

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HCVSVG2011/0123

BETWEEN:

**PDV SAINT VINCENT AND THE GRENADINES
LIMITED THE SUCCESSORS OF PETRO
CARIBE SVG**

APPLICANT/DEFENDANT

-AND-

**GLENROY BROWNE OF CANE GROVE
GLENS GAS AND ENERGY INVESTMENTS
LIMITED**

RESPONDENT/CLAIMANT

Appearances: Mr Bertram E. Commissiong, Q.C. of Equity Chambers for the Applicant/Defendant. Ms Rochelle Forde and Ms Renee Simmons for the Respondent/Claimant.

2016: Jan. 27
Feb. 17

DECISION

[1] **Henry, J.:** This is an application by the defendants Glenroy Browne and Glens Gas and Energy Investments Limited (“Glens Gas”) for extension of time to file their witness statements. They claim that Mr Browne’s illness and difficulty in locating witnesses contributed to his failure to file the witness statements on time. They also seek relief from sanctions. The Claimant PDV Saint Vincent and the Grenadines Limited Successors of Petro Caribe SVG (“PDV”) opposes the

application. Glenroy Browne's and Glen Gas' application are made on the same factual and legal bases. They are therefore considered together as it is convenient and more efficient to do so.

ISSUES

[2] The issues are:

1. Whether Mr Browne and/or Glens Gas should be granted an extension of time to file their witness statements?
2. Whether Mr Browne and/or Glens Gas should be granted relief from sanctions?

ANALYSIS

Issue 1 – Should Glenroy Browne and Glens Gas be granted extension of time to file their witness statements?

[3] The court has extensive discretionary powers to enlarge time for complying with the rules or a court order.¹ The applicable rule of court provides:

*“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.”*²

A defaulting party who seeks to vary a date set by the court for filing of witness statements must apply to the court.³ Such an application should as a general rule

¹ See Rule 26.1 (2) (k) of the Civil Procedure Rules 2000, (“CPR”).

² Ibid.

³ See CPR 27.8(3) which states:

“A party seeking to vary any other date in the time table without the agreement of

be made before the deadline.³ Otherwise, the applicant must apply for relief from sanctions.⁴ This application is made after the deadline and Glenroy Browne and Glens Gas have included a prayer for relief from sanctions.

[4] The court is required to act judicially⁵ in the exercise of its discretion. It must do so in accordance with well established principles and give effect to the overriding objective of the CPR to act justly.⁶ The court may also make an order to put things right if there has been a failure to comply with a court order.⁷ The court must consider all factors relevant to the admitted breach, including the reasons for it, the period of the delay and the degree of prejudice to the respective parties if the application is denied or granted.⁸

the other parties must apply to the court, and the general rule is that the party must do so before that date.”

“any other date” refers to a date fixed by the court under CPR 27.8(1), for a case management conference, pre-trial review, return of listing questionnaire, trial date, trial period or a date fixed for the party to something and a sanction is built into the order for non-compliance.

⁴ See CPR 27.8 (4) which states:

“A party who applies after that date must apply for-

- (a) and extension of time and
- (b) relief from any sanction to which the party has become subject under these Rules or any court order.”

⁵ See **Fok Hei Yu and John Howard Batchelor v Basab Inc. et al BVIHCMAP2014/0010 per Dame Janice M. Pereira CJ. at para. [11]** where she said:

“...it is also true and trite law that a discretion must be exercised judicially. In other words there must be a basis warranting the exercise of the discretion.”

See also **Carleen Pemberton v Mark Brantley SKBHCVAP2011/009**.

⁶ CPR Part 1.2 (a) which states:

“The court must seek to give effect to the overriding objective when it – exercises any discretion given to it by the Rules;”

⁷ CPR 26.9 (3) which provides:

“If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.”

⁸ **John Cecil Rose v Anne Marie Uralis Rose SLUHCVP2003/0019 per Sir Dennis Byron C.J. at para. [2]** where he said:

[5] On February 2, 2012, case management directions were made, by which the parties were directed to file and exchange witness statements on or before June 4, 2012. Neither party complied with that order. The Claimant applied for and obtained an extension of time to file its witness statements and they were duly filed on September 14th 2012. Further case management directions were given on September 30, 2015 and pre-trial review was adjourned to a date to be fixed by the Registrar. The trial window was set for May/June 2016. Mr Browne was present at that hearing.

