

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

SAINT LUCIA

SLUHCV2019/0440

BETWEEN:

DERMONT SHAUN WEEKES

Claimant

and

[1] THE ATTORNEY GENERAL

[2] CASTRIES CONSTITUENCY COUNCIL

Defendants

BEFORE:

Mrs. Michelle John-Theobalds

Master [Ag.]

APPEARANCES: (Via Zoom)

Ms. Alghitha Richelieu of Counsel for the Claimant

Mr. Seryozha Cenac and Mrs. Rochelle John-Charles of Counsel for the first
Defendant

Ms. Eugenia Dickson of Counsel for the second Defendant

2021: March 2;
July 6.

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]:** On 3rd October 2019, the claimant filed a claim against the defendants for damages alleged to have arisen from the defendants' negligence which caused injury and loss to the claimant. At the case management conference on 10th November 2020, the master gave, among other orders, partial

trial directions for the filing of witness statements by 15th January 2021. The claimant complied with the order; however the first named defendant failed to do so.

[2] On 22nd January 2021, the first named defendant filed witness statements on behalf of Linus Clarke, Kenyatta Alexander and David Antoine. Subsequently, on 16th February 2021, the claimant filed an application to strike out the witness statements filed on 22nd January 2021. It was not however until 19th February 2021 that the first named defendant filed an application for an extension of time and relief from sanctions in relation to the late filing of these three witness statements and their non-compliance with the master's order of 10th November 2020 respectively.

[3] It is these applications which concern the court presently. I should also note that the second named defendant did not participate in these applications. I will deal with the application to strike out the witness statement first, it being filed first in time.

Application to Strike Out the Witness Statements

[4] The claimant urges this court to strike out the three witness statements filed by the first defendant on 22nd January 2021 under rule 26.7(2) of the **Civil Procedure Rules 2000** ("CPR"). CPR 26.7(2) states:

"If a party has failed to comply with any of these 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."

[5] The first named defendant contends that the claimant's application is premature because once witness statements are filed outside of the time stipulated by the court, a party is prohibited from calling these witnesses unless the court permits. This is the sanction provided under CPR 29.11(1) which provides as follows:

"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."

- [6] Learned counsel for the first named defendant submits that the court has yet to deem the witness statements properly filed, therefore, there is currently no 'proper', witness statement before the court to be struck out.
- [7] I have considered the oral and written submissions by the parties on this application. The first named defendant's failure to make the application before the expiration of the deadline for filing means that the sanction imposed by CPR 29.11 has already taken effect. The rule is clear about the sanction for such failure, which is that the first named defendant is unable to call those three witnesses unless given permission by the court. In **Kyle David v Attorney General of the Commonwealth of Dominica et al**¹ Mitchell JA [Ag.] set out succinctly the effect of CPR 29.11(1) when he stated:
- “CPR 29.11(1) provides that the sanction of not being able to call the witness at the trial comes into effect immediately upon the expiration of the time limit, and continues until it is either lifted pursuant to CPR 26.8 which deals with relief from sanctions, or is revoked at the trial where the Court gives permission.”
- [8] Counsel for the claimant has pointed out that in **Kenton Collinson St. Bernard v The Attorney General of Grenada et al**² Barrow J [Ag.] held that CPR 26.7 and 26.8 suggests that the sanction for non-compliance takes effect unless an application for relief is made promptly. However, I am not of the view that this decision assists the claimant in this application. In **St. Bernard**, the issue was the sanction created by CPR 29.11 and whether it should be invoked against the offending party who had not, up until the morning of the trial, applied for relief from sanctions and permission to rely on their witness statements which were belatedly filed. The statements made by Barrow J [Ag.], simply put, fortifies the position that unless the court grants permission or relief from the sanction of not being able to call the witness at trial, a party may not rely on witness statements which have been filed out of time. Therefore, as it stands, the witness statements, although filed, cannot be relied upon until such time as the court grants permission.

¹ DOMHCVAP2013/0004 (delivered 21st January 2014, unreported).

² High Court Civil Case No. 0084 of 1999 (delivered 6th April 2003, unreported).

- [9] It follows that the application to strike out the witness statements is indeed premature as at the time of filing the court had not given permission for the witness statements to be filed. The application to strike out the witness statements filed by the claimant on 22nd January 2021 is accordingly dismissed.

