

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

ANGUILLA

CLAIM NO: AXAHCV2020/0035

BETWEEN:

PAUL CLIFFORD MORRISON

Claimant

and

PERCY THOMAS

Defendant

Appearances:

Mrs. Tona Simpson Whyte for the Claimant
Mr. Kerith Kentish for the Defendant

2021: May 25;
July 20.

RULING

- [1] **GILL, M.:** By an application filed on 15th December 2020, the claimant asked the court to be relieved from sanctions for failing to comply with Part 16.2(2)(b) of the Civil Procedure Rules 2000 as amended (CPR 2000). The application also sought orders for a witness statement, an affidavit and submissions filed beyond the time prescribed by the said rule to be deemed properly filed. However, the claimant insists that this is not an application pursuant to CPR 26.8 for relief from sanctions but that the court should treat it as an application for an extension of time to file the witness statement, affidavit and submissions of the claimant in support of assessment of damages. A chronology of events explains the apparent confusion.

Chronology

- [2] On 13th July 2020, the claimant filed a libel claim against the defendant seeking general damages inclusive of aggravated damages, and exemplary damages.
- [3] The defendant filed an acknowledgment of service on 27th July 2020.
- [4] On 13th October 2020, the claimant filed a request for judgment in default of defence. The request stated that the claimant was in a position to prove the amount of damages. Judgment in default of defence for an amount to be decided by the court was entered for the claimant by the learned Registrar on even date.
- [5] On 16th October 2020, a notice of hearing was issued by the court office. It stated that the matter was scheduled for hearing of assessment of damages on Tuesday 8th December 2020 before the Master via Zoom.
- [6] The hearing notice was uploaded to the Eastern Caribbean Supreme Court E-Litigation Portal (ELP) on the said 16th October 2020. By virtue of the ELP rules, both parties had notice of the notice of hearing. The notice triggered timelines under CPR 16.2(2)(b) for the assessment of damages after default judgment. In particular, the claimant was required to file his witness statements and written submissions within 14 days of the notice of hearing being uploaded. Therefore, the deadline for the claimant to file witness statements and submissions was 2nd November 2020.
- [7] The claimant filed a witness statement on 12th November 2020, 10 days after the deadline. Further, the claimant filed an affidavit in support of assessment of damages (which the defendant argues is not permissible under CPR 16.2), and written submissions on quantum of damages on 25th November 2020, 23 days after the deadline.
- [8] On 3rd December 2020, the defendant filed a notice of intention to be heard on the assessment. The defendant did not, and to date, has not filed any witness statements or submissions on the assessment of damages.
- [9] The day before the scheduled hearing, on 7th December 2020, the defendant filed a notice of objection to the claimant's reliance on the witness statement, the affidavit and the written

submissions for the assessment hearing as being in breach of the timelines established under CPR 16.2(2) and without leave of the court. The objection was grounded on the basis that the claimant had not made an application for extension of time for the filing of the documents and had also not made an application for relief from sanctions.

[10] On the scheduled hearing date, 8th December 2020, the claimant filed a response to the defendant's objection. (Being submitted for filing late on 7th December 2020, the response was uploaded on the ELP as being filed on the 8th). While the claimant agreed that the time for filing his witness statements had passed, the response posited that the failure to file and serve witness statements on time was a procedural error, the consequence for which was not specified in CPR 2000 in respect of an assessment of damages. The claimant asked the court to use its powers under CPR 26.9(3) to put matters right and to make an order allowing the witness statement, affidavit and submissions to stand.

[11] On 8th December 2020, Master Ricardo Sandcroft (Ag.) indicated that he would not conduct the assessment and the matter was adjourned to 21st January 2021 to be heard by another Master. The hearing of the defendant's notice of objection, which was scheduled for 11th December 2021, was also fixed for 21st January 2021.

[12] Meanwhile, on 15th December 2021, the claimant filed this application seeking orders that:-

1. The applicant be relieved from sanctions for failing to comply with Civil Procedure Rule Part 16.2(2)(b);
2. The witness statement and affidavit of Paul Morrison filed beyond the time prescribed by Rule 16.2(2)(b) be deemed properly filed;
3. Submissions in support of assessment of damages filed beyond the time prescribed by Rule 16.2(2)(b) be deemed properly filed; and
4. There be no order as to costs.

