

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0087

BETWEEN:

BARROW TOBY

CLAIMANT/RESPONDENT

AND

MAGAVON TOBY

DEFENDANT/APPLICANT

Appearances:

Mr. Michael Wyllie for the Claimant/Respondent

Mr. Duane Daniel for the Defendant/Applicant

2019: December, 12

2020: March, 3

Decision

Burnett, M. (Ag.):

- [1] This is an application by the Applicant for extension of time to file a Witness Statement and Relief from Sanctions which the Court may impose for failure to comply with its directions.

Procedural Background

- [2] At a case management conference on the 2nd day of May, 2019, the parties to these proceedings were given leave to file and serve Witness Statement on or before 12th September, 2019.
- [3] On the 12th September, 2019, the applicant filed an application for an extension of time to file Witness Statement. This application was heard on the 8th October, 2019, and the Court granted the Applicant an extension of time to file and serve Written Statements on or before 22nd November, 2019.
- [4] On the 27th November, 2019, the Applicant filed an application for extension of time to file and serve Witness Statement after the deadline set by the Court in its order of 8th October, 2019.
- [5] The application is made pursuant to Part 26.1 (2) K and Part 26.8 of the Civil Procedure Rules 2000.

The Law

- [6] Civil Procedure Rule 26.1 (2) K permits the Court to grant an extension of time for complying with an order of Court and says:
- (2) "Except where these rules provide otherwise, the Court may -
 - (K) Extend or shorten the time for Compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for Compliance has passed."
- [7] Civil Procedure Rule 26.7 (2) provides:
- (2) "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 default apply for and obtains relief from the Sanction and rule 26.9 does not apply."
- [8] Civil Procedure Rule 29.11 states the consequences for failing to comply with an Order for the filing and exchange of Witness Statements:
- (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 from Sanctions under Rule 26.8.
- [9] Civil Procedure Rule 26.8 addresses Relief from Sanctions and provides as follows:
- "(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.

- (4) The Court may not order the respondent to pay the applicant's cost in relation to any application for relief unless exceptional circumstances are shown."
- [10] The Court must determine whether the applicant should be granted relief from sanctions and extension of time to file Witness Statement?
- [11] The grounds for the application are that:
- (1) Civil Procedure Rule part 26.1(2)(K) empowers the Court to extend the time for compliance with an order or directions of the Court.
 - (2) Part 26.8 empowers the Court to be relieved from any sanction which the Court may impose for failure to comply with its directions.
 - (3) By Order of the Court made on 8th October, 2019, direction was given by Master Rickie Burnett (Ag.) for Witness Statement to be filed and exchanged on or before 22nd November, 2019.
 - (4) One of the Defendant's key Witness, Ms. Arrion Barnwell, the accountant responsible for preparing the financial report in this matter, experienced a death in her family, and as such, was only able to complete a report on the financial position of Reliable Rides and Parts, two (2) days ago, on the 19th November 2019.
 - (5) It will not be possible for Witness Statement to be filed by the stipulated deadline of 22nd November, 2019 as the report on the financial position of Reliable Rides and Parts mentioned at paragraph 2 above, has not been received within sufficient time to enable proper perusal and study, in order to inform and complete such Witness Statement.
 - (6) Lead Counsel, Mr. Duane Daniel, who has primary conduct of the matter, was out of the jurisdiction at the time when the report of Ms. Barnwell was received.
 - (7) The circumstances outlined in numbers 4 to 6 were unforeseen and unintentional.
 - (8) The delay in completing and filing the Defendant's Witness Statement was the result of unforeseeable circumstances outlined in numbers 4 to 6 above, and was unavoidable.
 - (9) The application for extension of time and relief from sanctions has been filed promptly in the circumstances.
 - (10) The Claimant is not likely to be prejudiced if the relief sought are granted.
- [12] The affidavit by Ms. Sherisse Veira stated that Ms. Arrion Barnwell, the accountant responsible for preparing the financial report, recently experienced a death in her family while she was out of state attending the wedding of her sister, when tragically, within three (3) weeks of the wedding, her brother-in-law died. Ms. Barnwell was actively involved in consoling her sister and arranging for the transport and funeral arrangements.

