

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2021/0010

BETWEEN:

MARCIANNO DEVON PICKERING

Appellant

and

[1] **ENID GERALDINE PICKERING**

[2] **DACIA ORELITA PICKERING**

[3] **PAULINE PICKERING**

(Executors of the Will of Alvin Pickering, deceased)

Respondents

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Esco Henry

Justice of Appeal [Ag.]

The Hon. Mr. Godfrey Smith, SC

Justice of Appeal [Ag.]

Appearances:

Mr. Frederick Gilkes and Ms. Reynela Rawlins-Solomon for the Appellant.

Mr. Sydney A. Bennet, QC with him Ms. Anthea L. Smith for the Respondents.

2022: May 13;
June 1.

Interlocutory appeal – Expert reports - Failure to provide experts’ reports by dates specified in court orders – No order for disclosure of experts’ reports - Whether disclosure of experts’ reports implied in judge’s orders – Whether respondents’ failure to provide experts’ reports by the specified dates attracted the sanction in rule 32.16 of the Civil Procedure Rules 2000 – Extension of time - Exercise of judicial discretion – Appellate interference with judge’s case management orders – Whether learned judge erred in the exercise of her discretion by granting the extension of time to file the experts’ reports

The respondents are the executors of the will of the late Alvin Pickering (the “Deceased”). In their substantive claim in the lower court they alleged that the appellant, through forgery and undue influence over the Deceased, became the transferee of a number of parcels of his land. They sought, inter alia, to set aside those transfers and an account of monies and

other assets of the Deceased received by the appellant. Pivotal to their claim was the assertion that at the time of the transfers, the Deceased was suffering from physical illness and dementia, and therefore lacked the capacity to validly execute the transfers. Expert reports were therefore crucial to the respondents' claim.

At two case management conferences, the trial judge ordered, *inter alia*, that Ms. Wendy Carlson ("Ms. Carlson") and Dr. June Samuel ("Dr. Samuel") be appointed as expert witnesses of the court and that they each provide a written report to the court by 30th June and 26th July 2021 respectively. No direction was given as to disclosure of the reports to the appellant. Both experts failed to provide their reports to the court by the stipulated dates. Ms. Carlson provided her report in September 2021 and Dr. Samuel provided hers in October 2021. In October 2021, the respondents applied for an extension of time for the filing of the expert reports and in November 2021, the judge ordered that the reports were deemed properly filed.

Being dissatisfied with the judge's decision, the appellant appealed. The issues which arose on appeal were: (i) whether on a proper construction of rule 32.16 of the Civil Procedure Rules 2000 (the "CPR") the respondents' failure to provide the expert reports by the dates ordered attracted a sanction; (ii) if yes, whether the sanction was engaged before the respondents applied for an extension of time thereby requiring them to seek relief from sanctions; (iii) if required to seek relief from sanctions, whether the respondents had satisfied the requirements for the grant of relief and (iv) if relief from sanctions was not required, whether the court properly exercised its discretion in granting the extension.

Held: dismissing the appeal and awarding costs to the respondents, to be assessed by a judge of the High Court if not agreed within 21 days, that:

1. Where a rule, direction or court order does not impose a sanction for non-compliance, there is no need to apply for relief from sanctions and a judge may make an order to put matters right under rule 26.9 of the CPR. Rule 32.16 of the CPR contains the sanction that a party who fails to disclose an expert report may not rely on it at trial unless the court permits. This sanction, however, is only engaged where there has been a failure to comply with a direction to disclose the expert report. On the facts, the judge's orders contained no directions to disclose the experts' reports and so the respondents' failure to provide the reports at the specified dates did not attract a sanction. Consequently, there was no need for them to apply for relief from sanctions. The judge was therefore entitled under rule 26.9 to put matters right and extend the time without an application for relief from sanctions.

