

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

SVGHCV2015/0142

IN THE MATTER OF PART 67 OF THE CIVIL PROCEDURE RULES

**IN THE MATTER OF THE TRUSTS OF THE WILL DATED 3RD AUGUST 1989 OF BERYL
ALEXANDRINA BAYNES, DECEASED**

**IN THE MATTER OF THE TRUSTS OF THREE CERTAIN PARCELS OF LAND WITH BUILDINGS AND
ERECTIONS THEREON SETTLED BY INDENTURES REGISTERED AS DEED NUMBER 2349 OF 1988
AND DEED NUMBER 4629**

**IN THE MATTER OF THE STATUTORY TRUSTS ARISING UPON THE INTESTACY OF BERYL
ALEXANDRINA BAYNES BY VIRTUE OF THE ADMINISTRATION OF ESTATES ACT CHAPTER 486.**

BETWEEN:

**CAMIRA BAYNES-CHAMBERS
(of Barrouallie, St. Vincent and the Grenadines)**

1ST CLAIMANT/APPLICANT

AND

**CAMIRA BAYNES-CHAMBERS
(Court Appointed Representative of the Estate of
Beryl Alexandrina Baynes, deceased by Order of
Court dated 4th October 2018)**

2ND CLAIMANT/APPLICANT

AND

**DAVID BAYNES "Also Known As" David FOX
(of Barrouallie, St. Vincent and the Grenadines,
Added Claimant pursuant to Order of Court dated
4th October 2018)**

3RD CLAIMANT/APPLICANT

AND

**THEODORE BROWNE
(Former Executor and Trustee of the Estate of
Beryl Alexandrina Baynes, deceased of Cane Garden,
St. Vincent and the Grenadines)**

DEFENDANT/RESPONDENT

Appearances:

Mr. Sten Sergeant for the Claimants

Mrs. Cheryl Bailey with Mrs. Mandella Peters for the Defendant

2020: 15th May

JUDGMENT ON WRITTEN AND ORAL SUBMISSIONS

Byer, J.:

- [1] This is a case in which the claimants have filed an application for an extension of time and for relief from sanctions for failure to file their witness statements on the day that the court had ordered being the December 9th 2019. The same were in fact filed on the 9th April 2020 after having filed the application on the 20th March 2020.
- [2] In looking at this matter the court is again struck by what it considers the cavalier and casual manner, in which counsel and parties but more particularly the parties approach the adherence to court orders.
- [3] In the case of **Kenton St Bernard v The Attorney General of Grenada and ors**¹ Barrow J as he then was, had this to say just after the advent of the CPR 2000 in relation to the approach taken by parties before the court as to compliance with orders of the court after the introduction of the new rules. After years of dilatory behaviour under the old regime, this observation by the learned judge is just as relevant some two decades later. “Non-compliance has continued to be commonplace under the new rules in the daily experience of these courts. Case management orders are often flouted. The breadth of this practice may have given acceptability to it. In truth that very acceptability stands as a reproach. Casual accommodation of non-compliance with orders is a violation of clear rules. It is a subversion of a fundamental objective of the rules which was precisely to put a stop to habitual non-compliance. The rules need to be obeyed they need to be enforced.”
- [4] Indeed, our Court of Appeal in 2019 reinforced this in the case of **Emmerson International Corporation v Starlex Company Limited and anr**² by Blenman JA at paragraph 37 as follows “our courts have been consistent in stating that judges are to take a strict approach to compliance with the rules and the preconditions have been held to be uncompromising”.
- [5] So once again, this court is faced with another application by a litigant who has failed to adhere to the orders of the court.
- [6] The history of this matter from its commencement has shown that this was not a matter that proceeded with any strict adherence to the time lines provided for in the rules by either party- whether it was for an extension of time to file a defence or for filing the reply and defence to

¹Civ. Case 84/1999(HCT Grenada)

²BVIHCMAP2018/0044

counterclaim, to the amendment of the fixed date claim form to the amended defence. The parties on both sides of this litigation have run afoul of the rules. Even the defendant who has vociferously opposed this application (which I must add quickly is their right, of course) had to file an application to have their witness statement deemed properly filed and relieved from sanctions having filed the same some two days late.