- [13] Ms. Veira further deposed that Ms. Barnwell was only able to complete and submit the financial report on 19th November, 2019, two (2) days before the deadline for the filing of Witness Statement on 22nd November, 2019. Further, lead Counsel, Mr. Duane Daniel who had primary conduct of the matter was out of the jurisdiction attending a meeting of the Civil Procedure Rules Review Committee when the report was transmitted by Ms. Barnwell. Consequently, there was not sufficient time to properly peruse and study the financial report and conduct the relevant meetings with all the potential witnesses in order to finalize and file the Witness Statement on or before 22nd November, 2019, in accordance with the Courts' directions.
- [14] Ms. Veira deposed that she verily believed that the report on the financial position of Reliable Rides and Parts was necessary to inform the other Witness Statements as they are relevant on the information contained therein.
- [15] Ms. Veira contended that the delay in completing and filing the Witness Statement of Magavon Toby was the result of circumstances beyond the control of the Defendant and was unavoidable and unintentional.
- [16] She deposed that the application has been filed promptly and that the delay is not expected to exceed three (3) weeks. The Defendant has generally complied with all other Orders of the Court. The matter is listed for Pre Trial Review on 30th January, 2020, and that no trial date has been set.
- [17] The Defendant will be greatly prejudiced if the application is denied as without the Witness Statement, that evidence will not be relied upon in support of his defence. The Defendant prospects of success at trial would be diminished.

The Applicant's Submission

- [18] Learned Counsel, Mr. Duane Daniel, posited that the substantive matter concerns a property whereby the Claimant claims for a specific sum, which cannot be determined without an audit.
- [19] Counsel submitted that part of his Counter Claim is for an account of profit, hence the need for an expert to guide the process.

The Respondent's Submission

- [20] Learned Counsel, Mr. Wyllie, opposed the application. Counsel submitted that the Court should address its mind to Part 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.
- [21] Counsel relied on Part 26.8 of Civil Procedure Rules 2000 and submitted the case of Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited¹.

¹ GDAHCVAP2015/0029

- [22] In paragraph 8 of that Judgment the Court states “CPR 26.8 may be contextually understood to comprise three (3) components. Firstly, CPR 26.8(1) requires that the application for relief be made promptly and must be supported by evidence on affidavit. Secondly, CPR 26.8(2) says that the court may only grant relief if three (3) conditions are satisfied, namely: by demonstrating that the failure to comply was not intentional; there is a good explanation for the failure; and that the defaulting party has generally complied with all other relevant rules, practice, directions, orders and directions. These conditions have been termed preconditions by the Privy Council in *The Attorney General v Keron Matthews*. There, the Board, in opining on CPR 26.7(3) of Trinidad and Tobago, which is a mirror of our Eastern Caribbean Supreme Court (“ECSC”), CPR 26.8(2) said at paragraph 17 that ‘an application for relief from a sanction must fail unless all three (3) of the conditions precedent specified in r.26.7(3) [ECSC CPR 26.8(2)] are satisfied.’ This Court in the decision of *Robin Mark Darby v Liat (1974) Limited* termed the CPR 26.8(2) conditions as ‘the compendious conditions circumscribing or the prerequisite for the exercise of the direction’ and that once these are satisfied then the Court is exhorted to then have regard to the considerations contained CPR 26.8(3) in exercising its discretion.
- [23] Counsel further submitted the reason the Applicant gave in his application for a further extension of time to file his Witness Statement as outlined in paragraph 4 of his current application. This is the same reason he gave in his application of 12 September, 2019, for an extension of time to file his Witness Statement; that is, “Ms. Arrion Barnwell, the accountant responsible for preparing the financial report in this matter has experienced a death in the family, and as such will not be able” to complete the report on the financial position of Reliable Rides and Parts by the deadline of Thursday 12th September, 2019, as per Case Management Order of 2nd May, 2019.
- [24] Counsel posited that whatever grief, shock and emotional distress Ms. Barnwell may have experienced from the death of a family member, three (3) months was far more than adequate for her to have reconciled and provide report in time for the Witness Statements to be prepared and filed by the deadline of 22nd November 2019.
- [25] Counsel asserted that paragraph 11 of Ms. Veira’s affidavit in support of the Application that the Defendant has generally complied with all other orders of the Court is erroneous as the Applicant had repeatedly failed to comply with other Court Orders with respect to the filing of Witness Statement and his Defence.
- [26] Counsel posited that on 25th July, 2018, by agreement, the Claimant’s Attorney consented to extend the time for the Applicant/Defendant to file his defence to 14th August, 2018.
- [27] Further, the Applicant/Defendant failed to file on the 14th August, 2018 and filed an application for a further extension of time to file his defence and relief from sanction. This application was heard on 24th September, 2018 before Master Moise who granted the extension to 30th September, 2018, within which to file his defence. The defence was filed on 28th September, 2018.