Rule 32.16 of the **Civil Procedure Rules 2000** applied; **Meredith and another v Colleys Valuation Services Limited and another** [2001] EWCA Civ 1456 applied; **The Attorney General v Keron Matthews** [2011] UKPC 38 applied, **Carleen Pemberton v Mark Brantley** SKBHC VAP2011/0009 (delivered 14th October 2011, unreported) followed; **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.** SLUHC VAP2011/0017 (delivered on 19th March 2012, unreported) followed and **Savita Indira Salisbury v The Director of the Office of**

National Drug and Money Laundering Control Policy (ONDCP)
ANUHCVP2012/0044 (delivered 21st March 2014, unreported) followed.

2. An order for disclosure of a document will not be implied into a court order if an express rule exists dealing with disclosure of the document. On the facts, disclosure of the experts' reports by implication could only be considered in the absence of express rules dealing with when an expert report must be served. Consequently, counsel for the appellant's argument that the judge's orders implied disclosure of the reports, was defeated by the existence of rule 32.6(5) of the CPR which mandates the court to direct by what date expert reports are to be disclosed.

Rule 32.6(5) of the **Civil Procedure Rules 2000** applied.

3. An appellate court will be very slow to interfere with the exercise of a trial judge's discretion and case management orders. It will only do so if the judge was clearly wrong and took into account irrelevant factors or failed to consider relevant ones. On the facts, the judge directed herself to the applicable rule 26.1(2)(k) of the CPR and the relevant legal principles. She evaluated the prejudice to both sides and conducted a careful examination of the relevant factors. In coming to her decision to grant the extension of time to file the experts' reports, the learned judge was not plainly wrong and there is therefore no basis for the intervention of the appellate court.

Rule 26.1(2)(k) of the **Civil Procedure Rules 2000** applied; **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.** SLUHCVP2017/0051 (delivered 18th September 2018, unreported) followed and **BBL Limited et al v Canouan Resorts Development Limited et al** SVGHCVP2019/0006 (delivered 12th January 2021, unreported) followed.

JUDGMENT

- [1] **SMITH JA [AG.]:** This is an interlocutory appeal against the case management decision of the learned trial judge in the proceedings below to extend time for two expert witnesses, a medical doctor and a forensic document examiner, respectively, to provide their expert reports to the court. The two experts had not filed their reports within the time originally stipulated by the court. The appellant contends that the learned trial judge could not extend time without the respondents having first applied for relief from sanctions, the requirements of which they did not satisfy, and, in any event, the trial judge was plainly wrong in exercising her discretion to extend time. The respondents counter that no application for relief from sanctions was required,

and if it was, they had satisfied the requirements for relief and the trial judge was right to grant an extension of time for filing the expert reports.

Background

- [2] A brief background suffices to provide some context to the appeal. The respondents (the claimants in the substantive claim) are executors of the will of the late Alvin Pickering (the “Deceased”). The first respondent is his widow and the second and third respondents are his daughters. The appellant (the defendant in the substantive claim) is a nephew of the Deceased. In the substantive claim filed on 26th August 2019, the respondents, in essence, alleged that the appellant, through forgery and undue influence over the Deceased, became the transferee of a number of parcels of his land in which the widow had a beneficial interest. The relief they sought included the setting aside of those transfers and an accounting of monies and other assets of the Deceased received by the appellant. Pivotal to their claim was the assertion that at the time of the transfers of property, the Deceased was suffering from physical illness and dementia and lacked the capacity to execute the transfers, make rational decisions or understand the consequences of his actions. The expert reports are therefore central to their claim.

The case management orders

- [3] At a case management conference on 22nd March 2021, the learned trial judge ordered that: (i) Ms. Wendy Carlson, a forensic document examiner, be appointed as an expert witness of the court in handwriting identification, signature comparison and techniques for distinguishing forged signatures, (ii) she provide her written report to the court by 30th June 2021 and (iii) she be permitted to appear at trial and give oral evidence. No direction was given or order made as to service of the report on the appellant.
- [4] At a further case management conference on 26th April 2021, the judge ordered that: (i) Dr. June Samuel, consultant psychiatrist, be appointed as an expert witness of the court to evaluate whether the Deceased was suffering from dementia at the

material time, (ii) her written expert report be provided to the court by 26th July 2021 and (iii) she be permitted to appear at trial and give oral evidence. No direction was given or order made as to service of the report on the appellant.

