

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2014/0228

**IN THE MATTER OF THE PARTITION ACT, CHAPTER 54:09 OF THE 1990 REVISED LAWS
OF DOMINICA**

BETWEEN:

ROBERTSON HYPOLITE

Claimant

and

[1] RUTH ANDREW

[2] ALLAN ALEXANDER

Defendants

Appearances: Mrs. Heather Felix Evans for the Claimant/Respondent
Mr. Lennox Lawrence for the Defendants/Applicants

2016; January; 18

March; 16

RULING

- [1] **STEPHENSON J:** Before the court is an application filed by the defendants for an extension of time to file their witness statements pursuant to Part 26 of the Civil Procedure Rules (CPR).
- [2] The correct approach to applications pursuant to this rule has given rise to much litigation and debate among practitioners and academics and there is a plethora of decisions on these types of applications.
- [3] At the first hearing of the fixed date claim form, the parties were ordered to file and exchange their witness statements by 6th March 2015. The defendants on 12th March 2015 filed an application for an extension of time and relief from sanctions. The grounds upon which the defendants sought to rely on were as follows:
- (1) The first named defendant as principle defendant resides out of the jurisdiction and was unavailable to complete the draft statement;
 - (2) The second name defendant was also unavailable to perfect the second draft for filing;
 - (3) The defendants have filed their application within reasonable time after the date for filing.
- [4] The application was accompanied by an affidavit sworn to on 12th March 2015 by one Miss Nanya Thomas, the clerk in the chambers of defence counsel. It was deposed that the first named defendant was resident out of the jurisdiction and was unavailable for the completion of the witness statement. Further that the second named defendant was also unavailable for the completion of his witness statement. Miss Thomas also averred that the application was filed within reasonable time after the date for filing.

[5] On 24th March 2015 the defendants went ahead and filed their witness statements out of time and without the leave of the court. On even date the defendants also filed an application for the witness statements filed herein to be deemed properly filed and that the time be extended for the filing of witness statements, for leave to call an expert witness and also for the list of documents filed out of time to be deemed properly filed.

[6] This application was accompanied by the affidavit of the second named defendant stating that:

(1) The first named defendant who lived outside of Dominica had visited Dominica and was able to sign her witness statement and by that time he himself was able to perfect and sign his witness statement further, that an additional witness was also secured.

(2) That in preparation of the witness statements certain documents arose which required expert analysis

[7] The claimant opposed these applications and on 2nd April 2015 he swore to an affidavit requesting that the defendants' application be refused and struck out. His reasons for his request were stated thus:-

(1) the application was filed on 12th March 2015 six days after the deadline and was not a prompt application as the defendants knew of the deadline since the order of 29th November 2014

(2) that the second defendant who was the deponent lives in Dominica and failed to provide the court with a good reason or explanation in his affidavit as to why his witness statement or summary could not have been filed by the deadline;

- (3) similarly that there was no good reason and or explanation why the witness statement of the first named defendant or at least a witness summary could not have been filed on her behalf by the deadline,
- (4) that the said first named defendant is retired and visits Dominica at least once a month.

[8] The claimant further averred that he has been advised by his counsel and verily believed that the defendants have not complied with the requirements of the CPR or the order of court and directions given, in that the defendants:-

- (1) have failed to file a certificate of truth in relation to their counterclaim; (this has been ruled on by the court already);
- (2) did not make standard disclosure on 25th March 2015;
- (3) failed to respond to a letter sent to facilitate the preparation of the agreed list of documents in order to comply with the order to file an agreed list of documents on or before 23rd January 2015; and
- (4) failed to file and serve witness statements or summaries on or before 6th March 2015.

[9] The parties filed written submissions on 17th January 2016 and they made oral arguments to supplement their written submissions.

The applicable rules

[10] Part 1:1 of CPR - The court is required to deal with all applications before it justly in accordance with the overriding objective of the Civil Procedure Rules 2000 (CPR.)

[11] Part 26.1(2)(k) of CPR confers discretion on the court to extend the time for compliance with any rule, practice direction, order or direction of the court even where the application is made after the time for compliance has passed.

[12] Part 26.8 of CPR states:

“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.”

