

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: SLUHCV2017/0470

BETWEEN:

Q HOMES LTD.

Claimant

and

AL'S INVESTMENT LTD.

Defendant

**Before: Her Ladyship, the Honourable Justice Kimberly Cenac-Phulgence
(A JUDGE IN OPEN COURT)**

Appearances: Mrs. Beryl George with Mr. Michael Bruney, Counsel for the Claimant
Mrs. Wauneen Louis-Harris, Counsel for the Defendant

Present: Ms. Lydia Monroe, representative of the Claimant
Mr. Aloysius Scott, representative of Defendant

2020: February 10, 19.

JUDGMENT

[1] **CENAC-PHULGENCE J:** This is a claim for damages for breach of contract. Case management directions were given on 23rd July 2019. Present at the case management hearing were counsel for the claimant, Mr. Michael Bruney ("Mr. Bruney") and Mrs. Beryl George and counsel for the defendant, Mrs. Wauneen Louis-Harris ("Mrs. Louis-Harris). Also present were Ms. Lydia Monroe and Mr. Aloysius Scott representing the claimant and defendant respectively.

- [2] By the case management order, standard disclosure was to take place by 30th September 2019, witness statements filed and exchanged by 6th January 2020, pre-trial review was set for 10th February 2020, the trial scheduled for 8th April 2020, and the date by which any application for changes in the case management timetable was to be made was on or before 31st January 2020.
- [3] Both the claimant and defendant in compliance with the order, filed standard disclosure by 30th September 2019. On 6th January 2020, the deadline for the filing of the witness statements, the claimant duly filed its witness summary which was then served on the defendant's counsel on 7th January 2020.
- [4] The defendant filed an application for (1) extension of time to file its witness statements and for relief from sanctions and (2) for leave to file the expert evidence and for all necessary directions to be issued by the Court to the expert. The application is supported by an affidavit of Kitanna Joseph who is a clerk employed with the chambers of counsel for the defendant, Mrs. Louis-Harris. Ms. Joseph in that affidavit says at paragraph 2 that 'in so far as the contents of this affidavit are within my personal knowledge, they are true and in so far as they are not within my personal information, they are true to the best of my knowledge, information and belief.'

Challenge to affidavit of the defendant in support of its application

- [5] Counsel for the claimant, Mr. Bruney raised as his preliminary objection to the entire application the fact that the affidavit in support of the application could not stand as evidence in the matter. He submitted that there was no evidence before the Court as (1) the affidavit did not comply with CPR 30; (2) it does not say on whose behalf Ms. Joseph is making the affidavit or that she was authorized by the defendant to so make the affidavit; (3) Ms. Joseph is in no position to speak from her own knowledge and belief about a misapprehension in dates by the defendant; (4) Ms. Joseph fails to indicate the source of her information and belief. He urged the Court that it should therefore not have any regard to the affidavit in support.

[6] Counsel for the defendant, Mrs. Louis-Harris' only submission was that the affidavit in response by the claimant was itself not a proper response as it contained legal argument and there had hitherto been no pronouncement by the Court of Appeal regarding affidavits being deposed to by legal clerks or secretaries in support of applications. In fact, it was accepted practice.

[7] Mr. Bruney referred to the following cases in support of his submission:

(a) **Development Bank of St. Kitts-Nevis v Osbert Chapman et al**¹ where Thomas J [Ag.] considering the submission that the affidavit of a legal secretary filed in support of an application to amend a statement of case failed to identify the source of the information therein, in that matter said:

“It is trite law that such a principle exists even before **CPR 2000** in relation to interlocutory proceeding. Now the rule is contained in Part 30.3(2)(b)(ii) of **CPR 2000** plus section 75 of the **Evidence Act No. 30/2011**.”

Thomas J [Ag.] went on to find that an examination of the said paragraphs of Kristyl Bristol's affidavit revealed what her information was and no source was identified. The result was that the said affidavit was struck with the dire consequence that the application was therefore not supported by any evidence.

(b) **St. Clair Investments Ltd. et al v David Holukoff et al**.² In that case, Henry J considered the affidavit in support of an application for extension of time to file witness statements and for relief from sanctions which had been filed by the legal clerk and in which she had deposed that she had been informed by counsel that through his negligence he had forgot to inform the defendants that the witness statements were due because he forgot to enter the date in his electronic calendar, with a reminder. The legal secretary then went on to depose the failure to file was not intentional. Henry J made the observation that she was not competent to say so.