[5] For reasons which will be examined later, both experts failed to provide their reports to the court by the stipulated dates. Ms. Carlson provided her report on 17th September 2021 and it was filed and served on the appellant's counsel on that same date, two and a half months after the date ordered by the trial judge. Dr. Samuel provided her report on 29th October 2021 and it was filed and served on the appellant's counsel on 30th October 2021, three months after the date ordered by the trial judge.

[6] On 12th October 2021, the respondents applied for an extension of time for the filing of the expert reports and on 23rd November 2021 the learned trial judge ordered that the expert reports were deemed properly filed.

Issues

[7] Counsel for both the appellant and the respondents identified the issues arising for this Court's determination as follows:

- (i) Whether, on a proper construction of rule 32.16 of the **Civil Procedure Rules 2000** (the "CPR"), the respondents' failure to provide the expert reports by the dates ordered by the court attracted a sanction;
- (ii) Whether the sanction provision was engaged before the respondents applied for an extension of time thereby requiring them to seek relief from sanctions;
- (iii) Whether, if relief from the sanction imposed by rule 32.16 of the CPR was required, the respondents had satisfied the requirements for the grant of relief; and

- (iv) Whether, if relief from sanction was not required, the court properly exercised its discretion in granting the extension of time sought?

[8] The first two issues can conveniently be analysed as one, namely, whether this is a case of relief from sanctions. The remaining two issues will then be analysed.

The CPR: Non-compliance with court orders

[9] As the determination of this appeal hinges upon the correct interpretation of the CPR regarding non-compliance with court orders, the applicable parts of the CPR, namely rules 26.7, 26.8, 26.9 and 32.16, serve as a useful starting point:

“Court powers in cases of failure to comply with rules, etc.

26.7

1. If the court makes an order or gives directions, the court must whenever practicable also specify the consequences of failure to comply.
2. If a party has failed to comply with any of the rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.
3. If a rule, practice direction or order –
 - (a) requires a party to do something by a specified date; and
 - (b) Specifies the consequences of failure to comply; by the time for doing the act in question may not be extended by agreement between the parties.”

[10] Rule 26.7(1) is an exhortation to judges to, whenever practicable, specify the consequence of failure to comply with any order the court might give. The exhortation recognises that judges do not always specify the consequence of a party’s failure to comply with orders the court makes. Rules 26.7(2) and (3) go on to set out the consequences of failing to comply with a rule, direction or order where that rule, direction or order imposes a sanction for non-compliance. If a party fails to comply with a rule, direction or court order, any sanction for non-compliance

imposed by the rule, direction or court order has effect unless the party in default applies for and obtains relief from the sanction. Parties cannot by agreement extend time nor can the court's general powers to rectify errors under rule 26.9 be used to cure the non-compliance. However, this rule does not deal with the situation where the rule, direction or order does *not* specify a sanction for failing to comply with that rule, direction or order.

- [11] Rule 26.8 sets out the requirements for obtaining relief from sanctions and it is clear that this rule applies only where a sanction is imposed by a rule, direction or order for failure to comply with that rule, direction or order:

"Relief from sanctions

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."

[12] Rule 26.9 sets out the court's powers where no consequences have been specified in a rule, direction or order for non-compliance with that rule, direction or court order:

"General power of court to rectify matters where there has been a procedural error

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."

This rule confers discretion on a judge to make an order to cure non-compliance with a previous court order where that previous court order did not specify a sanction for non-compliance with its terms.

[13] Rule 32.16 deals specifically with expert reports and prescribes the consequences of failure to comply with a direction to disclose an expert's report:

"Consequence of failure to disclose expert's report

32.16

1. A party who fails to comply with a direction to disclose an expert witness' report may not use the report at the trial or call the expert witness unless the court gives permission.

2. The court may not give permission at the trial unless the party asking for permission can show that it was not reasonably practicable to have applied for relief at an earlier stage.”

Is this a relief from sanctions case?