[13] Part 26.9 of CPR applies where the consequences of failure to comply with a rule is not specified by a rule, practice direction or court order. It provides that an error of procedure or failure to comply with a rule does not invalidate any step taken in the proceedings, unless the court so orders. The rule also confers discretion on a court

to rectify an error of procedure or a failure to comply with a rule, on or without an application.

[14] Part 29:11 of CPR imposes a sanction for failure to serve the witness statement of an intended witness within the time specified by the court. That is the witness may not be called unless the court permits.

[15] I am required to consider and analyse all the relevant factors, weigh each of them as is appropriate, having regard to all the surrounding facts and circumstances of the case.

[16] It is incumbent on me to consider all the criteria in Part 26 in making my determination in this application.

Under which part of CPR does the application regarding the witness statements fall?

[17] Having reviewed the written submissions filed by counsel on both sides and after listening to counsel's oral arguments; the first question that falls to be decided is whether or not the application falls to be determine under Part 26.8 or Part 26.9 of CPR.

[18] Learned Counsel Mr. Lennox Lawrence acting on behalf of the defendant contends that there was no express sanction or consequence for failure to comply with the court's order of 21st November 2014 and in the circumstances the application is to be dealt with under 26.9(1).

[19] Mr. Lawrence submitted that pursuant to Part 26.9(2) of CPR, failure to comply with a rule or court order or direction does not invalidate any step taken in the proceedings unless the court so orders; and in the instant case the defendants have taken a step by filing their witness statements. Additionally, that the court in such

circumstances is clothed with the discretion and power to put such things right and he urged the court to deem the witness statements and the disclosure filed out of time properly filed.

[20] Learned counsel relied on the Court of Appeal's decision in **C O Williams Construction (St Lucia) Ltd –v- Inter Island Dredging Co Ltd.**¹

[21] Learned Counsel Mrs. Felix-Evans submitted that the defendant's application is misconceived and that it does not fall to be considered pursuant to Part 26.9 as submitted by Learned Counsel Mr. Lennox Lawrence.

[22] Learned counsel for the claimant, Mrs. Felix Evans further submitted that the application to extend the time to file the witness statement was made after the date for filing that is after 6th March 2015 and therefore falls to be determined under Part 26.8 of CPR.

[23] Learned Counsel Felix-Evans disagreed with Mr. Lawrence that there is no sanction in the court order as it regards the witness statements entitling the application to be brought under Part 26.9. Learned counsel referred the court to Part 29.11 of CPR and submitted that Part 29.11 provides the sanction for the failure to file a witness statement. 'That failure to file the witness statement within the time specified by the court the witness may not be called unless the court permits'. Mrs. Felix Evans referred to a number of decisions of this court in support of her contentions.²

[24] I understood the thrust of counsel's submission to be that there is a consequence for the failure to file the witness statement within the time specified by the order and

¹ HCVAP 2011/017 – St Lucia

²The Nevis Island Administration –v- La Copropriete Du Navire 131 et al Civil Appeal 7 of 2005 (paras 5-14); Robin Mark Darby –v- Liat (1974) Limited HCVAP2012/0002 (Antigua); Prudence Robinson –v- Sagicor General Insurance Limited SLUHCVAP2013/009; Dominica Agricultural & Investment Bank-v- Mavis Williams DOMHCVAP2005/0020 (Paragraphs 19,20 & 21); Iona Irina Trucia –v- Remus Trucia et al, AXAHCV2013/0116

therefore there is a specific approach which must be taken by the court when there is such an application for the extension of time and that the application is not to be considered pursuant to Part 26.9 of CPR.

[25] Counsel Mrs Felix Evans further submitted that Part 26.9 states that the application vis a vis the late filing of a witness statement is to be made pursuant to Part 26.8 of CPR. Counsel stated further, that based on the facts in the case at bar, the cases cited by the defendants in support of their application are not applicable, on the ground that the **CO Williams Case**³ concerns the filing of a defence out of time and that the **Carlene Pemberton Case**⁴ concerns the filing of an appeal out of time.

[26] As is well known, the Court of Appeal has given assistance through various decisions such as **The Dominica Agricultural and Industrial Development Bank –v- Mavis Williams**⁵ (**Dominica AID Bank Case**) & **Goldgar & Ors. V Wycliffe H Baird**⁶ and most recently in the cases of **Robin Darby –v- LIAT (1974) Limited**⁷ and **Prudence Robinson –v- Sagicor General Insurance**⁸, as to the correct approach to be taken in the interpretation and application of Part 28 of CPR. I therefore adopt the approach as laid out in those cases.