[13] The application states, among other things, the conjunctive requirements for a successful application under CPR 26.8, that (i) the failure to comply is not intentional; (ii) there is a good explanation for the failure to comply; and (iii) the applicant has generally complied with all other relevant rules, orders and directions.

[14] Subsequently, in this highly contested matter, the following documents were filed:

- 29th December 2020 – applicant's (claimant's) submissions in support of application.

- 8th January 2021 – applicants' (claimant's) submissions in support of application for relief from sanctions and for documents filed beyond the time prescribed to be deemed properly filed.
- 15th January 2021 – claimant's supplemental response to the defendant's objection.

(As a result of scheduling conflicts experienced by the court, the hearing scheduled for 21st January 2021 did not occur. The matter was then scheduled for 23rd February 2021.)

- 22nd February 2021 - defendant's submissions in support of its notice of objection and in opposition to the claimant's application. Authorities submitted late on that date were uploaded on the ELP as filed on the said hearing date, 23rd February 2021.
- 8th March 2021 - with leave of the court, claimant's affidavit and submissions in response.

The defendant's objection

[15] On the eve of the first scheduled hearing of the assessment, the defendant filed a notice of objection to the claimant's intended use of his witness statement, affidavit and submissions in support of the assessment of damages. The defendant's main contention is that these documents were filed out of time without leave of the court by an application for extension of time and for relief from sanctions. The defendant alleges breach of CPR 16.2(2)(b). CPR 16.2 reads as follows:

(2) Unless the application states that the claimant is not in a position to prove the amount of damages –

(a) the court office must fix a date for the assessment of damages and give the claimant and the defendant at least 42 days' notice of the date, time and place fixed for the hearing;

(b) the claimant shall file and serve on the defendant all witness statements and written submissions on which he or she intends to rely within 14 days of service of the notice of assessment;

(c) the defendant shall be at liberty to file and serve witness statements and written submissions on which he or she intends to rely within 14 days of service of the claimant's witness statements and submissions on him or her.

- *Rules 29.8 – 29.12 deal with Witness Statements*

[16] The defendant submits that the claimant's failure to file the requisite documents under CPR 16.2(2)(b) within 14 days of the notice of assessment issued on 16th October 2020 attracts the

consequence or sanction set out in CPR 29.11(1) in relation to witness statements. The rule reads as follows:

29.11(1) 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.

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

- [17] With the filing of the claimant's application, on the face of it, for relief from sanctions, the defendant contends that the claimant has not satisfied the requirements of CPR 26.8 so that the application should be dismissed. The result of the defendant's position would be that there is no evidence before the court on which an assessment of damages hearing may proceed and the claimant cannot prove his entitlement to damages.

Issues

- [18] The court must determine:-

- 1) Whether the court should treat the claimant's application as an application for extension of time rather than an application for relief from sanctions.
- 2) If so, should the claimant be granted an extension of time?
- 3) If not, should the claimant be granted relief from sanctions?

The claimant's position

- [19] Whereas the claimant's application, as worded, is one for relief from sanctions, the claimant submits that it is not in substance such an application, but an application for extension of time within which to file the claimant's witness statement, affidavit and submissions and for them to be deemed properly filed. The claimant is asking the court to invoke its powers under CPR 26.1(2)(k) and CPR 26.9. These state as follows:

26.1(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 is made after the time for compliance has passed.

26.9(1) *This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.*

(2) *An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.*

(3) *If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*

(4) *The court may make such an order on or without an application by a party.*

[20] The claimant accepts that the sanction expressed in CPR 29.11 for failure to file a witness statement within the time specified by the court is that the witness may not be called at trial unless the court permits. However, learned counsel for the claimant, Mrs. Simpson Whyte submits that the CPR 29.11 sanction is not an immediate sanction, but a sanction that will take effect in the future – when the trial comes on. Counsel contends that in this matter, the sanction has not yet bitten and therefore, CPR 29.11 is not applicable to the present circumstances. She submits that CPR 26.8 governing relief from sanctions is only applicable in cases where the sanction has bitten, not to future sanctions.

[21] Mrs. Simpson Whyte further submits that the words “time specified by the court” in CPR 29.11 must mean time specified by an order of the court. Counsel posits that in this case, there has been no specification by the court, and indeed, no order as to the time within which witness statements and submissions were to be filed. It must then follow, Counsel says, that what is engaged is CPR 26.9, which empowers the court to rectify matters where there has been a procedural error.