[6] Two months later, on December 7, 2012, Glenroy Browne and Glens Gas filed a Notice of Application seeking extension of time to December 14, 2015 to file their witness statements. An affidavit sworn to by Glenroy Browne was filed in support.⁹ The affidavit essentially repeats the grounds of the application. Mr Browne asserts that he is the Managing Director of Glens Gas. He indicates further that he was involved in a motor vehicle accident and as a result travelled to the U.S.A. for medical treatment returning to Saint Vincent and the Grenadines only 3 months before. He claims that on his return he was notified of the court order and only then started interviewing witnesses throughout Saint Vincent and the Grenadines which took longer than anticipated. As a consequence they have not filed the witness statements within the time limited of doing so. He asserts that the Claimant is not thereby prejudiced.

“Granting the extension of time is a discretionary power of the court, which will be exercised in favour of the applicant for good and substantial reasons. The matters which the court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of ... succeeding; if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted.”

See also **C.O. Williams Construction (St. Lucia) Co. Ltd. v. Inter-Island Dredging Co. Ltd.** SLUHCVP 2011/017.

⁹ On December 7, 2015.

[7] On January 22, 2016, Glenroy Browne and Glens Gas filed an amended Notice of Application in which they seek relief from sanctions for non-compliance with the deadline established for filing of witness statements. They claim that they have complied with all other directions of the court.

[8] PDV's response is contained in an Affidavit of Fay Ferguson¹⁰ and submissions opposing the application. Fay Ferguson deposes that she is PDV's deputy manager. PDV objects to the grant of extension of time and relief from sanctions on several bases. The company contends that Glenroy Browne and Glens Gas have not satisfied the mandatory requirements under the CPR to:

1. apply for relief before the deadline for filing its witness statements;
2. make a joint application for relief from sanctions; and
3. provide a good explanation and cogent evidence for their failure.¹¹

PDV alleges also that Mr Browne and Glens Gas have not generally complied with other relevant rules of court and directions. It submits that the application should therefore be dismissed with costs.

Length of delay and reasons for delay

[9] This application is made 3 ½ years after the court ordered deadline for filing witness statements. This delay is without question inordinate. The reason proffered for the delay is illness of the defendant Glenroy Browne, former Managing Director of the other defendant Glens Gas. Neither defendant provides any details regarding the period of illness or the date of the accident from which Mr Browne's incapacity flowed. This is unfortunate and inexplicable having regard to the 3.5 years delay and the fact that the Notice of Application was filed in early December

¹⁰ Filed on January 1, 2016.

¹¹ They assert that these constitute breaches of CPR rules 26.8

2015 but not heard until January 27, 2016. The defendants both had adequate time within which to file any supporting documentation to inform the court.

[10] The defendants are represented by experienced Queens Counsel who is familiar with the applicable rules of court and the factors to be considered in respect of an application for extension of time. Mr Browne's and Glens Gas' failure to be more forthcoming is quite troubling. I note that Glenroy Browne refers to himself as "former" managing director of Glens Gas. Who is the current managing director and when was he or she appointed? Are there other officers functioning within the company and if so, why did none of them attempt to locate witnesses and if necessary seek relief prior to December 2015? Inexplicably, that information is not before the court. It is more than passing strange that Mr Browne and Glens Gas would realistically delay identifying witnesses until after the court makes an order for witness statements to be filed. Surely, this must have been in their contemplation since the date of service of the claim form. I reject that assertion.

[11] Usually, protracted illness of a party would provide an excusable reason for failure to comply with a court order. However, such a party must substantiate his excuse with proof satisfactory to the court. Mr Browne and Glens Gas have supplied only a bald statement as explanation for their delay in filing witness statements and applying for extension of time. This demonstrates an alarming nonchalance and scant regard for the seriousness of the court processes. There is no proof that Mr Browne's alleged illness spanned the entire 3 ½ year period. Lack of specifics regarding the date of his accident, types of injuries suffered and nature of incapacitation renders Mr Browne's explanation incomplete and suspect.