¹ SKBHCV2012/0168, delivered 7th June 2013, unreported, at paragraph 30

² SVGHCV2015/0162, delivered 15th November 2016, unreported.

Analysis and Conclusion

- [8] CPR 30.3 is clear as to the contents of an affidavit which are very commonly overlooked. Its contents are worth setting out.

“30.3

1. **The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.**
2. **An affidavit may contain statements of information and belief –**
 - a. if any of these Rules so allows; and
 - b. **if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –**
 - i. **which of the statements in it are made from the deponent’s own knowledge and which are matters of information or belief; and**
 - ii. **the source of any matters of information and belief.”**
(my emphasis)

- [9] It is clear that the affidavit of Kitanna Joseph breaches this rule in many respects. She says at paragraph 5 that the failure to comply with the order was not intentional; at paragraph 9, that the claimant will not be prejudiced should an extension of time be granted; at paragraph 10 that the justice of the case requires that the defendant file witness statements to defend the case and to prosecute the counterclaim. All of these are matters which Ms. Joseph is not competent to speak to.

- [10] There can be no excuse for not complying with CPR 30.3 and while I would not go as far as Thomas J [Ag.] and strike out the affidavit, I think it is of sufficient importance to caution legal practitioners against the growing practice, which has swept through the jurisdiction of the Eastern Caribbean Supreme Court of legal clerks and secretaries swearing to affidavits in support of applications where there is no statement that they are authorized to do so, or which speak to matters which cannot be and/or are not within their knowledge.

- [11] That having been said, I move to consider the substance of the application.

Application for leave to file expert evidence

- [12] The basis for the application for leave to file expert evidence is provided at paragraph 16 of Ms. Joseph's affidavit. It reads:

"That the Defendant requires the expert evidence in order to prove that the changes to the premises which were the subject matter of the lease which predicated the instant proceedings caused the walls to be structurally undermined in the circumstances."

- [13] That is all that is said. Mrs. Louis-Harris submitted that the expert witness was necessary to substantiate the pleaded case of the defendant at paragraphs 10 and 11 of its defence filed on 13th February 2018 and that it would therefore be prejudicial to the defendant if its application were not granted. Counsel for the claimant, Mr. Bruney submitted that CPR 32.6(1) had not been complied with and that that evidence would not support the pleadings in any event.

Analysis and Conclusion

- [14] CPR 32.6 sets out the requirements for an application for appointment of an expert witness. It provides that a party may not call an expert witness without the court's permission and that where a party applies for such permission it must name the expert witness and identify the nature of his or her expertise. It also states that the general rule is that the court's permission to call an expert witness is to be given at the case management conference.
- [15] The defendant's application falls short of meeting the requirement of the rules. It was not made at the case management conference and at that point the defendant would have known that its defence was that it had not given authorization or consent to the enlarging of the window and door on its premises or to such a material alteration as they put it at paragraph 11 of the defence and that this was based on advice by its engineer as to the effect of such enlarging on the integrity of the building. Yet no application was made at the case management conference. The defendant now files an application for leave to call such expert testimony and fails to comply with the basic requirement of detailing who the

expert is and the area of expertise of the witness. The Court is in no position to assess the proposed expert. In addition, the Court does not understand why an application for such an expert is being made at the door of the trial which is to take place on 8th April 2020 when between July 2019, the case management conference and 31st January 2020, the defendant's defence remained as was stated in the defence filed on 13th February 2018.

[16] The application to appoint an expert witness is therefore refused.

The application for extension of time to file witness statements and for relief from sanctions

[17] This application was not made prior to the deadline date for filing of the witness statements. It was made twenty-five days after the deadline which meant that the sanction of CPR 29.11 had already bitten.

[18] CPR 29.11 provides that 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. The rule provides that the court may not grant such permission at the trial unless the party in default has a good explanation for not previously seeking relief from sanctions in accordance with CPR 26.8. As we are not at the trial, the application must be considered in accordance with CPR 26.8.

[19] CPR 26.8(1) requires that the application for relief from sanction be made promptly and be supported by evidence on affidavit. These two requirements have been met in this case even though there is some concern about the quality of the evidence provided in support of the application. CPR 26.8(2) provides as follows:

"Relief from sanctions

26.8

1. ...

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."

[20] It is trite after so many pronouncements by the Court that the three conditions under CPR 26.8(2) are cumulative and must be satisfied in order to warrant the exercise of the discretion to grant relief from sanction.³

Was the failure to comply intentional?