[22] In addition, Counsel argues that CPR 26.9(2) is applicable in that the failure to file witness statements and submissions within 14 days – a procedural error or failure to comply with a rule – does not invalidate any steps in the proceedings unless this court so orders. Counsel urges the court that “in the pursuit of justice, procedure is a servant, not a master”.¹ Counsel submits that the court’s ability to determine the issue of damages should not be frustrated by defects or errors in the

¹ See *Texan Management Limited & Others. v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46, per Lord Collins in his introductory paragraph

proceedings, whether or not they are the fault of a party. CPR 26.9(2) is a demonstration of the intention to prevent an over-technical approach in the court.²

[23] Mrs. Simpson Whyte referred the court to the judgment of the Caribbean Court of Justice (CCJ) in **Watson v Fernandes**.³ Paragraph 39 states:

“Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency...Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court’s ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times.”

[24] Counsel further posits that where a rule has such severe consequences for a litigant for breach of it, in keeping with the overriding objective, a court should take a liberal approach in determining whether to give effect to the relevant consequence.⁴

[25] In addition, Counsel submits that this is an appropriate case for the invocation and application of the court’s discretionary power under CPR 26.1(6), which provides that in special circumstances, on the application of a party, the court may dispense with compliance with any of these rules. Counsel states that special circumstances exist here.

[26] Mrs. Simpson Whyte points out that both parties are non-compliant as the defendant has not filed witness statements and submissions as set out in CPR 16.2(2)(c). Counsel alleges that the defendant seeks to condemn the claimant for the very breach he has committed, and which to date he has not attempted to remedy.

[27] In summary, the claimant asks that the application for relief from sanctions be treated as that for an extension of time, and for the relevant documents to be deemed properly filed. The claimant submits that the application should be granted so as to prevent an unfair and unjust result, and asks that the court dispense with the strict compliance with CPR 16.2(2)(b), grant an extension of

² See *Powell v Spence* [2021] UKPC 5 at paragraph 28

³ [2007] CCJ 1 (AJ), delivered jointly by The Honourable Mr. Justice Adrian Saunders and The Honourable Mr. Justice David Hayton

⁴ See *The Treasure Island Company & Another v Audubon Holdings Limited & Others*, Civil Appeal No. 22 of 2003 (British Virgin Islands) at paragraph 21, delivered September 20, 2004

time, deeming the witness statement and affidavit of the claimant, along with the submissions filed late to be properly filed and served.

- [28] The claimant suggests that the court may wish to give directions to both parties to have the assessment of damages hearing proceed on a date to be set by the court.

The defendant's response

- [29] The defendant is adamant that the claimant's failure to file witness statements and submissions by 2nd November 2020 is not a procedural error capable of correction pursuant to CPR 26.9. Learned counsel for the defendant, Mr. Kentish, posits that it is clear that CPR 16.2(2) must be read with CPR 29.11, which said rule sets out the consequence for the claimant's failure to file his witness statements on time. The note to CPR 16.2(2) tells practitioners that CPR 29.11 applies. The consequence is clear, Counsel states. The claimant having failed to file and serve witness statements by 2nd November 2020, may not call his witnesses unless the court permits. This is a sanction. Counsel further points out the second sub-rule to CPR 29.11, which provides that the court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under CPR 26.8.

- [30] In answer to the submission on behalf of the claimant that the sanction has not yet bitten, Mr. Kentish is of the contrary view. Counsel submits that the sanction under CPR 29.11 bit when the deadline for the filing of the claimant's witness statements passed. In support of his contention, Mr. Kentish directed the court to the judgments of the Court of Appeal in **Adam Bilzerian v Gerald Lou Weiner & Another**⁵ and **Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited**.⁶

- [31] In **Adam Bilzerian**, at paragraph 10, Pereira CJ had this to say:

"The Extension Application [for an extension of time to file witness statements and for relief from sanctions] was not made before the deadline for filing of the witness statements expired some six weeks thereafter, which meant that the sanction imposed by CPR 29.11 had already bitten. The sanction was that the appellant would be unable to call those witnesses in respect of whom he had failed to file the witness statements or summaries by the deadline ordered at the trial of the claim

⁵ SKBHCVP2015/0015, delivered January 27, 2016

⁶ GDAHCVAP2015/0029, delivered December 8, 2016

unless the court granted permission at the time of the trial. The court however may not grant permission at trial unless that party has a good explanation for not seeking prior relief from the sanction in accordance with CPR 26.8. The Extension application fell to be treated pursuant to CPR 26.8 as the trial date had not arrived, nor does it seem that one had been at that time fixed.”