[14] The learned trial judge’s original orders in relation to Ms. Carlson were:

“2. The Expert shall provide her written report to the Court by 30th June 2021 and the expert report must meet the requirements of Part 32.14 of the CPR.

3. The expert is permitted to appear at trial to give oral evidence.”
(Underlining added)

[15] In relation to Dr. Samuels, the orders were the same, except for the filing date:

“2. The Expert shall provide her written report to the Court by 26th July 2021 and the expert report must meet the requirements of Part 32.14 of the CPR.

3. The expert is permitted to appear at trial to give oral evidence.”
(Underlining added)

[16] Mr. Gilkes, counsel for the appellant, grounded his argument on rule 32.16. He accepted that the learned trial judge did not specify dates for the service or disclosure of the reports on the appellant. His argument ran as follows. Even though the judge did not direct specifically on service, the omission did not prevent the orders being orders for disclosure. Wrapped up or implied in those orders were orders for disclosure, otherwise, how was the appellant to exercise his entitlement under rule 32.8 to ask questions of the experts and how could the respondents themselves rely on those reports at trial if disclosure was not implied in the trial judge’s orders?

[17] There are, in my view, a number of difficulties with this argument. First, rule 32.16 is clear and unambiguous. It does contain a sanction that a party who fails to disclose an expert report is unable to rely on it at trial unless the court so permits. This sanction is engaged when a party fails to comply with a direction to disclose. The learned trial judge’s orders, however, contained no direction to disclose the experts’ reports. They were ordered to provide their reports to the court by the

specified dates. So, on a plain and ordinary reading of the rule, the sanction is engaged only where there has been a failure to comply with a direction to disclose.

[18] Mr. Bennett QC, counsel for the respondents, referred this Court to the English Court of Appeal judgment of **Meredith and another v Colleys Valuation Services Limited and another**¹ in which that court heard an appeal from a trial judge's refusal to allow a party to rely on an expert report for failure to comply with an order to serve the report by a specified date. That court examined rule 35.13 of the English Civil Procedure Rules (the "English CPR") which is similar, though not identical, to the Eastern Caribbean CPR. The English CPR states: 'A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.' At paragraph 14 of the judgment, that court commented that: 'Note 35.13.1 in Civil Procedure 2001 states that rule 35.13 assumes that a party has been directed to disclose an expert's report and has failed to do so...'. In other words, rule 35.13 of the English CPR took effect where there had been a direction to disclose and the defaulting party had failed to do so.

[19] The Eastern Caribbean CPR is explicit: there must be a failure 'to comply with a direction to disclose an expert witness' report'. If a court is to find that there has been non-compliance with a direction to disclose which attracts a sanction, there must first, perforce, have been a direction to disclose.

[20] Second, disclosure by implication could only properly be considered in the absence of express rules dealing with when an expert report must be served. The appellant's argument, that disclosure is implied in the trial judge's order, is defeated by the existence of an express rule dealing with disclosure. Crucially, rule 32.6(4) – (6) provides:

"4. The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.

5. The court must direct by what date the report must be served.

¹ [2001] EWCA Civ 1456.

6. The court may direct that part only of an expert witness' report be disclosed." (Underlining added)

- [21] Third, the appellant's argument is undermined by the fact that the reports were in fact served on the appellant at the same time they were provided to the court. It would be straining the language of the learned trial judge's order to imply into it an order that the reports were to be served on the appellant by the dates specified in the order for service on the court. If the appellant's argument is correct, it begs the question what becomes of the judge's duty under rule 32.6(5) to 'direct by what date the report must be served'? If the duty to disclose the report to the appellant is by implication rolled up in the trial judge's order, rule 32.6(5) is rendered otiose, a dead letter.
- [22] To illustrate the point, rule 32.6(6), for example, states that the court may direct that part only of an expert witness' report be disclosed. The court, presumably, can only know which part of an expert's report it may wish to direct be disclosed after it has received and reviewed the report. This discretionary power would be impaired if the expert report was required, by implication, to be served upon the appellant at the same time as upon the court.
- [23] In the circumstances of this case, it seems academic to ask, 'what if the court does not make a specific order to serve or disclose the reports on the appellant?' because the appellant was in fact served with the expert reports. Furthermore, rule 26.4(1) provides that: 'If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".' The appellant did not apply for an unless order nor did the court make one. In any event, there is a duty of continuous disclosure during proceedings under rule 28.12 and the consequence of failing to disclose or serve an expert report is that the defaulting party would not be able to put in that evidence at trial.