Court's considerations

Was there an application for relief from any sanction? Was it made promptly?

Was it supported by evidence on affidavit?

[27] In the case at bar, there is no doubt that there is an application which is supported by an affidavit and that the first application was filed six days after the due date for

³ Op cit

⁴ HCVAP 2011/009 (St Christopher & Nevis)

⁵ DOMHCVAP2005/0020

⁶ Civil Appeal 13 of 2007 (St Christopher & Nevis)

⁷ DOMHCVAP2012/002

⁸ SLUHCVAP2013/0009

the filing of the witness statements. The question of the promptitude of the application has not been questioned or doubted by counsel for the claimant.

[28] I would then move right along to consider whether the defendant meets the three compulsory requirements of Part 26.8(2) of CPR. Should I find that the claimant fails to satisfy all three of these requirements there would be no need to proceed to consider the requirements set out in 26.8(3) as the application would have failed.

[29] The three requirements are:

- (1) Was the failure intentional?
- (2) Has the defendant provided the court with a good explanation for their failure to file their witness statements by the deadline stipulated by the order of court?
- (3) Has the defendant generally complied with all other relevant rules, practice direction, orders and directions?

Was there intentional failure?

[30] The Oxford Dictionary defines the word “intention” to mean ‘*an aim or plan. The fact of intending something.*’ The word “Intentional” is defined as “*deliberate.*” To my mind therefore, was there a deliberate decision taken not to file the witness statements? Barrow JA in the **Dominica Aid Bank Case**⁹ found that there seemed to have been a deliberate decision not to file the witness statement which is considerably different from whether there was a mistake or oversight by which the defendant was to file the witness statement.

⁹ Op cit

[31] The defendants in this case are taken to be aware of the deadline for filing the witness statements as a review of the Court's Order on the first hearing of the Fixed Date Claim Form the parties were present as is recorded on the file.

[32] Having regard to the affidavits filed by the defendants herein, it is clear that the defendants' failure to file the witness statements in compliance with the court order was intentional. It is noted that in the event that the witness is not available to file their witness statement the party can file a witness summary and clearly it would have been the prudent thing to do in the case at bar.

Was there a good Explanation?

[33] In the defendants' affidavits sworn in support of the applications from which I have to draw the facts attendant on the application, what explanation has been proffered for the defendant's failure to file the witness statements? One of the explanations offered was that the defendants were not available, that the first defendant was out of state and it is understood from the averments that counsel having conduct of the matter saw it fit to wait on the first named defendant to travel into Dominica to sign the witness statement. Regarding the second named defendant, it was stated baldly in the affidavit that he was just not available to sign the witness statement.

[34] Counsel asked the court to find that the averments amount to a good explanation and that the failures to comply with the order of court were not intentional.

[35] Learned Counsel Felix Evans for the claimant submitted to the court that as it regards the first named defendant learned counsel had the option of filing a witness summary as is provided by CPR and that this was not done. Learned Counsel Felix Evans submitted that the defendants failed to provide the court with any proper explanation which would allow the court to make a proper assessment and informed decision. I agree with counsel and in my view there is no proper explanation for not

filing the witness statement or any adequate reason for not filing the application before the due date. I respectfully find that the excuse tendered by the defendant was bland and bare bones and not sufficient to satisfy the requirement of CPR.

- [36] In the case of **Prudence Robinson –v- Sagicor General Insurance Inc. (Formerly Barbados Fire and Commercial Insurance Company Inc.)**¹⁰ It was held that the learned trial judge erred when he did not pay proper regard to the inadequacy of the affidavit evidence in satisfying himself that there was good explanation for the delay in filing the witness summary. That the judge erred when he granted relief from sanction where the affidavit in support of the application contained bald assertions. Justice of Appeal Baptiste stated

‘... In my judgment reliance on bald assertions support of the application was ‘did not meet the threshold of a good explanation for must be inimical to the grant of relief.’¹¹

*The learned judge held the affidavit filed in the delay. The affidavit evidence does not condescend to particulars. ...*¹²

- [37] It is clear that the explanation offered in the affidavit in the case at bar does not rise to the threshold required to establish good reason for the failure to file the witness statement or summary in compliance with the deadline set by the order of court . In the circumstances of this case it would therefore be wrong for me to accept the explanation offered by the defendants in their affidavits sworn in support of their application.