[32] Her Ladyship, the Chief Justice, also delivered the oral judgment of the Court in **Issa Nicholas**. In that case, the appellant sought to file a witness statement about a month after the deadline set by the judge at first instance for the filing of witness statements. The appellant applied for an extension of time to deem the witness statement properly filed and for relief from sanctions “as the sanction contained in CPR 29.11 had already bitten....The matter fell squarely within the provisions of CPR 26.8 which governs the grant of relief from sanctions, the deadline date fixed by the court having passed”.⁷

[33] Mr. Kentish observes that from these cases, the learned Chief Justice is consistent as to when the sanction bites, so that in the present case, it is clear that CPR 26.8 applies. Up to the scheduled trial date of 8th December 2020, the claimant had not made an application for extension of time or relief from sanctions and to date, the claimant has not given a good reason for not previously seeking relief under CPR 26.8.⁸

[34] Mr. Kentish completely rejects the claimant’s submission that the claimant’s breach is one that can be put right under CPR 26.9. Counsel repeatedly relies on the pronouncements of Edwards JA in **Michael Laudat and The Attorney General of The Commonwealth of Dominica v Danny Ambo**⁹ where Her Ladyship stated:

“A claimant’s failure to prove damages under a pleaded head of claim in the evidence adduced is not an error of procedure, or a failure to comply with a rule, practice direction, or court order or a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages. There is obviously a tension between principle and fairness.”

[35] In relation to CPR 26.1(6), Mr. Kentish states that the claimant has not cited any cases on special circumstances and there is nothing before the court as to what are considered special

⁷ Ibid at paragraph 6

⁸ See also *Paul Hackshaw v St. Lucia Air and Sea Ports Authority* SLUHCV2008/0827, delivered April 6, 2017, per Smith J. at paragraphs 44 and 45

⁹ HCVAP 2010/016 at paragraph 31

circumstances to allow the court to apply that provision. Counsel posits that the claimant has failed to bring anything before this court that allows it to dispense with the rules.

Analysis

- [36] First, the defendant raised the issue of one of the documents filed by the claimant in support of the assessment of damages being an affidavit and not a witness statement as stipulated in CPR 16.2. The defendant did not elaborate on this issue. However, the claimant addressed it as an over-technical point, both documents being used to provide the requisite evidence for the assessment. The principal distinction between the two is that an affidavit is made under oath. For the purposes of this case, I am of the view that the issue relating to the affidavit, a statement of the claimant's evidence, is really one of form, and the court will adopt a tolerant approach¹⁰ and treat it as satisfying the requirement of CPR 16.2(2)(b) to file a witness statement.
- [37] CPR 16.2 directs the procedure leading up to an assessment of damages hearing after default judgment. CPR 16.2(2) sets timelines in relation to the notice by the court office of the date, time and place fixed for the hearing. In particular, CPR 16.2(2)(b) requires the claimant to file his witness statements and written submissions within 14 days of service of the notice. In this case, the notice being uploaded on the ELP, the parties are deemed to have been served with the notice. The notice is not a specific court order. However, the note to the rule directs one to Rules 29.8 -29.12 (inclusive of CPR 29.11) dealing with witness statements. Therefore, in my view, the notice of hearing from the court office triggering the timeline for witness statements must be construed as referring to the time specified by the court for the filing of such witness statements. The note directs the claimant to the sanction for breach of CPR 16.2(2)(b) that if a witness statement is not filed within 14 days of the service of the notice, then the witness may not be called at the trial unless the court permits.
- [38] I see no reason to read into CPR 16.2 a distinction between witness statement timelines triggered by the hearing notice and a specific order of the court, with the result that the latter attracts the sanction in CPR 29.11 and the former does not.