Analysis

- [28] The Court of Appeal in the Issa Nichols² case outlined the practice that the Court should employ when dealing with application for relief from sanctions.
- [29] The Court said that CPR 26.8 comprises three components:
- i. It requires that the application be made promptly and must be supported by affidavit of evidence.
 - ii. CPR 26.8(2) requires the Court to embark upon a stepped approach when considering an application for relief from sanction.
- [30] It provides that the Court may only grant relief if three (3) conditions are met, namely, the defaulting party demonstrates that the failure to comply was unintentional, there is a good explanation for the failure and the defaulting party has generally complied with all other relevant rules, practice directions, orders or directions.
- [31] CPR 26.8(2) is uncompromising. It imposes a fetter on the exercise of the Courts' directions and a failure to satisfy all three (3) pre conditions is fatal to the application.
- [32] I am satisfied that the applicant has filed the application promptly.
- [33] Was the failure to comply intentional? In the case of the Attorney General of Trinidad and Tobago v Universal Project Ltd Jamadar JA said:

“however, it is one thing to say that the Appellant in pursuance of that intent delayed, defaulted and ultimately ran fatally afoul of the CPR, 1998, but it is quite another to say that the Appellant intended the consequences of its inaction and laxity and that the State intended the consequences caused in this case... Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice, negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order. All of these reason may be assessed as not providing any good explanation for the breach of the order, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7(3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7(3) and wedded to all of the requirements of Part 26.7.”

- [34] He went on to say:

“...what must be shown is that the motive for the failure to comply was a deliberate intent not to comply. It is accepted that this positive intention can be inferred from circumstances, but... it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended. However, because the consequences of actions or

² Court of Appeal No: 104 of 2009 (Trinidad & Tobago) delivered on the 26th February, 2010.

omissions or choices are not intended, does not necessarily exempt one from taking responsibility for them.”

- [35] This reasoning was upheld by the Privy Council in the Attorney General of Trinidad and Tobago v Universal Projects Ltd [2011] UKPC 37. Privy Council Appeal no. 0067 of 2010 and it is now generally accepted that a finding of intentional failure to comply with a rule or order requires evidence which is direct or inferred, of some conscious, deliberate decision not to comply.
- [36] Learned Counsel, Mr. Wyllie, submitted that the Applicant failure to file Witness Statement on 12th September, 2019, as ordered on 2nd May, 2019, and again on 22nd November, 2019, was intentional.
- [37] The Court applies the natural and ordinary meaning to the word intentional which connotes something deliberate.
- [38] On the fact presented in this matter, there appears to be a conscious or deliberate decision on the part of the Applicant to disregard the order to file the Witness Statement by the date stipulated by the Court. Two (2) opportunities were presented. I therefore, conclude from the conduct of the Applicant, that this limb of the CPR 26.8(2) is not satisfied.
- [39] Was there a good explanation for the failure? Counsel for the Respondent drew the Court’s attention to the reason given by the Applicant in this application and the reason that was given by the Applicant in the first application.
- [40] What is a good explanation was addressed in the Privy Counsel decision in the Attorney General of Trinidad and Tobago v Universal Projects Ltd case. In that case, the Board rejected the Appellant submission that:
“..... to interpret “good explanation” as requiring absence of fault would impose an unreasonably high test, because in practice virtually all breaches are the result of some fault. Rather, ... a “good explanation” is one which “properly explains how his breach came about, which may or may not involve an element of fault such as inefficiency or error in good faith.
- [41] The Board held:
“The Board cannot accept these submissions. First, if the explanation for the breach i.e. failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a “good” explanation for the breach. To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.
- [42] From the above, it can be deduced that a good explanation entails a consideration of whether the reason for the failure connotes real or substantial fault and whether it is excusable or inexcusable.

- [43] I accept Counsel for the Respondent's submission that the explanation given by the Applicant in paragraphs 4, 5 & 6 of his grounds for the application are without merits and have not satisfied the rule.
- [44] The record also shows that the Applicant has not generally complied with orders.
- [45] In the circumstances, the application before the Court cannot succeed as the Applicant has not satisfied the conditions under Part 26.8.

ORDER, in summary,

1. The application before the Court is dismissed.
2. The Applicant to pay the Respondent costs of \$1,000.00

**Rickie Burnett
MASTER (Ag.)**

By the Court

Registrar