[12] Glens Gas' feeble explanation for its inactivity during that period is also troubling. Surely, Glens Gas remained operational for most if not all of the period under contemplation. What action if any, did its officers take to locate witnesses and file witness statements in Mr Browne's absence? That information is not provided. A

party applying for extension of time must give the court “a clear, detailed and accurate picture of what occasioned the failure and what was done in seeking to remedy it”.¹² The paucity of information provided by Glenroy Browne and Glens Gas’ suggest that their default was deliberate, intentional and for no good reason. I am inclined to so infer in absence of other explanation. I so find.

Effect of delay and degree of prejudice to the parties

[13] PDV initiated this claim 5 years ago.¹³ Mr Browne and Glens Gas filed their joint defence and counterclaim within 2 months.¹⁴ One month later PDV filed its reply and defence to counterclaim.¹⁵ Up to that point, the parties were operating within the confines of the CPR. After the filing of PDV’s witness statements in 2012, the proceedings appeared to have stalled. The court office must assume some responsibility for this because no case management sessions were scheduled between February 2012 and September 2015. In this regard, the court failed to prosecute its case management role in accordance with CPR Part 25.¹⁶ To some extent, the delay in advancing this claim is attributable to this failure.

[14] Be that as it may, there being no applications for extension of time or other relief by either party, the court in September established timelines to bring the case to trial in 2016. Neither Mr Browne nor Glens Gas indicated on that date that they had

¹² See **Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner SKBHCVAP2015/0015 at para. [15] per Pereira CJ.**

¹³ On March 18, 2011.

¹⁴ On May 3, 2011.

¹⁵ On June 30, 2011.

¹⁶ See CPR 25.1 which imposes a duty on the court to actively manage cases by *inter alia* fixing timetables, controlling the progress of the case and giving directions to ensure that the trial proceeds quickly and efficiently.

any difficulties in meeting the timelines. If they had, those matters could have been taken into account and appropriate directions given. On the January hearing date Mr Browne and Glens Gas signaled that they would need an additional week to February 7, 2016 to finalize and serve their witness statements.

[15] If the application is granted, it probably will not derail the yet unscheduled trial date. The parties would both be able to ventilate their respective claims with minimal or no further delay. The prejudice to PDV is two-fold. Firstly, Mr Browne and Glens Gas are unfairly positioned to “trim” their witness statements in response to PDV’s.¹⁷ Secondly, PDV would need to prepare and file another trial bundle to replace the one filed on November 30, 2015 as it does not contain witness statements and supporting documentation from Mr Browne and Glen Gas.

[16] Should the application be dismissed, neither Glens Gas nor Glenroy Browne would be able to provide testimony at the trial, they would have their claims dismissed and face certain judgment on PDV’s claim. Glens Gas and Glenroy Browne would suffer the greater prejudice by not being able to establish their respective cases.

[17] They contend that such an outcome would be unfair and unjust and contrary to the overriding objective. They rely on the decisions in **Jones v Williams**¹⁸ and **Mealey Horgan plc v Horgan**¹⁹ in support. It was held in those cases that the court was wrong to deny the applicants extension of time to file witness statements and relief from sanctions without taking into account that to do so would be a disaster for the defendant. The court declared that it would need the strongest reasons and fairly extreme circumstances to exclude the defendant’s case. It considered that

¹⁷ See Blackstone’s Civil Practice 2013, para. 46.27.

¹⁸ (2002) LTL, 27 May.

¹⁹ (1991) The Times, 6 July.

inexcusable delay and flouting of court orders would constitute such extreme circumstances.

[18] Both decisions cited are in keeping with the dicta from cases decided by the Eastern Caribbean Court of Appeal. In **Carleen Pemberton v Mark Brantley**²⁰ and **C. O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**²¹ the court stressed that in exercising its discretion, the adjudicating court must consider all the circumstances and not operate “*in a vacuum or on a whim*”.²² The gravamen of those decisions is that no one factor should determine the outcome unless it is substantially weighted as against the others. The overall picture must be considered and a proportionate approach adopted. Furthermore, extreme cases of deliberate and egregious default including excessive delay in complying with a court order may justify refusal of relief.

Likelihood of success

[19] PDV’s claim against Glenroy Browne and Glens Gas is for the sum of \$287,064.00 in respect of the price of goods allegedly sold to them and damages arising from non-payment. Glens Gas and Glenroy Browne admit a portion of the debt and claim a set-off in respect of professional services allegedly rendered to PDV by Mr Browne. Neither Glenroy Browne nor Glens Gas allege the existence of a contract for services or of services between them and PDV. The legal basis of the claim for payment for professional services is not pleaded and is therefore questionable.