[24] This is therefore plainly a case in which a court order to provide expert reports to the court by a certain time was not complied with and for which no sanction was specified in the court order. The prevailing Eastern Caribbean judicial authorities are clear on the effect of this. Where a rule, direction or court order does not impose a sanction for non-compliance with that rule, direction or court order, there is no need to apply for relief from sanctions and the judge is able to make an order to put matters right under rule 26.9(3), which is what the learned trial judge did in this case.

[25] In **The Attorney General v Keron Matthews**² the Privy Council explained rule 26.7 of Trinidad and Tobago's Civil Proceedings Rules (the equivalent of the Eastern Caribbean's CPR rule 26.8)

"15. Secondly, rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from any sanction imposed for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, "any sanction for non-compliance *imposed by the rule ... has effect unless the party in default applied for and obtains relief from the sanction*" (emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert's report).

16. ... It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose."

[26] In **Carleen Pemberton v Mark Brantley**,³ Pereira JA (as she then was), having found that no sanction was specified for the failure to file a notice of appeal within

² [2011] UKPC 38.

³ SKBHC VAP2011/0009 (delivered 14th October 2011, unreported).

the specified time, stated at paragraphs 12 to 14 of her judgment that she had a discretionary power under rule 26.9 of the CPR which was 'a very broad one'. The discretionary power, she said:

"[12] ...cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties.

The Principles

[13] Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.

[14] I am mindful, that there are a number of decisions by judges of this Court, addressing the various principles to be applied. In fact one of the earliest decisions on the ushering in of CPR 2000 is the case of **John Cecil Rose v Anne Marie Uralis Rose**,⁴ a judgment of Byron CJ (as he then was) sitting also as a single judge in which he dealt with an application for an extension of time to appeal. This case, in my view, captures the essence of the exercise of the discretion with respect to applications of this type, and applications for extensions of time generally, (where no sanction is specified for failure)."

[27] In **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**,⁵ this Court, per Edwards JA, stated that in the absence of any stated consequence of failure to comply stipulated by a rule, direction or order, a judge is entitled to use his or her case management powers to extend time without an application for relief from sanctions:

"[21] ...Rule 27.8 stipulates the circumstances that must exist for a party to apply for extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for either a case management conference; or a date set by a court order to do something and the order specifies a sanction for non-compliance; or a date for pre-trial review, return of a listing questionnaire, or a trial; or where a party wishes to

⁴ SLUHCVP2003/0019 (delivered 22nd September 2003, unreported).

⁵ SLUHCVP2011/0017 (delivered on 19th March 2012, unreported).

vary a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from sanctions to which the party has become subject under these Rules or any court order.

....

[23] The instant case did not present any complex circumstances as to cause an invocation of CPR 26.8 in my view, where the **Sayers [v Clarke Walker (a firm)]**⁶ approach is applied. In such a case the learned judge would be exercising her case management powers to extend time under CPR 26.1(2)(k) only, and not under CPR 27.8(4). In that regard CPR 26.9 would be applicable. The learned judge would be making an order to put matters right under CPR 26.9(3) in the absence of any stated consequence of failure stipulated by a rule, practice direction, or order.

[24] I therefore adopt the observations of Lord Justice Jonathan Parker in **Keen Phillips (A Firm) v Field**,⁷ who, in rejecting counsel's submission that the court was powerless to extend time in the absence of an application for relief from sanctions, stated:

‘... I would regard such an interpretation of a CPR as perverse and as flying in the face of the overriding objective of dealing with cases justly.’”