Application for Extension of Time and Relief from Sanctions

- [10] In considering an application for relief from sanctions the court must have regard to CPR 26.8.

- [11] CPR 26.8 states:

"(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, order 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."

- [12] Under CPR 26.8 (1) it is clear that an application for relief from sanctions must be made promptly and be supported by evidence on affidavit. The detailed affidavit filed by the first named defendant sought to explain the reasons for the delay in filing the application. In seeking to explain their belated application for an extension of time, the affidavits states that (i) counsel involved in the matter was quarantined, (ii) other counsel with conduct was involved in matters which had potentially significant implications for the collection of revenue for Saint Lucia, income tax appeal with a

similar consequence, and (iii) ongoing rotations occurring at the Attorney General's Chambers due to the COVID-19 pandemic, on which it could be reasonably inferred would have significantly slowed down operations.

- [13] The first named defendant has offered as an explanation for the filing on 22nd January 2021 the fact that the witnesses, being members of the Royal Saint Lucia Fire Service, were actively engaged and on duty during that week. Learned counsel for the first named defendant also stated that the officers were rotated and were not always available to sign the witness statements. Also offered as an explanation was that the fire service personnel were affected by the transmission and had to be isolated. They do not however say how the 3 officers themselves were affected and whether these officers had to be isolated. This, however, prevented counsel from securing the signatures in person and all interactions were done via email. The witness statements were returned on 22nd January 2021 at which time they were filed by counsel. It is submitted that the first named defendant always intended to file its application before the next case management conference.
- [14] In response, the claimant submits that the application by the first named defendant was by no means prompt. The application for relief was filed some 5 weeks after the deadline had expired. Learned counsel for the claimant submits that this is the timeline which must be looked at and not the date when the witness statements were filed. Counsel also argues that the first named defendant has deliberately flouted the court's order and the rules and cannot now ask for mercy by invoking the overriding objective.
- [15] Learned counsel for the first named defendant argues that in assessing whether an application has been made promptly all of the prevailing circumstances must be looked at and not just the length of time between the date the sanction took effect and the date the application was made for relief. To buttress this argument, learned

counsel relied on the decision of **Rawti Roopnarine and Another v Harripersard Kisso et al.**³ In that case, the Court of Appeal of Trinidad and Tobago found:

“26... But whether an application is prompt does not depend simply on the time that has elapsed from the date the sanction took effect to the date the application for relief was made. It depends on the factual context and there are other relevant and more significant matters in this case that the Judge did not consider.”

[16] However, it is noted that the circumstances of **Rawti Roopnarine** are quite different from the circumstances of this case. In that case, 3 witness statements were to be filed and exchanged by 31st October 2011, and after a series of events, including counsel for the appellant having relocated offices without indicating the location of his new office, which made service on the afternoon of that day impossible, the witness statements were exchanged on 1st November 2011 to the 4 respondents in the case. It was not until the pre-trial review on 31st January 2012 did it become apparent that the 4th respondent had only been served with 2 of the 3 witness statements. The other 3 respondents had been served with all 3 of the witness statements. On 1st February 2012, an application for relief from sanctions was filed by the appellant for the failure to file the witness statements in compliance with the order, the two having been filed on 1st November 2011 being filed late as well. The application was later amended on 24th February 2012 to include the breach of serving all the witness statements one day late. It was in this context that the Court of Appeal of Trinidad and Tobago criticised the trial judge’s finding as follows:

“28. ... The application was therefore made almost four (4) months after the date the sanction took effect in relation to these witness statements. **But it was made in the context where the witness statements were filed in time and served the following day.** This was well before the pretrial review and the trial date. The parties appeared at the pre-trial review and, having read the statements indicated that they had no evidential objections to them. The application for relief was therefore made long before the trial date and in circumstances where it could cause no prejudice to the parties nor delay of the trial. Such considerations are relevant and form an essential part of the context in which promptness must be considered. When those considerations are taken into account it is not possible to regard the application as not having been made promptly. Indeed when those circumstances are taken into account the application for relief is best viewed

³ Trinidad and Tobago, Civil Appeal No. 52 of 2012, para. 24.