Has there been general compliance by the defendants in this matter?

- [38] Learned counsel for the claimant submitted that the defendant in this case has failed to comply with anything and that everything was late. Learned Counsel Mr. Lennox

¹⁰ SLUHCVP2013/0009

¹¹ Ibid page 5 Paragraph 7

¹² Ibid Page 6 Paragraph 10

Lawrence did admit in his submissions to the court that the defendant has not been fully compliant with the orders of court in this matter. I would therefore not delve any further into the matter as the defendant application also fails to meet the criteria of the CPR Part 26.8(3)

[39] Learned Counsel Mr. Lennox Lawrence on behalf of the defendants urged the court to consider the application favourably towards his client to give effect to the Overriding Objective. Learned counsel submitted that the court has a discretion when it interprets the rules and urged the court to take into consideration of Part 26.8.3 and to take into consideration that there will be no adverse effect on the claimant as the statements which the defendant is seeking to rely on and use in the trial have been with the claimant for the last ten months. Counsel further asked the court to also consider that the matter has been to mediation.

[40] Mr. Lawrence urged the court to consider that granting the relief from sanctions, extension of time and deeming the statements properly filed would be advancing the administration of justice. That the trial date would not be impacted in any way as the matter has not yet arrived at the stage for the filing of trial bundles.

[41] Learned counsel also submitted that it is important that both sides be heard. That denying the application would mean that the witness would be out of court. Learned counsel submitted that when the court looks at the circumstances including the time when the statement should have been filed and the date that the application was actually filed it would be seen that the circumstance of this case should pose no difficulty whatsoever.

Conclusion

[42] The requirements of CPR are in very clear and obligatory terms. The rule does not permit a complicated construction. The words are very clear in order to facilitate the

defendant. The court can only grant relief from sanctions and an extension of time in accordance with the rules. As I understand it, I cannot overlook CPR and the requirements set out therein because it may be just or reasonable to do so. For me to exercise the discretion with which I am clothed, I must do so having due regard to the mandatory requirements laid down by the provisions of CPR.

- [43] Having regard to the applicable rules in particularly the criterion for relief from sanctions as provided for by Part 26.8 of CPR and to the numerous decisions by our courts, I am going to deny the defendants' application to deem the witness statements filed out of time properly filed. The defendants have not satisfied the requirements of the law which have been give due consideration by this court.
- [44] There is also the application to deem the list of documents filed out of time properly filed.
- [45] Learned Counsel Mr. Lawrence submits that the duty of disclosure is a continuous during proceedings¹³ that the order for disclosure did not have any sanctions attached and accordingly the application in this regard should be dealt with and rectified under Part 26.9 of CPR.
- [46] Mr. Lawrence submitted that the application was timely and that in the interest of administration of justice linked to the Overriding Objective of CPR 2000, the failure to comply with the court order has already been rectified even ahead of filing the application for extension of time and that no prejudice will be caused to the claimant by the granting of the order.
- [47] Learned Counsel Mrs. Felix Evans indicated to the court that on this point they do not pose any challenge and if there is to be a challenge it would be done at trial.

¹³ Re: CPR Part 28.12

[48] I agree that the application as it regards the list of documents falls to be considered under part 26.9 as there is no sanction for the late or none filing of same. I also agree that there is a continuous duty of disclosure in civil proceedings. Therefore as it regards the list of documents which have been filed out of time the order of the court is that the said documents filed out of time are deemed properly filed.

[49] The order of this court is therefore that:

- (1) The application for an extension of time and for an order to deem the witness statements filed out of time properly filed is denied as the applicant has failed to meet the requirements set out in Part 26.8 of CPR.
- (2) The application for the extension of time and to deem the list of documents filed out of time properly filed is deemed properly filed.
- (3) Costs are awarded to the claimant in the sum of \$1000.00

[56] I wish to thank counsel for their assistance rendered to the court in this matter.

M.E.B. Stephenson (Sgd.)
M E Birnie Stephenson
High Court Judge