

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

IN THE HIGH COURT OF JUSTICE

DOMHCV2014/0302

BETWEEN:-

JERRY BRISBANE

Claimant/Respondent

and

D A VIBES INC

Defendant/Applicant

Appearances:

Ms. Danielle Edwards of Singoalla Blomqvist Williams Chambers for the claimant/respondent

Mr. Lennox Lawrence for the defendant/applicant

2015: November 11;
December 18

RULING
On written submissions

- [1] **Stephenson, J.:** This is an application for an extension of time to file and serve witness statements, to deem the witness statements properly served and from relief from sanctions.
- [2] The parties to the case were on the 9th March 2015 ordered by the master to file their witness statement on or before the 31st July 2015. The learned master also ordered that the parties could have applied for further directions or orders before the 16th September 2015.

- [3] The claimants/respondents (the respondents) filed their witness statements in a timely manner however the defendant/applicants (the applicants) missed the deadline of the 31st July 2015 and filed their witness statements on the 14th August 2015.
- [4] On the 18th August 2015, the applicants filed an application for an order that the witness statements filed by them be deemed properly filed, in the alternative that they be granted an extension of time to file their witness statements and that they be granted relief from sanctions. The application was supported by an affidavit of Nanya Thomas, a clerk in the chambers of the applicant. The respondent opposed the application. Each party was ordered to file written submissions with authority in support of their respective positions. This order was complied with and the court now rules briefly on the matter.
- [5] It is the applicant's contention that their failure to file the witness statements out of time was not intentional on their part. Miss Thomas averred that the witness statements were prepared within the time as ordered, however in error they were filed away in the file instead of being sent to the Registry for filing. Further, it was stated that the applicant has complied with all other orders of the Case Management Conference and that the deponent had been advised and verily believe that all other order have been complied with.
- [6] It is noted that the witness statement were filed on the 14th August 2015.
- [7] Learned Counsel Mr. Lennox Lawrence in support of his application submitted pursuant to Part 3.3 of Civil Procedure Rules 2000 (CPR) the long vacation begins on the 1st August and ends on the 15th September 2015, and that during the long vacation the time for serving any statement of case other than a statement of claim does not run. That therefore between 31st July 2015 which was the date for filing and exchanging of witness statements and 15th September 2015 time did not run.
- [8] Learned counsel submitted therefore that because the application for extension of time and relief from sanctions was filed on the 18th August 2015 during the long vacation when time was not running the defendant's application was only out of time by one day.
- [9] Learned Counsel Mr. Lennox Lawrence submitted that pursuant to part 26.9 of CPR failure to comply with a rule or court order or directions does not invalidate any steps taken in the proceedings unless the court so orders. Further that, if there has been a failure to comply with the court order as

is in this case, the court may make an order to put things right and such order may be made with or without application by the party.¹

- [10] Mr. Lawrence submitted that the instant case is a proper case for the application of parts 26.9(3) and 26.9(4) of CPR in view of the fact that the applicant has taken the interim step of filing the witness statement on the 14th August 2015 which was in fact one day late considering the provisions of part 3.2 of CPR and also prior to the end of the long vacation and prior to the date limited from making further applications.
- [11] Counsel for the applicant Mr. Lawrence submitted that pursuant to parts 27.7 and 26.8 the court may make an order for an extension of time and relief from sanctions and in the case at bar and that making the application during the court vacation was appropriate as the application was made one day outside the limited by virtue of the computation of time rule.
- [12] Learned counsel also submitted that in exercising its discretion as provided for by CPR the court must pay heed to and be guided by the overriding objective as set out in Part 1.1 and 1.2 of CPR. Learned counsel urged the court to consider the ruling in Nottinghamshire and City of Nottingham Fire Authority –v- Gladman Commercial Properties Ltd² and to adopt the ruling therein. In that case it was held that the decision whether to allow late evidence to be adduced is a matter of discretion by the trial judge in accordance with the principle set out in CPR 2000 1 and 3 with the overriding back drop of the duty of the court to ensure that each party has the fullest opportunity fairly and fully to present their case, ensuring that a decision in favour of one party does not unfairly impact on other parties. It was also held that a decision to exclude evidence should not be made merely because the evidence is late.
- [13] It is noted that the applicants averred that the applicant has complied with all other orders of the Case management conference.
- [14] The respondent to this application contends that Pursuant to Part 29.11 of CPR where a witness statement is not served within the time as ordered by the court that witness may not be called unless the court permits and that the court may not give permission at the trial unless there is good reason

¹ Re: Part 26.9.4 of CPR 2000

² [2011] 1 WLR 3235

for not seeking relief under 26.8. It is noted that the application currently before the court is an application pursuant to part 26.9 of CPR therefore part 29.11(2) is not relevant to the application before the court.