- [7] In looking at the application, it was therefore incumbent on this court to look at the evidence that supported the application. The court has consistently indicated that this evidence must be “cogent”. In the case of **Issa Nicholas Grenada Ltd v Time Bourke Holdings Grenada Ltd**³ the learned Chief Justice made it clear that “whether these preconditions have been satisfied falls to be determined in large measure from the evidence provided by the affidavit in support of the application...”⁴ and further that “the evidence adduced in support of an application for relief from a sanction must be cogent in the sense that it must be set out with sufficient particularity so as to satisfy the court that these three preconditions have been met.”
- [8] This position was adopted by the court in **Adam Bilzerian v Weiner and Weiner**⁵ which stated “the court must be given a clear, detailed and accurate picture of what caused the failure and the steps to be taken in an effort to remedy the same.”⁶
- [9] The evidence of the claimant can be summarized as follows:
- i. She changed lawyers in 2018 and instructed the firm of Williams and Williams.
 - ii. She says that from the time she was with the firm she interfaced with the person of her present counsel.
 - iii. She alleges that she played an active role in the litigation.
 - iv. When the matter came up for hearing in September 2019 she was aware that trial directions were given (and the court takes notice that on the file notation as stating that the claimant was present on the 20th September 2019 when the case management directions were given).
 - v. She was aware that the date was given of the 9th December 2019 for the filing of the Witness Statement.
 - vi. By the 31st October 2019 she was aware that standard disclosure had been made on her behalf.
 - vii. The next contact for this litigant who played an “active role” was when she was contacted by the present counsel on the 18th December 2019 indicating that he was no longer associated with Williams and Williams.
 - viii. She next had interaction with counsel when she was contacted by the firm of Williams and Williams to attend court on the 31st January 2020 and that was the first time that she was aware that counsel Mr. Richard Williams would not be in a position to act for her on the matter.

³GDAHCVAP2015/0029

⁴Paragraph 9

⁵SKBHCVP2012/0028

⁶ Op Cit paragraph 15

- ix. She attempted to speak to junior counsel in that firm and was informed that they were unwilling and/or unable to do act.
- x. Finally, in February 2020 she took her file from Williams and Williams and prevailed on present counsel to take her file. (There is however no indication when that may have occurred, but the court takes note of the change of legal practitioner filed on 6th March 2020).
- xi. The application was then filed on 20th March 2020 and the claimant stated that she “may” have been ready by the 9th April 2020 to file the witness statements which in fact did occur.

[10] That is the evidence in a nutshell.

[11] This evidence must be utilized to assess whether the claimant has met the threshold that is dictated by the “reasonable conditions that the rules lay down for obtaining relief”⁷.

[12] Part 26.8 CPR 2000 is well known to all parties and in particular sub rules 1, 2 and 3. I therefore will not repeat them here⁸.

[13] In summary they are that parties when they file an application must do so promptly and that the evidence shows that the failure was not intentional, there is a good reason for the same, and that there has been a general compliance with relevant directions and orders. Once this stage has been met, the question then arises as to the exercise of the court’s discretion pursuant to sub rule 3.

[14] In looking at the evidence the reality is that this application was filed some four months after the date was given for the filing of the witness statements. The question raised by the defendant on this point was therefore whether this could be considered prompt and rightly accepted that there is no sanction or bar if the application may not be considered as having been filed promptly but that it must be taken into consideration on the application as a whole.

⁷Per Barrow JA in the case of **Ferdinand Frampton v Ian Pinard** DOMHCVAP2005/0015 at paragraph 19

⁸Part 26.8 CPR 2000: “(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.”

- [15] In the case of **JR O'Neal and GA Cobham v Cliff Williams**⁹ Barrow JA said that the issue of the promptness of an application is a fact that needs to be examined in light of the surrounding circumstances and not only by the reference to the length of time.
- [16] The affidavit evidence as it relates to prompt filing does not in this court's mind explain the time period that was covered from discovering that counsel who had carriage of the matter had moved on, to the ultimate removal and reassignment of the file to present counsel.
- [17] There was no indication that the claimant had attended the office immediately upon the discovery of the removal of counsel to inquire as to the status of her matter.
- [18] However in looking at this aspect of the requirements in the round, I do not consider that the lack of prompt filing in all the circumstances will count against the claimant on this present application.
- [19] In this court's mind the apex and crux of any application under Part 26.8 is as to the fulfillment of sub rule 2.