¹⁰ See *Powell v Spence* [2021] UKPC 5 at paragraph 28

- [39] In this case, the claimant's breach of CPR 16.2(2)(b) by filing of the witness statement beyond 14 days of the notice uploaded on 16th October 2020 is subject to the sanction under CPR 29.11. The court having made this determination, a consequence of the claimant's failure to comply arises, and CPR 26.9 cannot apply. This is an error of procedure on the part of the claimant, but it is an error of procedure, which carries a sanction, and which cannot be corrected by an order to put matters right.
- [40] The sanction in this case bit, or took effect, when the deadline of 2nd November 2020 for the filing of the claimant's witness statements passed. Therefore, the proper application for the claimant to make is for an extension of time and for relief from sanctions pursuant to CPR 26.8. The court will treat the application as such, and not simply as an application of extension of time under CPR 26.1(2)(k).
- [41] In the recent Court of Appeal judgment in **BBL Limited and Irina Savelieva v Canouan Resorts Development Limited and Canouan Realty Limited**,¹¹ cited by learned counsel for the claimant, the Court had to consider whether the learned judge in the court below should have treated an application by the appellants as an application for relief from sanctions under CPR 26.8 or an application for extension of time for compliance with an unless order pursuant to CPR 26.1(2)(k), the exact issue raised here by the claimant. In that case, at first instance, the learned judge made an unless order for the parties to file witness statements by 5th November 2018, failing which their statements of case would stand struck out. Five days before the 5th November deadline, the appellants filed an application seeking to extend the time to a date in January 2019 to file and exchange their witness statements and for relief from sanctions. Both parties treated the application as one for relief from sanctions. The court dismissed the application on the basis that the appellants had not met the threshold to pass any of the requirements under CPR 26.8(2).
- [42] The Court of Appeal ruled that the timing of the application is determinative of this issue.¹² The Court was of the view that the appellant's application, having been made before the deadline for the filing of the witness statements, fell to be considered as an application for extension of time for compliance governed by CPR 26.1(2)(k) and CPR 1.1, the overriding objective. At paragraphs 47 and 48 of the judgment, Farara JA (Ag.) stated:

¹¹ SVGHC VAP2019/0006, delivered January 12, 2021

¹² Ibid, per Farara JA (Ag.) at paragraph 48

“47. ...This is very different from a situation where, as in **Adam Bilzerian**, the application was made after the deadline stipulated in the case management order for the filing and exchange of witness statements. There, Pereira CJ opined that, as the sanction in CPR 29.11 had already bitten by the date the application was filed, the applicant/appellant ought to have applied CPR 26.8 for relief from sanctions as no trial date had yet been set, and the residual power of the court under CPR 29.11 to give permission at trial, had not yet arisen.

48. Accordingly, in my judgment, an application to extend time for compliance with an order, practice direction or rule which specifies a sanction for non-compliance by a party to civil litigation, including an unless order, **made prior to the expiration of the time stipulated for compliance**, falls to be considered by the court pursuant to CPR 26.1(2)(k) and the overriding objective at CPR 1.1, and not CPR 26.8 for relief from sanctions, even where the application is not heard and determined by the court until the time stipulated in the order, practice direction or rule for the sanction to take effect.” (Emphasis added)

[43] It is evident, therefore, that the claimant’s application for relief from sanctions, made after the 2nd November 2020 deadline for compliance with CPR 16.2(2)(b), was the correct application in the circumstances of this case, the sanction in CPR 29.11 having bitten. It is left to the court whether to permit the witness to be called at the assessment. This will be determined on the court’s decision on the said application considering the requirements of CPR 26.8.

Relief from sanctions

[44] As mentioned earlier, the claimant’s actual application is premised on the requirements of CPR 26.8. In addition, the claimant’s submissions filed on 29th December 2020 and 8th January 2021 are submissions directly addressing the said rule.

[45] Understandably, the claimant asks for the court to apply the principles in relation to an extension of time pursuant to CPR 26.1(2)(k) as the requirements for the grant of relief under CPR 26.8 are more stringent. CPR 26.8 reads as follows:

(1) An application for relief from sanctions imposed for 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 was 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 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.*

Application not made promptly

[46] The claimant was required to file witness statements by 2nd November 2020. The application for relief from sanctions was filed on 15th December 2020, about six weeks later. The claimant has not addressed this issue in the application or submissions so as to allow the court to consider any circumstances that may lead to a conclusion that notwithstanding the apparent lengthy delay, the court can determine that the application was prompt. The claimant has not offered any reason or explanation for the lapse. This application was not made promptly at all. In fact, the defendant's suggestion, that in the circumstances of this case, the claimant did not intend to make the application, bears some weight.