[21] The affidavit of Ms. Joseph simply says that the failure to comply was not intentional in the circumstances. There is nothing to suggest to the Court that the failure to comply with the date for filing the witness statements was intentional and so pre-condition (1) of CPR 26.8 is satisfied.

Has the defendant provided a good explanation for the failure to comply?

[22] The defendant submits that it has a good explanation. At paragraph 3 of the affidavit of Ms. Joseph she deposes:

"That the Defendant did not file the witness Statements by the 6th day of January 2020 due to a misapprehension of the said Order in that the Defendant believed that the deadline for filing the witness statements was the 31st day of January 2020 whereas the 31st day of January was the deadline to file an application for changes in the case management time table."

³ Prudence Robinson v Sagicor General Insurance Inc. SLUHCVP2013/0009, delivered 29th September 2014 at paragraphs 8, 12; Adam Bilzerian v Gerald Lou Weiner et al SKBHCVP2015/0015 delivered 27th January 2015 at paragraph 12.

- [23] Ms. Joseph also avers at paragraph 6 that the Defendant has provided a good explanation for the failure to file the witness statements on time and that it was not due to the fault of the Defendant.
- [24] Mrs. Louis-Harris submitted that the reason for the failure was simply a misapprehension of the dates and that draft witness statements had been appended to the affidavit which were in the same terms as that filed in support of the earlier application for summary judgment and so no prejudice would be suffered by the claimant.
- [25] Mr. Bruney submitted that the defendant had not provided a good explanation for its failure to file the witness statements. He submitted that the case management order dated 23rd July 2019 showed that both the claimant's and defendant's representatives were present. The misapprehension spoken of does not indicate who had the misapprehension. In addition, Mr. Bruney submitted that the claimant's witness statement was served on the defendant's legal practitioner on 7th January 2020, the day after it was filed and should have alerted the defendant to the fact that something had to be done. The evidence must have particulars and the defendant has not explained the three week delay between receiving the claimant's witness summary and the filing of the application for relief from sanctions.
- [26] Counsel relied on several authorities which he says support his contention that the defendant had failed to provide a good explanation.

Analysis and Conclusion

- [27] It is clearly not enough to simply say that the applicant has a good reason for its failure to file the witness statements. The applicant must provide the Court with sufficient evidence to allow it to make such an assessment. In the case at bar, all the defendant says is that there was a misapprehension of the dates. The

evidence does not reveal on whose part, when this misapprehension happened, why it took another three weeks to make the application for extension of time and relief from sanctions after being served with the claimant's witness summary. The filing of the claimants' witness summary should have alerted the defendant to the fact that something had to be done in the case and trigger at least some form of enquiry on the part of the defendant or its counsel.

[28] The affidavit of Ms. Joseph whilst it says that the defendant misapprehended the dates, states at paragraph 12 that 'the failure to file the witness statements in time was not due to the fault of the defendant'. The Court can only assume by that statement that the defendant's legal practitioner is the one at fault and not the defendant. The defendant provides a bald statement of an excuse.

[29] The Court has been clear in its pronouncements that what amounts to administrative inefficiency is not a good explanation. To my mind, the explanation provided by the defendant does not rise to the level of particulars. In the case of **Issa Nicholas v Time Bourke Holdings Limited(Grenada) Limited**⁴ the learned Chief Justice said:

"We have in numerous decisions of this Court been consistent in expressing the view 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.** In this regard, the decision of this Court in **Prudence Robinson v Sagicor General Insurance Inc.** (SLUHCVP2013/0009 (delivered 29th September 2014, unreported) as to the need for cogency and particularity as referenced in paragraph 10 of that judgment, is also instructive. This Court quite recently returned to this issue and made similar observations in the case of **Adam Bilzeraian v Gerald Lou Wiener et al** (SKBHCVAP2015/0015 (delivered 27th January 2016, unreported). In **Ferdinand Frampton v Ian Pinard et al**, (DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported) Barrow JA, delivering the judgment of the Court, although there dealing with an application for extension of time to appeal, had this to say at paragraph 19 in speaking of CPR 26.8 (2):

"The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these

⁴ GDAHCVP2015/0029, delivered 8th December 2015, unreported at paragraph

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.” (my emphasis)

[30] I do not think the position can be put any clearer. In **Issa Nicholas** the Court was clear that ‘the burden fell squarely on the shoulders of a defaulting party and it behooves a defaulting party not to view this obligation as trifling or treat it lightly or otherwise to assume or expect that any accommodation will be forthcoming from the other party’.⁵

[31] As the Court said in **Ferdinand Frampton v Ian Pinnard et al**⁶ and reiterated in **Issa Nicholas**, CPR 26.8 is uncompromising. It imposes a fetter on the exercise of the court’s discretion. A failure to satisfy all three preconditions is fatal. It is not for the court to guess and supply the omissions in the application. The learned Chief Justice said:

“An applicant who must be taken to be seized of the importance of its case and thus the evidence it requires to make good its case, must never leave it up to the court where an opportunity given to address it was not utilized, to find a way to fill the void in its favour.”