in the nature of a house-keeping exercise and it is surprising in those circumstances that there were objections to the application by attorneys-at-law for the Respondents. The Judge did not consider those factors and I am therefore of the view that he was plainly wrong in the exercise of his discretion. In my judgment, the application for relief from sanction in relation to the witness statements that were served on November 1st, 2012, was made promptly within the meaning of [rule 26.8 (1)].” (Emphasis added)

[17] In relation to the witness statement that was not served on the 4th respondent the Court of Appeal of Trinidad and Tobago viewed it in a very different context. The Court found that there was no good explanation for the delay in making the application some 3 months after the breach, obviously not finding the explanation proffered by the applicant to be satisfactory. The Court agreed with the trial judge that application for relief from sanctions in relation to this witness statement was not made promptly in the circumstances, and therefore did not go on to consider the other limbs of the test.

[18] I have great difficulty in seeing how **Roopnarine** assists counsel in this case. The circumstances in that case were certainly very much different to the case at bar. What the court found as a good explanation, and promptitude was in relation to circumstances where in totality it was acceptable. What counsel for the first named defendant failed to recognise however was that in relation to one of the witness statements the Court found that a delay of 3 months was not prompt within the meaning of CPR 26.8(1).

[19] There are several cases of the Eastern Caribbean Supreme Court dealing with the issue of promptitude. As stated before the, application was filed some five weeks after the deadline and is supported by an affidavit from the Hon. Attorney General. In considering whether the application can properly be considered as being made promptly, the decision of the Court of Appeal in **Adam Bilzerian v Gerald Lou Weiner and Another**⁴ is of assistance. In that case, the Court of Appeal found that an application for relief from sanctions filed six weeks after the deadline for filing

⁴ SKBHCVAP2015/0015 (delivered 27th January 2016, unreported).

witness statements had expired could not be considered as being promptly made. Similarly, I am of the view that the application filed by the first defendant some five weeks after the deadline for filing witness statements had passed cannot be regarded as being promptly made. However, at paragraph 12 of the judgment in **Adam Bilzerian** Pereira CJ explained that:

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

- [20] Having found that the delay of five weeks is not prompt, I am however of the view that it is not fatal to the application. I will therefore address the other limbs under CPR 26.8(2).
- [21] The compendious conditions set out in CPR 26.8(2) have been deemed critical to the court’s exercise of its jurisdiction to grant relief.⁵ These conditions are pre-requisites and must be satisfied before any further consideration under sub-rule (3) is given to the grant of any relief.
- [22] The first named defendant submits that although the witness statements had been drafted by 15th January 2021 these were sent off to the witnesses with questions, for their review, and response, informing them of the deadline, however the first named defendant did not receive these back until after the deadline. The first named defendant has submitted an email exchange between counsel and the Chief Fire Officer to whom the statements were sent. The first named defendant submits that these witness statements were returned on 15th January 2021, but contained alterations and notes which had to be further clarified and redrafted. As a result, the first defendant realised that it would not be able to meet the deadline in order to comply with the order. The first named defendant further submits that the witness

⁵ See *Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited* GDAHCVAP2015/00029 (delivered 8th December 2019, unreported) at para 15.

statements were filed thereafter as soon as reasonably possible, which was on 22nd January 2021, some 7 calendar days later.

[23] In response, the claimant submits that it is uncertain from the evidence adduced by the first named defendant whether the first named defendant tried to establish a line of communication before the date of the deadline. The email information is incomplete in this regard. The first named defendant states that it requested telephone numbers but it is not certain whether these were obtained. The first named defendant has failed to show that efforts began before the date of the email. This, the claimant submits, amounts to nothing more than bald assertions as to what steps were taken to try to obtain the signatures before the date.

[24] I am of the view that the explanation for the delay provided by the first named defendant is adequate and the reasons are good. It is all very well known that the COVID-19 pandemic has caused many things to slow down causing many delays in all circles. I do however accept counsel for the claimant's submission that a phone call from the first named defendant could have been made, especially when it was realized that counsel would have been late in filing the witness statements, which appears to be before the explanations above appeared to have kicked in. However, this does not take away from the adequacy of the reasons given.

[25] In addressing whether the failure was intentional, the first named defendant states that he had taken all reasonable steps to meet the deadline; notwithstanding, he was unable to meet the same. In support, an email is exhibited showing that the Chief Fire Officer was emailed the witness statements to pass on to the Fire Officers for their action. That email also stipulated the deadline by which the witness statements had to be filed.