[47] Notwithstanding the lack of promptitude in making the application, I am guided by the statement of Pereira CJ in **Adam Bilzerian** that it is not fatal to the application but that it is a factor to be weighed generally in the exercise of the court's discretion.¹³

[48] What is fatal to the application is the claimant's failure to satisfy the cumulative requirements of CPR 26.8(2).

¹³ SKBHCVAP2015/0015 at paragraph 12

Was the failure to comply intentional?

[49] The affidavit of Eimy Mojica Rogriguez, legal secretary employed by the legal practitioners of the claimant, in support of the application, sets out that the failure to comply was not intentional and was entirely due to the claimant's counsel, Mrs. Tona Simpson Whyte, who was attempting to obtain permission from certain government officials to include certain sensitive information in the claimant's witness statement. The affidavit goes on to state that when a response was not forthcoming, the sensitive information was removed and the witness statement was filed. As to the claimant's affidavit in support of the assessment of damages, Ms. Rodriguez swears it was also filed out of time as it contained certain information that was conveyed to Mrs. Simpson Whyte beyond the time prescribed by CPR 16.2(2)(b). Counsel sought permission from government officials prior to filing the affidavit.

[50] In my view, this evidence clearly shows that the failure was intentional. I agree with the argument on behalf of the defendant that Counsel made a choice not to file the witness statement by waiting for permission to the detriment of prosecuting the assessment by filing the documents by the deadline. It is evident that the witness statement was already drafted and Counsel opted to wait until after the deadline, and still, Counsel filed the witness statement without the so-called sensitive information. If Counsel considered the sensitive information and the additional information which she submits would ultimately assist the court in determining the extent and effect of the libel complained of, Counsel had the option to apply to the court to file a supplemental witness statement if the requisite permission and information were obtained prior to the assessment hearing. Before the deadline, Counsel could have made an application for extension of time with good reason for so doing. Counsel chose to wait for permission and let the deadline pass. This is an intentional breach. I rule that the pre-condition in CPR 26.8(2)(a) has not been met.

[51] Having made this determination, it is not necessary for the court to go on to consider the other requirements of CPR 26.8(2). As Her Ladyship reminded us in **Issa Nicholas** at paragraph 17:

“As Barrow JA said in **Frampton**, CPR 26.8(2) is uncompromising. It imposes a fetter on the exercise of the court's discretion. A failure to satisfy all three pre-conditions, as said by the Privy Council in **Matthew**, is fatal.”¹⁴

¹⁴ References to *Ferdinand Frampton v Ian Pinard et al* DOMHCVAP2005/0015 and *The Attorney General v Keron Matthews* [2011] UKPC 38

[52] Nevertheless, for completeness, I shall deal with the other pre-conditions.

Is there a good explanation for the failure?

[53] In addition to the affidavit of Ms. Rodriguez, the claimant's affidavit filed on 8th March 2021 in support of the application supplies his explanation. At paragraphs 8 and 9, he depones:

“8. *We were requesting permission from the then Governor and that was the reason for the delay in filing the witness statement and affidavit in support of the assessment late. I contacted the Governor himself and the head of the Governor's Office Colin Hicks with respect to obtaining the said permission.*

9. *We did not receive authorisation to disclose the relevant information and as such the information was removed and the relevant documents were filed.”*

[54] The claimant swears that the information in confidential discussions concerned an ongoing criminal investigation into the defendant involving the words used in the libel complained of. He was advised by Counsel that because of the office he held, and his obligations under the Official Secret Act UK, that it would be prudent to first receive permission from the Governor prior to including the information in his witness statement.

[55] Mrs. Simpson Whyte submits that the safeguarding of the claimant's employment status is a good reason for the delay in filing the relevant documents, as the information may have resulted in further damage to the claimant in his profession and as a servant of the British government.