²⁰ **SKBHCVAP2011/009**

²¹ **SLUHCVAP2011/017**

²² Supra. at **para. 12 of the Carleen Pemberton case**, cited with approval at **paras.52 and 56 of the C.O. Williams case**.

[20] In all the circumstances, Glenroy Browne and Glens Gas have not advanced sufficient factual and legal bases which would move the court to exercise its discretion in their favour. The 42 month delay in making the application is excessive and inexcusable, they having not provided acceptable reasons for the default. In addition, further protraction of this case would be prejudicial to Mr Stewart in all of the circumstances. Neither the inordinate delay nor the paucity of information undergirding the excuse proffered can be overlooked. I take note too that the defence amounts to a partial denial of PDV's monetary claim while the counter-claim is for a set-off which can both be borne out by cross-examination of PDV's witnesses.

[21] Glen Browne and Glens Gas have sat idly by and waited until the last moment to seek relief. This behavior can only be described as negligent or careless and cannot be ignored or accepted by the court. Rules and orders are made to guide the proceedings. Wilful disobedience must be discouraged. In the words of Lord Justice Rimer:²³

“...Rules as to time limits are expected to be respected, and there is precisely nothing unjust about that. Litigants are not entitled to expect rules of practice to be re-written so as to accommodate their own negligence, idleness or incompetence...the principles recognize that...time limits will be missed and ... in appropriate circumstances it may therefore be just to extend time for compliance. That, however, is in the nature of an indulgence...”

²³ In **Jurkowska v Himad Limited [2008] EWCA Civ 231 at para. 19**, cited with approval by **Edwards JA** in the **C. O. Williams case**.

Glen Browne and Glens Gas failed to satisfy the court that there are good reasons for it to exercise its discretion to grant the extension of time. Their application for extension of time is accordingly dismissed.

Issue 2 – Should Glenroy Browne and Glens Gas be granted relief from sanctions?

[22] Having determined that Glenroy Browne and Glens Gas will not be granted an extension of time to file their witness statements, the issue of relief from sanctions becomes moot. It is worth noting that the rules contain a sanction for failure to serve witness statements within the time stipulated by the court.²⁴ Such failure is visited by an automatic exclusion of that witness from the trial.²² No express sanction is specified for failure to “file” a witness statement. However, it follows logically that an application for additional time to file incorporates a prayer for more time to “serve” or “exchange”. For all practical purposes they are inseparable. By extension, the sanction applies equally to a failure to “file”.

[23] The court has broad discretion to grant relief from sanctions for non-compliance with its order or a rule. However, such relief will be granted only if the court is satisfied that the failure was unintentional, with good reason and the defaulting party has generally complied with rules, practice directions and orders.²⁵ Glen Browne and Glens Gas have not generally complied such rules and orders. As chronicled by Ms Ferguson, they have not filed their List of Documents, skeleton

²⁴ See CPR 29.11 (1) which provides:

“If a witness statement ... 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.”

²⁵ See CPR 26.8 (2) which provides:

“The court may grant relief only if it is satisfied that –

- (a) the failure 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.”

See also **C. O. Williams** case.

arguments and list of authorities and they did not submit any documents to be included in the Trial Bundle. They intentionally and without good reason disobeyed the court's order to file and exchange witness statements and have been generally recalcitrant. In all the circumstances, Glenroy Browne's, and Glens Gas' application for relief from sanctions is accordingly dismissed.

ORDER

[24] It is accordingly ordered:

1. Glenroy Browne's application for extension of time to file his witness statement and relief from sanctions for his failure to do so is dismissed.
2. Glenroy Browne shall pursuant to CPR 65.11 pay assessed costs of \$850.00 to PDV Saint Vincent and the Grenadines Limited the Successors of Petro Caribe SVG.
3. Glens Gas' application for extension of time to file its witness statement and relief from sanctions for its failure to do so is dismissed.
4. Glens Gas shall pursuant to CPR 65.11 pay assessed costs of \$850.00 to PDV Saint Vincent and the Grenadines Limited the Successors of Petro Caribe SVG.

[25] The court is grateful to both counsel for their submissions.

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Esco L. Henry
HIGH COURT JUDGE