- [15] Learned Counsel Miss Edwards on behalf of the respondent to the application further submitted that the applicant can only be allowed relief if he can show good reason why he was unable to comply with the order of court.
- [16] Learned counsel made reference to the decision of the Court of Appeal of the Eastern Caribbean Supreme Court in the matter of *Kenton Collinson St Bernard –v- The Attorney General of Grenada et al* I am of the considered view that this case as cited by Counsel is not applicable to the case at bar as we are currently dealing with an application being made under Part 26.8. The case cited speaks to where the defaulting party has not made such an application.
- [17] Counsel further relied on the said decision in that the court refused to extend the time as sought by the applicant as the application was not made promptly, this again is not the situation in the case at bar.
- [18] Learned Counsel Miss Edwards also submitted that in the circumstances of this case counsel for the applicant should have contacted counsel for the respondent to request an extension of time to file and serve his witness statements if he genuinely needed more time to do so and urged the court to reject the application.
- [19] The rules that fail to be considered in this application is CPR part 29.4 which deals with “Requirements to serve witness statements”, part 29.7 which deals with “procedure where one party does not serve witness statement by date directed” and part 29.11 which speaks to “consequence of failure to serve witness statement of summary”.
- [20] Part 29.4 provides for the service of witness statements and provides that the court may order a party to serve on any other party a statement of the evidence of any witness upon which the first party intends to rely in relation to any issue of fact to be decided at the trial.
- [21] Part 29.11 of CPR 2000 makes provision for consequence of failure to file and serve witness statements as follows:

“(1) If a witness statement or a witness summary for use at trial 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 under rule 26.8.”

[22] In civil litigation the parties are obliged to file and serve their witness statements in compliance with the orders of the court, failing which, that witness cannot be called at trial unless the court grants permission so to do. In those circumstances the court will not grant permission unless there is good reason proffered by the defaulting party as to their failure to comply with the court order.

[23] The evidence in the case at bar indicates that the applicant did not file their witness statements within the time ordered by the learned master, which time expired on 31st July 2015. The applicant did however file its witness statements two weeks after during the Court’s long vacation, they also made an application for relief from sanctions and for the statements which were filed to be deemed properly filed.

[24] The excuse presented by the applicant was that the witness statements were prepared in a timely matter but due to clerical error they were filed away in a file and not taken to the court to be filed. There seems to have been prompt action on the part of the applicant in that the witness statements were file and the application made during the court vacation.

[25] Should I agree with the respondents objections to the granting of the applicants application that would meant that the applicants will not be able to call the witnesses in defence of their case which would be severe if not draconian. I am of the view that to do so would fly in the face of the overriding objective of the CPR to deal with matters justly. It would be an unjust result as the applicant would be deprived of the opportunity to defend the case before the court.

[26] Learned Counsel Mr. Lawrence submitted to the court that immediately after the due date for the filing of the witness statements the court proceeded on its long vacation and pursuant to the provisions of Part 3.5(1) *“the time prescribed by the rules or by any practice direction for filing or serving any statement of case (other than a statement of claim) does not run unless the court orders or directs that the time shall run.”* Therefore time stood still so to speak and would not have started to

run again until the 16th September that is the date after the Long vacation came to an end. That the applicant filed its application during the long vacation and not thereafter meant that the application was made one day out of time and it is noted applying this reasoning that the witness statements were also filed one day out of time. Therefore no time was in fact lost by the late filing and the case schedule so to speak would not have been interfered with. It is noted that the applicant has complied with the other orders of the court.

[27] Considering the evidence, submissions and the law in this matter, I am of the view that the applicants application for relief from sanctions and extension of time to serve their witness statements and in fact to deem their witness statements properly filed should be granted. If this application was to be refused that the applicants would not be in a position to properly defend the matter in the case at bar as they would be in a position where they would be able to call any witnesses in their defence. I am of the considered view that to do so would lead to injustice being visited upon them and would be too severe a consequence against the factual backdrop of this case. It is clear that should the applicants be allowed to tender their evidence a fair trial could be held and the case will be dealt with justly.

[28] It is noted that the court has the power to rectify matters where a party has failed to comply with a rule, practice direction, court order or directions and the court may make an order to put matters right. The court may make an order so to do with or without the application by a party.³ I am of the view that this is such a case where the court can make an order to set matters right.

[29] Accordingly, the application for relief from sanctions and for extension of time to file and serve the witness statements in this matter is granted and the witness statements which were filed out of time during the long vacation of the court are deemed properly filed.

M E Birnie Stephenson
High Court Judge

³ Part 26.9 (3) & (4) of CPR

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Before Justice M E Birnie Stephenson

Dated the day of December 2015

Entered the day of December 2015

UPON READING the written submissions filed herein pursuant to order of court.

ORDER

IT IS HEREBY ORDERED THAT:

- [1] The applicant's application for an extension of time to file the witness statements in this matter, relief from sanctions and to deem the witness statements filed out of time on the 12 August 2015 properly filed is granted.
- [2] The matter will now take its normal course.
- [3] Pre Trial Review is fixed for the 25 February 2016.

BY ORDER OF COURT

REGISTRAR