[28] In **Savita Indira Salisbury v The Director of the Office of National Drug and Money Laundering Control Policy (ONDCP)**⁸ this Court noted:

“[28] There is common ground that Ms. Salisbury did not file an affidavit in support of her claim in clear violation of rule 56.7(3). The only real question for me to determine is whether this was fatal to the survival of her claim as the learned trial judge seemed to have thought. Much of the learned trial judge's decision to strike seemed to turn on the fact that Ms. Salisbury had failed to file an application for extension of time to put in an affidavit in support of the claim which should have been accompanied by an application for relief from sanctions. It is unfortunate that the judge was not referred to the several decisions of our Court which have clearly held that, in the absence of a sanction that is imposed by a provision of the rules or order, an applicant who breaches the provision of a rule in relation to a procedure does not have to apply for relief from sanctions.

⁶ [2002] 3 All ER 490.

⁷ [2006] EWCA Civ 1524.

⁸ ANUHCVP2012/0044 (delivered 21st March 2014, unreported).

[29] In **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.** it was held that rule 27.8 stipulates the circumstances that must exist for a party to apply for an extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for a case management conference; or for a party to do something where the order specifies a sanction for non-compliance; or for trial review; or for variation of a date set by the Court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that rule 27.8(4) requires that the party apply for an extension to which the party has become subject under the rules or a court order.”

Proper exercise of discretion?

[29] The law regarding appeals against the exercise of a trial judge’s discretionary case management powers is clear and settled. An appellate court is very slow to interfere with the exercise of a trial judge’s discretion and will only do so if it is clear that the trial judge was blatantly wrong by, for example, taking into account irrelevant factors or failing to take into account relevant factors. The complaint under this ground of appeal is that the learned trial judge was plainly wrong in exercising her discretion to grant the extension of time. This Court has consistently stated that it will not interfere with the trial judge’s case management order unless he is clearly wrong, has misdirected himself in law, failed to take into account some material which he ought to have taken into account, or had taken into account a matter which ought to have been excluded thereby exceeding the generous ambit within which reasonable disagreement is possible.

[30] In **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**⁹ Webster JA [Ag.] stated:

“[25] This is an appeal against the exercise of the master’s discretion in refusing the appellants’ application for security for costs. The principles for reviewing the exercise of the judge’s discretion are well-known. The case that is most frequently cited is **Dufour and others v Helenair Corporation Ltd and Others.**¹⁰ where Chief Justice Floissac said:

⁹ SLUHCVP2017/0051 (delivered 18th September 2018, unreported).

¹⁰ (1996) 52 WIR 188.

‘We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.’”

[31] I have carefully reviewed the transcript of the learned trial judge’s oral decision on the respondents’ application for an extension of time to file the experts’ reports and can find no basis to interfere with the exercise of her discretion. The learned trial judge properly directed herself on the applicable rule 26.1(2)(k), as well as the relevant legal principles adumbrated in judicial authorities like **John Cecil Rose**, **Carleen Pemberton** and **C.O. Williams Construction (St. Lucia) Limited**.

[32] The learned trial judge weighed all the pertinent factors. She concluded, based on the evidence, that while the delay was ‘not negligible’ it was ‘clear that the delay in both cases were at the instance of the experts themselves who were at all times diligently pursued by counsel for the claimant’. She evaluated the prejudice to both sides, concluding that:

“...if this extension is not granted, a critical prong of the Claimants’ case would be largely unsupported since it requires the Court to make a finding of fact relative to the mental capacity of a now deceased person. This is a conclusion that any Court would be reluctant to make in the absence of appropriate expert testimony...Conversely, given the still early stage of the proceedings, the matter is now at pretrial review with the pleadings in the matter only recently having been closed, the Court is satisfied that there is no prejudice to the Defendant which could not be compensated in costs.”

[33] In **BBL Limited et al v Canouan Resorts Development Limited et al**¹¹ Farara JA [Ag.] stated:

¹¹ SVGHCVP2019/0006 (delivered 12th January 2021, unreported).