[26] I agree with the claimant that the first named defendant has failed to show what steps were taken before the 15th January 2021 to secure the completion of these witness statements to allow them to be filed by the due date. However, even in the

absence of such information, I am unable to find any evidence which leads to the conclusion that the delay was intentional or deliberate. Although there is no step by step account of what was done to secure the completion of the witness statements, the first defendant's explanation in my view is sufficient to satisfy the second limb. I am satisfied that the first named defendant attempted to have the witness statements filed by 15th January 2021 but simply failed to do so.

[27] In **Ferdinand Frampton v Ian Pinard et al**⁶ Barrow JA (as he then was) in addressing the failure of the applicant to address the compendium provisions of CPR 26.8(2) in their affidavit in support of their application for relief said at paragraph 19:

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

[28] From the evidence presented and the submissions made to the court in this matter, I am satisfied that the first named defendant has shown that the failure to comply with the order was not intentional, that there was a good reason for the failure to comply and that the first named defendant had generally complied with other relevant rules, orders and directions in the matter.

[29] CPR 28.6(3) however mandates other conditions to which the court must have regard when determining whether to grant such an application.

“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;

⁶ Commonwealth of Dominica Civil Appeal No.15 of 2005 (delivered 3rd April 2006, unreported).

- (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."

[30] In this case, the failure to comply was remedied within a reasonable time, some seven days later, although the application was made later. I am also cognisant of the fact that granting relief would have no effect on the trial date as one has not yet been set. It therefore leaves the other three limbs (a), (b) and (d) to be considered.

[31] In considering the effect which the granting of relief would have on each party, the claimant urges this court to accept that they would be prejudiced if the first defendant were granted relief from sanctions as the first named defendant would have had an opportunity to scrutinise and craft their witness statements to challenge the claimant's account. In response, the first named defendant states that the witness statements are in line with their defence and have not been prepared as the claimant suggests.

[32] I have heard the submissions on behalf of the claimant as to the effect that granting relief from sanctions would have on him. However, in my view, the claimant has failed to demonstrate how the witness statements filed by the first named defendant have been prepared taking his own witness statements into consideration. Further, there is nothing to suggest that the claimant would not be in a position to lead evidence in relation to this case, essentially preventing it from the ability to fight its case on the merits as it would not be allowed to call any witnesses at the trial. In the premises, I am satisfied that the granting of relief would not have an adverse impact on the claimant.

[33] In gauging the effect that the decision to grant or deny relief will have on the parties, Pereira CJ in **Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited**⁷ had this to say:

“[10] 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(1) and (2) expressed in the terms as crafted, must in themselves be interpreted as reflective of the overriding objective.”

Pereira CJ went on to say:

“[19] ... It would not be in the interest of the administration of justice to exact disproportionate punishment by denying entry through the door of justice for untimely compliance in the face of the ability and readiness to remedy that failure and which in so doing visits no prejudice upon the other party or in any way threatens the due administration of justice.

[20] The failure to comply has either been remedied or can be remedied within a reasonable time.”

[34] I am satisfied that such a sanction would be disproportionate, keeping at the forefront of my mind the overriding objective and what the justice of this case requires. Accordingly, the application for an extension of time is allowed.

Order

[35] I hereby order as follows:

- (i) The application to strike out the witness statements of Linus Clarke, Kenyatta Alexander and David Antoine filed on 22nd January 2021 is dismissed with no order as to costs.
- (ii) The first named defendant is relieved from the sanction of CPR 29.11.
- (iii) The first named defendant is granted an extension of time to file the witness statements of Linus Clarke, Kenyatta Alexander and David Antoine to 22nd January 2021.

⁷ GDAHCVAP2015/0029 (delivered 8th December 2016, unreported).

- (iv) The witness statements of Linus Clarke, Kenyatta Alexander and David Antoine filed on 22nd January 2021 are deemed properly filed.
- (v) The first named defendant is granted permission to call Linus Clarke, Kenyatta Alexander and David Antoine at the trial of this matter.
- (vi) There is no order as to costs on the application for an extension of time.

[36] I am grateful to counsel for their assistance in this matter.

Michelle John-Theobalds

Master [Ag.]

By the Court

Dp. Registrar