Was The Failure Intentional?

- [20] This requirement, beyond being defined as deliberate in the case of **Robertson Hypolite v Ruth Andrew and anr**¹⁰ also can be considered in terms of whether a party has taken all reasonable steps to meet a deadline. If this can be proven the court has considered that their actions may not amount to being intentional¹¹.
- [21] This fact is one that can only be determined by looking at the evidence that was filed.
- [22] When one looks at the evidence it was clear that the claimant described herself as taking an active role in the case. Yet it was indeed telling that there was no indication that she took any active step after being told of the departure of her lawyer on a date that was clearly subsequent to the due date of filing of the witness statements. In this court's mind the evidence clearly shows that the failure of the claimant was intentional.
- [23] Like the **Issa Nicholas**¹² case, the evidence of the claimant indicated a decision to take no action to ask no questions or do nothing until almost six weeks after the date had passed. I do not consider that this shows that the claimant had taken "all reasonable steps" or any active steps to adhere to the timeline for filing the witness statements. There is no evidence that the claimant attempted to immediately contact her lawyer, there was no evidence as to what she did upon realizing her lawyer no longer was employed at the firm, nothing to show what steps she took upon receiving that information or what steps she took in an attempt to comply with the time lines.
- [24] I therefore cannot find that the failure to file was unintentional.

⁹Civ App 10/2006 BVI

¹⁰DOMHCV2014/0228

¹¹Bilzerian v Weiner op cit

¹²Op cit

- [25] Having so failed to satisfy this limb there really is no requirement for this court to examine the other two steps of the sub rule but for completeness I shall do so.

A Good Explanation

- [26] In the case of **Emmerson v Starlex**¹³ the court of appeal by Blenman JA held that the provision of a good explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done.
- [27] Indeed, the court in that case agreed with the proposition of law in the case of **Attorney General v Universal Projects Ltd**¹⁴ which stated that “oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation...”
- [28] The cases have all spoken as to what is or is not considered a good explanation to fulfill this limb. These range from misapprehension of law, mistake of counsel, lack of diligence, heavy volume of work, difficulty in communicating with client or secretarial incompetence.
- [29] When one considers the reason, the true reason that these witness statements were not filed, it is clear to the court that the evidence shows that the reason was a combination of lack of diligence of the litigant and non-contact with the client. As a result, this date was never met. As was stated by the court in the case of **Gary Smith v Edward Henry**¹⁵ even though I sympathize with the claimant that some of the circumstances were beyond her control, not all were and as the court in that case clearly stated “**litigation belongs to the parties not to counsel**”¹⁶. The claimant was therefore under an obligation to ensure compliance with the order of the court and to have acted immediately upon discovery of the non-compliance by her counsel.
- [30] The circumstances although being unfortunate do not in this court’s mind meet the threshold of a good explanation in all the circumstances. She would therefore fail on this limb as well.

General Compliance with Relevant Rules, Practice Directions, Orders and Directions

- [31] It was of some concern that the evidence failed to address this limb at all given that the limbs under this rule have long been understood to be compendious and must all be fulfilled in order for the applicant to be successful on any such application.

¹³ Op cit at paragraph 53

¹⁴At paragraph 54 of the **Emmerson** case

¹⁵SKBHCV2008/254

¹⁶At paragraph 15

- [32] In the case of **Bilzerian v Weiner** the court of appeal made it clear that a bald statement by a litigant that they have generally complied is not enough¹⁷. Rather it must be addressed as a free-standing precondition and must be addressed as such¹⁸.
- [33] In fact the court is aware that the claimant had not complied with orders of the court or had done so outside of the time provided to do so. It was therefore of grave concern that the claimant did not even address this in her evidence and made only passing mention to this ground in the submissions of counsel for the claimant. The claimant has failed to satisfy this ground as well.
- [34] Therefore in looking at this application this court finds that none of the limbs of 26.8(2) have been satisfied by the claimant.
- [35] The application is therefore dismissed with costs to the defendant in the sum of \$500.00.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

¹⁷Op cit at paragraph 16

¹⁸**Emmerson International** case at paragraph 58