“[67] ... even where an applicant for relief pursuant to CPR 26.1(2)(k) has failed to satisfy one of the considerations for the grant of an extension of time to comply with an order of the court, such failure is not immediately fatal to the application, as is the case where a defaulting party fails to satisfy any one of the conjunctive criteria for relief from sanctions under CPR 26.8(2). In discharge of its duty to do justice to the parties, the court must consider all the factors and circumstances put before it, including the effect which a refusal will have on the applicant and its case; whether the failure can be remedied within a reasonable time; what effect the extension sought would have on the litigation including on any trial date; what, if any, prejudice an extension would cause to the other party or parties to the litigation; the proportionality of refusing to grant the extension sought in relation to any failure to comply with the court’s order; and that, in the interest of the proper administration of justice, the orders of a court, especially unless orders, must be obeyed, unless there is some good reason for excusing the non-compliance. Put another way, the court must apply the overriding objective in determining which way to exercise its discretion and, in doing so, the relevance of the factors relied on and the weight to be attached to each such factor, is a matter for the court to decide in all the circumstances. In **Roland James v The Attorney General of Trinidad and Tobago**,¹² Mendonca JA stated:

‘...on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.’”

[34] The trial judge therefore enjoys a wide discretion and the analysis involved is essentially a judgment call to be made by the judge, a weighing and balancing of values in the exercise of her discretion. The judge is not expected to mechanically apply rules to shut litigants out, but is engaged in a process of sifting, weighing and evaluating before arriving at a decision according to her own judgment. The learned trial judge did all of this, not on a whim but on a careful evaluation of the relevant factors and in accordance with settled principles of law.

[35] While this is sufficient to dispose of this appeal, because both counsel made extensive submissions on whether relief from sanctions was, in any event, satisfied, I will deal succinctly with this point.

¹² Civil Appeal No. 44 of 2014.

Relief from sanctions

- [36] The learned trial judge also considered whether, if the application were treated as one for relief from sanctions, the threshold requirements would have been satisfied. She again properly directed herself on the relevant principles before proceeding to weigh the threshold factors set out in rule 26.8 of the CPR.
- [37] On the question of promptitude, the trial judge considered that the application was made 'less than a month after receiving the report, but more significantly prior to the pretrial review' which required consultation with the experts and this 'cumulatively accounted for the breach of the deadline ...the evidence reveals that the Claimants diligently pursued the experts'. She concluded that, in the context of those facts, the application was made promptly, and that the illness of Ms. Carlson and the workload of Dr. Samuel occasioned by the covid spike were good explanations for the late filing of the expert reports and was neither intentional nor attributable to the respondents or their counsel who had sent emails chasing the reports.
- [38] The appellant complained of 'persistent dilatory conduct by the respondents' and their 'laissez-faire' attitude to filing the expert reports. The trial judge acknowledged 'some measure of non-compliance on the part of the Claimants' but rejected the characterisation of their attitude as laissez-faire. The issue of the breach being remediable within a reasonable time was moot since, as she correctly noted, the reports had already been filed with the court and served on the appellant.
- [39] As regards prejudice and the interest of the administration of justice, the appellant submitted that the delay in prosecuting the claim, the multiplicity of applications and the filing of the expert reports after he had filed his witness statements and therefore could not respond to factual assumptions upon which the reports are based, taken together amounted to 'tremendous amount of prejudice on the appellant'. The learned trial judge noted that there was no impact on trial date since none had yet been set. There was no affidavit setting out any prejudice to the appellant other than further delays in the litigation. The judge accepted that while protracted litigation

could be evidence of prejudice, 'in balancing the respective rights and risks of the parties, the Court can see no prejudice to granting relief, but protecting a defendant by an appropriate order for costs'. The trial judge accordingly ordered costs in favour of the appellant.

Conclusion

[40] There is therefore no proper basis to interfere with the decision of the learned trial judge to extend time for the filing of the expert reports and, accordingly, I would make the following orders:

- (1) The appeal is dismissed.
- (2) Costs are awarded to the respondents to be assessed by a judge of the High Court if not agreed within 21 days.

I concur.
Mario Michel
Justice of Appeal

I concur.
Esco Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar