

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF MONTSERRAT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: MNIHCV2018/0038

BETWEEN:

DOUGLAS ANDERSON

Claimant

and

[1] **JEAN KELSICK**
[2] **STEDFORD WHITE**
[3] **ANTILLIA LAWRENCE**

Defendants

Appearances:

Mr. Sylvester Carrott, Counsel for the Claimant
Mr. Jean Kelsick for the first Defendant appearing in person

2021: November 4th

ORAL DECISION

- [1] **GARDNER HIPPOLYTE, M.:** This is an application for the following: (1) to strike out the claim against the first Defendant; or (2) an unless order directing compliance with all Court orders including the case management order of 31st March, 2021; (3) Costs to be paid on this application and aborted mediation hearings.

Background

- [2] The facts of the case are set out quite succinctly in the affidavit of Jean Kelsick filed 26th August, 2021. The salient points for the purpose of this oral ruling are that there has been non-compliance on the part of the Claimant to file their documents pursuant to the Court's case management order of 31st March, 2021. The order required the Claimant to file the list of agreed documents by the 21st May, 2021, witness statements by the 15th June, 2021 and the skeleton arguments by the 25th June, 2021.
- [3] The first Defendant filed his documents within the requisite time frame as required by the case management order. He subsequently filed this application on the 26th August, 2021 to strike out the claim, and on the 12th October, 2021 he amended the application so that it reflected two material changes – the first being that the claim should only be struck out against the first Defendant and included a request for costs of the aborted mediation hearings.

[4] The matter came up for hearing on the 23rd September, 2021 and directions were issued for the Claimant to respond on or before the 29th October, 2021. On the 1st November, 2021 the Claimant filed his affidavit in response and arguments to the application along with the Claimant's list of documents, and the Claimant's witness statement. Only the affidavit in response was served on the first Defendant. There is no application filed with the list of documents and witness statement seeking an extension of time and relief from sanctions.

[5] I will now go on to substance of the application.

Part 26.3(1)(a) Sanctions – Striking out Statement of Case

[6] Part 26.3(1)(a) of the Civil Procedure Rules states as follows:

26.3(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

[7] In the affidavit of Jean Kelsick, he highlights at paragraphs 15 and 16 the key points for his application to strike out. It is noted that there is non-compliance of the case management order of 31st March, 2021 and I now turn to the affidavit of the Claimant as to reason for the said non-compliance. The affidavit of the Claimant filed 1st November, 2021 states at paragraph 13 that he received “a witness statement and list of documents via email but I simply could not find them and I had to tell Mr. Carrott to send them again. I also had difficulties contacting Mr. Carrott and I didn't know whether he was in Antigua or in the UK. I do know that at one stage he was in the hospital but the point is that I have not had contact with him which I would have wanted.”

[8] He also stated he is a stagehand and notices are important so that arrangements can be made. That it is not intentional his reasons for defaulting.

The Test to be Applied

[9] In **Michael Baptiste v Yolanda Bain-Joseph** HCVAP 2006/0026 – a decision by Edwards JA (Ag.) at paragraph 10, Justice of Appeal Edwards - indicates “The only expressed statutory criteria for the court's exercise of the discretion under CPR 26.3(1)(a) are provided by CPR 1.1 and 1.2 as follows:

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

(2) dealing justly with the case includes-

- (a) ensuring, so far as is practicable, that the parties are on equal footing;
- (b) saving expense;
- (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

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

Relevant Case Law

- [10] It is trite law that the striking out of a statement of case is a draconian measure and it is a sanction that should be used sparingly by the Court since it has the effect of ousting a party from the Court.
- [11] This application is made in relation to a section that requires the Court to examine the Court's record to make observations as to the compliance and/or non-compliance of the orders and directions of the Court. I have noted the affidavit of the first Defendant, and I have also noted that this matter was filed since 2018, with many attempts at the mediation process culminating in the case management order of 31st March, 2021 giving directions for trial. The Claimant has in his affidavit indicated reasons for the non-compliance however the excuse provided for the delay in relation to non-compliance does not demonstrate that the Claimant is actively pursuing his case.
- [12] On the 1st November, 2021 the witness statement and list of Claimant's documents were filed without an application for an extension of time and relief from sanctions. The case law provided by the first Defendant as it pertains to striking out and the disregard for Court orders are persuasive. Further I also rely on a case from the Court of Appeal in Jamaica – **McNaughty v Wright** (2005) Court of Appeal Jamaica, Civ App no 20 of 2005 (unreported) at paragraph 3 of the reasons:

“I am constrained to repeat what the court of appeal has said ad nauseam, namely that orders or requirements as to time are made to be complied with and are not be lightly ignored. No court should be astute to find excuses for such

failure since obedience to the orders of the court and compliance with the rules of the court are the foundations for achieving the overriding objective of enabling the court to deal with cases justly.” (My Emphasis)

- [13] I adopt this reasoning and further wish to rely on **Bank Crozier Limited (in Liquidation) v RBTT Bank Grenada Limited** GDAHCV 2010/0520 where Justice Gilford held at paragraph 5 “the claimant having failed to comply with the order of the master and having failed to apply for an extension of time in a timely manner cannot be heard to say at this point that the defendant is not entitled to the fruits of the judgement. The defendant at all times acted in compliance with the orders of the court -the claim was struck out”
- [14] That when considering the overriding objective, the Court seeks to apply this to both Parties to the case, to ensure that it is dealing with a case justly.
- [15] The Parties provided affidavits to the application which is not normally required for a striking out application but since we are some three years in, it was useful for the Court to have summaries from both sides.
- [16] I wish to point out that the non-compliance being primarily considered by the Court - was the failing to file the agreed list of documents by the 21st May, 2021 followed by the witness statements on the 15th June, 2021. That these documents are late some 168 and 140 days respectively. The reasons provided by the Claimant for the non-compliance of the Court order and the late filing of 1st November, 2021 with no application for an extension of time and relief from sanctions only bolsters the arguments of the first Defendant as to why the case should be struck out. I have not appreciated from the affidavit of the Claimant the explanation that would justify the delay from May and June of this year.
- [17] The dicta from **Michael Baptiste** highlights that CPR has significantly changed the way we proceed to deal with cases and to deal with them justly. The Claimant should have appreciated that having failed to file his documents within the time required he should have at the very least applied for either an extension of time prior to the sanction would come into effect or after it did an application for extension of time and relief from sanctions – to this date there is no such application filed before the Court. Further the affidavit must contain all the information for the Court to consider as to why the discretion should be exercised in a favourable way to his case.
- [18] Accordingly, I find that the first Defendant’s application for the claim to be struck out is granted; since the claim is struck out it is irrelevant to consider the second part of the application. In relation to the costs, I will now hear from the Parties.

Conclusion

- [19] For the above mentioned reasons the order of the Court is as follows:

1. The first Defendant's application to strike out the claim against the first Defendant is granted;
2. Prescribed costs – at \$50,000 at 55% = \$4,125.00.
3. The first Defendant to draw file and serve this Order.

Charon Gardner-Hippolyte
High Court Master