[56] It should be noted that this affidavit was filed after the filing of the defendant's submissions, which advanced, forcefully in my view, that the affidavit of Ms. Rodriguez fell woefully short of what is required to satisfy the conjunctive requirements of CPR 26.8(2), in that it contains bald and unparticularised assertions. It appears that the claimant's affidavit seeks to remedy the deficiencies pointed out in Ms. Rodriguez's evidence by providing details to ground a good explanation. Still, nothing in the evidence indicates what reasonable steps, if any, were taken to meet the deadline. For example, the court is not told when the information was requested, or whether the claimant had reason to believe that permission would be given before the deadline. There is nothing to suggest to the court that the claimant did anything more than to request permission, sit back and wait for it while the deadline came and went. I am not satisfied that the claimant has put forward cogent

evidence to convince the court that there was a good explanation for the failure to file the relevant documents on time. I also rule that the claimant has not met the pre-condition in CPR 26.8(2)(b).

Has the claimant generally complied with all other relevant rules, directions or orders?

[57] The claimant submits that he has generally complied with the rules prior to the irregular filings in respect of the assessment of damages. The defendant has not taken great issue with this limb and I am satisfied that the claimant has met the requirements of CPR 26.8(2)(c).

[58] In summary, the claimant has not satisfied the conjunctive or cumulative pre-conditions for the granting of relief from sanctions in this matter. Therefore, the application fails at the pre-requisite stage. As stated in **Issa Nicholas**,¹⁵ “The failure to meet any of the three preconditions required under CPR 26.8(2) was fatal to the success of the application for relief from the sanction and we are constrained so to hold.”

Overriding objective

[59] Learned counsel for the claimant urges the court to be mindful of the overriding objective to deal with matters justly, and submits that to ensure that justice is done between the parties, the court ought to deem the claimant’s documents that were filed out of time properly filed. If the application is refused, the claimant would not be able to call his witness to assist the court in determining the quantum of damages payable to him, denying him the fruits of his judgment.

[60] A ruling by this court to refuse the claimant’s documents to be deemed properly filed would deprive the claimant, now former Commissioner of Police of Anguilla, of presenting evidence in support of the assessment of damages. Having obtained judgment in default against the defendant for what appears to be a serious libel, the claimant would not be in a position to present any evidence whatsoever to substantiate the damages to which he is entitled, however big or small. This appears to be an injustice weighing on the mind of the court. This is so bearing in mind, but not limited to the fact that the breach was the fault of the claimant’s legal practitioner. This is one of the factors in CPR 26.8(3) the court could have taken into consideration had the claimant crossed the hurdle of the pre-conditions in CPR 26.8(2). Further, the assessment was adjourned from the hearing date of 8th December 2020. With the defendant’s objection and the claimant’s application, and a request by

¹⁷ GDAHCVAP2015/0029 at paragraph 10

learned counsel for the claimant for the matter to be set for a date in May following Counsel's involvement in a murder trial, the assessment has been delayed. Therefore, if relief is granted, the trial date can still be met. The claimant is seeking the fruits of his judgment. The assessment is in jeopardy as a result of Counsel's error. In light of the overriding objective, should the court not find a way for the claimant to be adequately compensated for the attack on his character as determined by the judgment?

- [61] In considering the overriding objective, I am led to the principle that following the rules is indeed in keeping with the overriding objective. In many instances, the rules themselves provide remedies for their breach. Barrow JA in **Ferdinand Frampton v Ian Pinard et al**,¹⁶ in dealing with a case where the applicants failed to address any of the three preconditions in CPR 26.8(2), stated:

"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."

- [62] The overriding objective was put in perspective in relation to CPR 26.8 by the learned Chief Justice in **Issa Nicholas**¹⁷ as follows:

"The overriding objective set out in CPR 1.1, in interpreting and applying the rules, is to enable the court to deal with cases justly. This encompasses, when interpreting the meaning of any rule, elements of proportionality as well as expedition. It must be understood then that the provisions of CPR 28.6 (*sic*) (1) and (2) expressed in the terms as crafted, must in themselves be interpreted as reflective of the overriding objective."

- [63] Learned counsel for the defendant, quoting extensively from Her Ladyship in **Adam Bilzerian**, considers the following at paragraphs 17 and 18 of the judgment particularly applicable to the instant case.

