders and directions

[62] The AG submits that they have generally complied with all other relevant rules, practice directions, orders and directions. It is the case that there have been several variations to the case management timetable at the instance of both parties jointly. I agree with the AG that the history of this case reveals that both parties initially had difficulty complying with the case management directions as regards standard disclosure and filing of witness statements, hence the several joint applications.

[63] The AG further submits that with the information they had, they fully intended to comply with the last revised case management timetable, and it is the discovery of the previously unavailable information which necessitated the current application.

[64] Ms. Thomas however submits that the AG has not generally complied with the previous orders and the rules. Counsel argues that there were several breaches including the failure of the AG to file witness statements on the date required by the further joint application made on 31st December 2020 extending time to 4th January 2021. I pause to note that while this joint application was filed on 31st December 2020 seeking an extension to 4th January 2020, it was not dealt with until 2nd February 2021 when an extension was granted to 23rd February 2021 for the AG to file their witness statement.

[65] I would agree with the AG that what is required is general compliance and not absolute compliance and that there has been general compliance by the AG.

Has 26.8(2) been satisfied by the AG?

[66] The AG has satisfied two of the three conditions in CPR 26.8(2). What does this mean for the AG?

[67] In *Issa Nicholas* the learned Chief Justice referred to the case of **Ferdinand Frampton v Ian Pinard et al.**¹¹ Barrow JA, delivering the judgment of the Court, although there dealing with an application for extension of time to appeal, had this to say at paragraph 19 in speaking of CPR 26.8 (2):

“The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...**The failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position. The court is not permitted to guess and to supply the omissions in the application ...It is not permissible for the applicants to violate clear rules and escape sanctions by leaving it to the court, impressed with the importance of the matter, to find a way out for the applicants...The rules are not draconian; where a party has made a slip the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief.”** (my emphasis)

[68] I adopt the statement of Saunders JA in the *St. Kitts* case of **Avril Francis v St Kitts-Nevis Finance Company Limited**,¹²:

“The court has to be careful not to set precedents which may have the effect of allowing these rules to be interpreted in a manner that carries us back to the lax ways that built up under the old rules. Under these new rules, the Court places a premium on timeliness, on professionalism, on efficiency, on cogent reasons being advanced for failure to adhere to time standards...”

[69] In **Dominica Agricultural and Industrial Development Bank v Mavis Williams**¹³ the Court of Appeal was considering two applications, one of which was an application for an extension of time to appeal against the judgment of the High Court. Barrow JA, who delivered the judgment of the court stated:

“Apart, therefore, from providing the criteria by which to determine the present application, rule 26.8 has a wider importance. Rule 26.8 demonstrates the paradigm shift in the culture of litigation that CPR 2000 is intended to accomplish by, along with other things, its emphasis on compliance with the rules. Rule 26.8 ordains that the sanctions imposed for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise, as it did in the past, an “unfettered discretion”

¹¹ DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

¹² *St Christopher and Nevis Civil Appeal No. 21 of 2003*, (delivered November 4, 2003, unreported).

¹³ DOMHCVAP2005/0020.

and relieve against sanctions where the defaulter fails to satisfy a particular criterion. The court has no power to overlook inordinate delay or intentional non-compliance.”

[70] In **Issa Nicholas** the Court was clear that ‘the burden fell squarely on the shoulders of a defaulting party and it behooves a defaulting party not to view this obligation as trifling or treat it lightly or otherwise to assume or expect that any accommodation will be forthcoming from the other party’.¹⁴

[71] The idea that a party can simply file witness statements along with an application for extension of time and for relief from sanctions cannot be what the rules envisaged. It cannot be that a party simply says, ‘Oh well, the other side already has the statements and they can be given time to respond if necessary.’ This was the suggestion of counsel for the AG when asked how filing of these additional witness statements would impact the claimants. It is not a tennis match where one side responds to the serve of the other. Witness statements are to be filed and exchanged. It should only be in very exceptional cases that a party is allowed to file additional witness statements. They must show that the evidence filed was not available at all, not simply that it was not provided to them or they did not do sufficient investigations to seek out all the information which was required to file the evidence necessary to support or defend the particular cause of action, in this case, malicious prosecution. The CPR is in place for a reason, to encourage efficient management of cases by attorneys and the Court alike. The fact that the Court can award costs in relation to the default as suggested by counsel for the AG cannot be the deciding factor.

[72] All the pre-conditions of CPR 26.8(2) having not been satisfied, the application for relief from sanctions and for an extension of time to file witness statements must fail. There is no need to go on to consider the factors in 26.8(3) as those are only engaged if the Court finds that CPR 26.8(2) has been satisfied.

[73] This case is a stark reminder to legal practitioners that applications to extend time to file witness statements and for relief from sanctions ought not to be

¹⁴ See Issa Nicholas at paragraph 13.

treated with scant regard as the consequence of a failure on such an application can be dire for a litigant. The very strict requirements of the rule and the fact that it provides the Court with no discretion to consider the factors in sub-rule 3 unless sub-rule 2 has been satisfied, make it very difficult. CPR 26.8 is uncompromising and until the rules are revised, this Court is bound to follow the reasoning of the Court of Appeal expressed clearly in its many decisions.

Conclusion

- [74] The application filed by the AG for time to be extended to file witness statements and supplemental list of documents and for relief from sanctions is refused. Costs are awarded to each claimant in the sum of \$500.00 having regard to the fact that the claimants have separate cases albeit they are being heard together. I have considered that each claimant did not file a response separately but that one response was filed on behalf of all three of them in deciding the costs award.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar