

**IN THE EASTERN CARIBBEAN SUPREME COURT
THE COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: DOMHCV2019/0113

BETWEEN:

MCKENZIE ROBINSON

Claimant

and

ROBERTSON THOMAS

Defendant

Appearances:

Mr. David Bruney, Counsel for the Claimant

Mrs. Hazel Johnson, Counsel for the Defendant

2021: October 21st
November 24th

DECISION

- [1] **GARDNER HIPPOLYTE, M.:** This is an application made on behalf of the Defendant for an extension of time and relief from sanctions to file his witness statements. However, since the application was made prior to the sanction taking effect it will be treated as an application for an extension of time under CPR 26.1(2)(k) where the Court has the power to extend or shorten time for compliance with any order.

Background

- [2] This is an action for personal injuries pursuant to an accident on the 21st May, 2016. The claim was filed on the 20th May, 2019. The first Counsel who initially represented the Defendant recused himself after realising there was a conflict of interest and the Defendant's current Counsel joined in March 2021. Thereafter, mediation was attempted between the Parties. Mediation was unsuccessful and trial directions were issued on the 21st April, 2021. Pursuant to the Order of the Court, standard disclosure was to be made by the 28th May, 2021 and the filing and exchanging of witness statements by the 21st June, 2021.
- [3] The Defendant complied with the first part of the Order but was unable to comply with the filing and serving of witness statements on the 21st June, 2021. An application for an extension of time

and relief from sanctions was filed on the 18th June, 2021 along with the affidavit in support and exhibits. A supplemental affidavit was provided on the 9th July, 2021.

- [4] The crux of the Defendant's application is that his Attorney's husband was injured because of a crime. This resulted in an initial medical emergency, follow up medical appointments and personal attention that required the Defendant's attorney to postpone the appointments with the Defendant's witnesses. Additionally, the Chambers for the Defendant were appointed as legal representatives in a high-profile Judicial Review case in early June 2021 where close timelines were given for filing of documents. As a result, Counsel could not keep with the appointments made for the witnesses for the Defendant.
- [5] Counsel for the Claimant has argued in his submissions that the information provided to justify the application for the extension of time and the relief from sanctions test laid out in CPR 26.8 has not been made out. Counsel for the Claimant refers the Court to several cases that highlight the relief from sanctions test and a comparison is made with the evidence provided in the affidavits.
- [6] Whilst a very careful and through analysis has been fully ventilated by both Counsels in relation to the test for relief from sanctions, the test to be applied in this instant case is the test for an extension of time under CPR 26.1(2)(k).
- [7] I will now go on to why CPR 26.1 (2)(k) is the relevant section to be applied and the substance of the application. CPR 26.1(2)(k) states:

Court's general powers of management

26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule, practice directions or any enactment.

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

- [8] In **Vanroy Romney v Sheridan Smith**¹, Michel JA, examines the law in relation when only an application for extension of time is required. He refers to the fact that a sanction only comes into effect once the sanction has been bitten, in the instant case this would be the date the witness statements had to be filed, which is the 21st June, 2021. If Counsel had applied on the 22nd June, 2021 for the extension of time and relief from sanctions then this would be the appropriate application to be made.

¹ AXAHCVP2015/0002

[9] However, Counsel for the Defendant applied on the 18th June, 2021 three days prior to the sanction taking effect. Having filed the application prior to the sanction taking effect, the factors to be considered in a case such as this one has been laid out in, Carleen Pemberton v Mark Brantley² and Vanroy Romney.³

[10] The factors which are not exhaustive are:

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) the degree of prejudice if the application is granted; and
- (iv) the prospect of success;

The Length of the Delay

[11] The Defendant has filed two affidavits in support of his application. One on 18th June, 2021 and the second on 9th July, 2021. In the first affidavit the request was made for an additional two weeks to file and serve the witness statements, but the Defendant subsequently filed the witnesses' statements on 6th July, 2021. This is 15 days after the deadline of 21st June, 2021. The length of time of 15 days is not a long period in my opinion, especially considering the reasons of the delay.

The Reasons for the Delay

[12] The Defendant proffered two affidavits in support of the reasons for the delay, the first starts by indicating that the husband of Counsel for the Defendant, was struck in the forehead by a thief using a stone. A medical report is provided to substantiate the injury. Further to the head injury in the second affidavit it is highlighted that it was "exacerbated by severe swelling of the right eye, blurred vision and headaches". As a result, Counsel was required to attend to her husband and provide care.

[13] Additionally, it was also indicated that the reason for the delay was that the Defendant's Counsel was engaged to represent the integrity commission in a Judicial Review case, and this case was given priority by the High Court Judge. The Court gave "demanding trial directions", and this had to be prioritised. Timelines given were as follows: an ex parte proceeding for Judicial Review filed on 11th May, 2021. Counsel and her firm were retained on 2nd June, 2021 and they had to file by the 16th June, 2021. The reasons proffered for the delay are acceptable in the circumstances.

² [2011] ECSCJ 229 delivered 14th October 2011

³ Ibid

The Degree of Prejudice if the Application is Granted

- [14] The Claimant/Respondent is not prejudiced if the application is granted. No trial date has been set and the witness statements have already been filed. The Defendant/Applicant in the alternative will be prejudiced greatly if the application is not granted. He will not be able to present his witnesses for the trial and bearing in mind the documents have been filed (15 days late), I find there is no prejudice to the Claimant/Respondent.

The Prospect of Success

- [15] At this stage I will consider the merits of the Defendant's case. The Defendant and Claimant were in a traffic accident. The Claimant blames the Defendant for accident and the Defendant denies this and attributes the accident to the Claimant. The Defendant also has a counterclaim which is defended by the Claimant. After review without an in-depth analysis of the facts which are in dispute, (as this is a position for the trial judge,) I find that the defence and counter claim are not unmeritorious. Accordingly, the Defendant has a prospect of successfully defending his case.

Conclusion

- [16] Having reviewed the application and the affidavits in support, and having applied the overriding objective, I find that the Defendant has satisfied the Court in the circumstances. Accordingly, the application to extend the time to file the witness statements and to deem it validly filed is granted.

- [17] For the above mentioned reasons the Order of the Court is as follows:

1. The Defendant's application to extend the time to file the witness statements and deem it validly filed on 6th July, 2021 is granted;
2. No order as to costs;
3. The Defendant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master