"17. ... The consequence, as here is dire and thus it behoves a litigant to forward fulsome and cogent information which will assist the court in the proper exercise of its discretion and in furthering the overriding objective of dealing with cases justly.
Dealing with cases justly does not mean that a litigant can ignore the clear

¹⁶ DOMHCVAP2005/0015 (delivered 3rd April 2006) at paragraph 19

¹⁷ GDAHCVAP2015/0029 at paragraph 10

requirements of a rule, order or direction and then seek to suggest when the consequence bites that it is unjust when he has failed to avail himself adequately or at all of the opportunities given for redemption. [Emphasis added] ...A discretion may not be exercised in a vacuum even when given in broad terms and far less so where, as here, the discretion is circumscribed by the clear rules contained in CPR 26.8. As Saunders JA said (and with which statement I agree) in **The Treasure Island Company and Another v Audubon Holdings Limited et al**,

“The overriding objective does not of itself empower the court to do anything or grant to the court any discretion. It is a statement of the principle to which the court must seek to give effect upon its interpretation of any provision on which it exercises any discretion specifically granted by the Rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself.”

18. I am afraid that the appellant has failed to adequately avail himself of the opportunity provided to him for demonstrating to the court why the discretion relieving him from the sanction ought to have been exercised in his favour.... The appellant in my view is the author of the hardship of which he now complains and cannot seek refuge in praying aid the overriding objective of the **Civil Procedure Rules 2000** whilst not comporting with the said Rules governing the exercise of the discretion.”

[64] On the evidence before this court, the claimant, having breached CPR 16.2(2)(b) and the sanction in CPR 29.11 having bitten, did not take advantage of the procedure afforded to him to avoid the dire consequence of the breach. On the clear direction of the Court of Appeal, this court ought not to exercise its discretion to deem the claimant’s witness statement and affidavit properly filed when in violation of the rule that could help him, the claimant failed to follow it.

Alleged non-compliance by the defendant

[65] The claimant calls out the defendant as himself being in breach of CPR 16.2(2)(c) for failing to file any witness statements and submissions on the assessment on which the defendant intends to rely. The defendant’s response to this is that the defendant’s obligation to file his documents does not properly arise unless and until the court deems the claimant’s documents properly filed, so to that extent, the defendant is not in breach.

[66] CPR 16.2(2)(c), in my view, gives the defendant a choice. He “shall be at liberty” to file witness statements and submissions. Notwithstanding the filing of a Form 31 notice indicating that the

defendant intends to call witnesses and make submissions, this is all it is, an intention. The defendant is not bound by it. A defendant may determine it is sufficient for his purposes to cross-examine a claimant, or perhaps not. The defendant may decide to rely on the claimant's evidence and submissions to advance his own argument and in his favour. What is needed to carry out the assessment is the claimant's evidence. Unless the defendant filed witness statements and submissions beyond 14 days of the late filing and service of the claimant's, the issue of the defendant being in breach does not arise.

Special circumstances

[67] In my view, there is nothing before the court warranting its invocation of CPR 26.1(6).

Conclusion

[68] The claimant's breach of CPR 16.2(2)(b) by filing his witness statements beyond the time stipulated in the rule carries the sanction in CPR 29.11 that the witness, the claimant in this case, may not be called at the assessment unless the court permits. The defendant's objection was met initially with a response that the claimant's breach was a procedural error that the court could put right under CPR 26.9(3). It appears, on second thought, in an attempt to remedy the situation, the claimant's application was filed after the deadline for the filing of the claimant's witness statements, that is, after the sanction bit. The application filed was properly one for relief from sanctions pursuant to CPR 26.8 and ought not to be treated as one for an extension of time under CPR 26(1)(2)(k).

[69] The claimant has failed to satisfy the cumulative requirements for relief from sanctions under CPR 26.8(2) and there are no special circumstances allowing the court to exercise its discretion to dispense with compliance with the applicable rules. Being guided by the authorities, I am constrained to impose the dire consequence of the claimant's breach.

Disposal

[70] The result of the court's determination is the claimant is not permitted to give evidence in the assessment. The claimant being the only witness in this matter, there is no evidence before the court on which he can rely in support of the quantum of damages payable to him. There is no evidence before the court on which an assessment of damages may proceed. Without any

evidence, the submissions fall away. Having obtained judgment in default, the claimant is entitled to costs of the claim.

Order

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

- 1) The claimant's application filed on 15th December 2020 is refused.
- 2) The claimant shall pay the defendant costs of the application in the sum of US\$750.00.
- 3) The defendant shall pay the claimant costs of the claim to be agreed within 21 days, failing which the claimant shall be at liberty to apply.

Tamara Gill
Master

By the Court

Registrar