[32] Counsel, Mrs. Louis-Harris spoke of a Court of Appeal decision in which she said the Court of Appeal had accepted a misapprehension of dates as a good reason for failure to comply. Although Mrs. Harris subsequently provided the Certificate of Result of the Appeal, there is nothing to advise the Court of the reasons for the order.

⁵ See Issa Nicholas at paragraph 13.

⁶ DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

[33] A misapprehension of dates cannot be looked at in a vacuum. The particular facts of the case must be considered. I cannot see how 6th and 31st January 2020 could be misapprehended except because the defendant's counsel did not pay sufficient attention and completely missed the deadline date of 6th January 2020. Further, in my view, not reading the order properly and essentially mixing up the dates for two things in the same matter is not even a misapprehension of the dates in the true sense of the word. It is counsel's responsibility to pay due regard to the case management order.

[34] Finally, I refer to the St Kitts case of **Avril Francis v St Kitts-Nevis Finance Company Limited**,⁷ where Saunders JA made the following statement which I fully adopt:

“The court has to be careful not to set precedents which may have the effect of allowing these rules to be interpreted in a manner that carries us back to the lax ways that built up under the old rules. Under these new rules, the Court places a premium on timeliness, on professionalism, on efficiency, on cogent reasons being advanced for failure to adhere to time standards...”

[35] In all the circumstances of this case, I therefore find that the defendant has not provided any good explanation for its failure to file its witness statements on time and has therefore failed to satisfy pre-condition (2) of CPR 26.8(2). That is fatal to the application for relief from sanctions.

Has the defendant generally complied with all other relevant rules, practice directions, orders and directions?

[36] The defendant states in the affidavit of Ms. Joseph that it has generally complied with all other relevant rules, practice directions, orders and directions. The claimant averred in its affidavit in response that this is not the case given that the defendant had to obtain the Court's permission to file its defence out of time.

⁷ St Christopher and Nevis Civil Appeal No. 21 of 2003, delivered November 4, 2003.

- [37] The record reflects that the defendant did not file its acknowledgement of service within 14 days of service of the claim form and judgment in default was entered. The defendant then made an application to set aside that default judgment and the parties agreed by consent to set it aside and for the defendant to file a defence and counterclaim within 14 days of the order. The defendant complied.
- [38] Counsel, Mrs. Louis-Harris submitted that the rules do not envisage perfect compliance which is why it is couched in that language: “generally complied”. I agree.

Conclusion

- [39] Despite the claimant’s submissions, I find that the record shows that the defendant has generally complied with all other orders, rules and directions and has therefore satisfied pre-condition (3) of CPR 26.8.
- [40] All the pre-conditions of CPR 26.8(2) having not been satisfied, the application for relief from sanctions and for an extension of time to file witness statements must fail.
- [41] This case is a stark reminder to legal practitioners that applications to extend time to file witness statements and for relief from sanctions ought not to be treated with scant regard as the consequence of a failure on such an application can be dire for a litigant. The very strict requirements of the rule and the fact that it provides the Court with no discretion to consider the factors in sub-rule 3 unless sub-rule 2 has been overcome, make it very difficult even where it is clear that the infraction is not that of the litigant at all but falls squarely at the feet of a legal practitioner. In such circumstances, all that is open to a Court to do is to award costs against the legal practitioner personally so that the litigant is not saddled with costs for something which it no part to play. CPR 26.8 is uncompromising and until the rules are revised, this Court is bound to follow the reasoning of the Court of Appeal expressed clearly in its many decisions.

Order

[42] In light of the foregoing, the Order is as follows:

- (1) The application for an extension of time to file witness statements and for relief from sanctions and to appoint an expert witness is refused.
- (2) The defendant shall pay costs to the claimant on the application in the sum of \$500.00 to be paid by its counsel Mrs. Louis-Harris personally before the adjourned date of 4th March 2020.
- (3) The matter is adjourned for further pre-trial review to 4th March 2020.
- (4) The claimant shall have carriage of this Order.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar