

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2013/0200

BETWEEN:

PHILSBERT MAGLOIRE

Claimant

and

[1] SAT TELECOMMUNICATIONS LTD

[2] JASON MARONI

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Gina Dyer -Munroe for the claimant

Mr. Kevin Williams for the defendants

2015: June 24;
August 17

Case management powers- extension of time to serve witness statements- relief from sanctions - witness statements filed in sealed envelope - Disclosure and service of witness statements filed in a sealed envelope - Civil Procedure Rules 2000 (CPR 2000) CPR 29.3; CPR 29.4; CPR 29.11

JUDGMENT

[1] **ACTIE, M.:** This is an application for extension of time to serve witness statements, to deem witness statements properly served and for relief from sanctions.

Background

- [2] The background to the case is as follows. The master in an order dated 3rd December 2013 gave trial directions for the future conduct of the case. The parties were directed to file and exchange witness statements by 14th April 2014. The defendants complied and filed their witness statements on 14th April 2014; the claimant, however, did not. As a result, the defendants filed their witness statements in a sealed envelope.
- [3] By application filed on 15th April 2014, the claimant sought an extension of time to file and exchange his seven (7) witness statements. The master, on 26th June 2014, granted leave to the claimant to file two witness statements no later than 2nd September 2014 but refused the claimant leave to file the other 5 witness statements. The basis for her decision was that the claimant had not put forward any good explanation for the failure to file the witness statements by 14th April 2014 as was ordered in the trial directions.
- [4] The claimant filed his witness statements by 2nd September 2014 as was directed.
- [5] On 29th September 2014, the defendants served the claimant with their witness statements which were filed in the sealed envelope on 14th April 2014.
- [6] The matter proceeded to pre-trial review in December 2014 where the issue of late service of the defendants' witness statements appeared to have surfaced. On 19th January 2015, the defendants filed an application seeking an extension of time to serve their witness statements and to deem their witness statements served on the claimant on 29th September 2014 to be properly served and in addition asked that relief from sanction be given under CPR 26.8 for the failure to exchange the witness statements by 14th April 2014 as was directed by the master in the trial directions. The application is supported by the affidavit of Kellisa Benjamin, a clerk in the chambers of counsel for the defendants. The defendants contend that the failure to seek leave to serve the witness statements out of time

and relief from sanctions was not intentional. Ms Benjamin deposed that the witness statements concealed by other documents and files in the office were discovered on 29th September 2014 when she was in the process of filing away documents. The witness statements were served on the claimant on that very same day upon discovery of the omission to serve.

[7] Counsel for the defendants' states that he has generally been compliant with all other relevant rules, practice directions and orders of the court. Counsel informed the court that the reason for making the application on 19th January 2015 was because he was out of state. Counsel is of the view it that would be of no adverse effect on the parties neither would it cause a disruption of the trial if relief from sanctions is granted as a trial date has not been set.

[8] The defendants' application is vigorously opposed by the claimant. The claimant contends that the defendants' application was not made promptly and is without any good reason for the delay in seeking relief from sanctions. Counsel for the claimant avers that the defendants were aware of the claimant's application for an extension of time made on 15th April 2014 and the delay of some 9 months and 4 days before making the application for relief from sanctions is significant. The claimant further contends that granting relief to the defendants will have an adverse effect as the claimant will be deprived of obtaining summary judgment against the defendants. The claimant in support cites the authorities of **Kathleen Trotter et al v Jermy Vital**¹ and **David Goldgaretal v Wycliff H. Baird**².

Law and Analysis

[9] The rules which are relevant to this application are CPR 29.4, CPR 29.7 and CPR 29.11.

¹ DOMHCV2011/ 0165

² Civil Appeal2007/0013 - St. Kitts & Nevis

[10] CPR 2000 Part 29.4 provides for the service of witness statements and states 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. A party's obligation to serve a witness statement is independent of any other party's obligation to serve such a statement (CPR 29.4 (3)).

[11] CPR 29.7 provides a procedure that may be adopted when one party does not serve witness statements by the date directed by the court as follows: CPR Part 29.7(1). This rule applies where:-

“(a) one party (the “ the first party”) is able to and prepared to comply with the order to serve witness statements; and

(b) the other party fails to make reasonable arrangements to exchange statements.

(2) The first party may comply with the requirements of this Part by

(a) filing the witness statements in a sealed envelope at the court office by the due date directed; and

(b) giving notice to all other parties that the witness statements have been filed.

(3) Statements filed pursuant to paragraph (2) must not be disclosed to the other party until the other party certifies that witness statements or summaries in respect of all witnesses upon whose evidence the other party intends to rely have been served.”

[12] CPR 29.11 provides the consequences for failure to file a witness statement 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.

- [13] It is the general rule that witness statements are to be filed and served by the date specified by the court. The failure of a party to file and serve his/her witness statements by the stipulated time is fatal as the witnesses cannot be called at trial unless the court grants permission. The court may not grant permission at trial unless the party gives good reason for the failure for not seeking relief from sanctions.
- [14] Parties are under an obligation to file and serve their witness statements by the date ordered by the court. One party's obligation to serve his witness statements does not depend on the other party's duty to do the same. A party who complies can serve his/her witness statement(s) by the date specified by the order of the court irrespective of the defaulting party's noncompliance. However the combined effect of Rule 29.7(2) and Rule 29.7(3) is to give the first party who complies with a court order an option to file his/her witness statements in a sealed envelope and to withhold service and disclosure of the contents to the defaulting party.
- [15] Where the first party takes the option of filing in a sealed envelope, unless the court directs otherwise, the service or disclosure of the witness statement(s) is to be effected when the defaulting party certifies that all witness statements or summaries have been filed and served. CPR 27.9(3) provides that witness statements filed in sealed envelopes **must not** be disclosed until the other party certifies that witness statements or summaries in respect of all witnesses upon whose evidence the other party intends to rely have been filed and served .
- [16] The evidence indicates that the claimant, by court order dated 26th June 2014, was granted permission to file his witness statements not later than 2nd September 2014. This extension granted to the claimant would necessarily defer the time by which the defendants had to serve their witness statements filed under seal.
- [17] Where CPR 29.7(3) is engaged, the defaulting party, in this case the claimant, is under an obligation to inform the first party (the defendants) that all his witness

statements or summaries had been filed and served. Since the defendants utilized Rule 29.7(2)(3), the claimant was under an obligation to (1) file and serve his witness statements by the 2nd of September 2014 as directed by the master and (2) give notice to the defendants that all the witness statements/summaries of the witnesses that he intends to rely on at trial had been filed and serve in accordance with Rule 29.7(3).

[18] The time for service by the defendants did not commence from 14th April 2014 as both the claimant and defendants contend. The time for service would be from the date of the certification by the claimant that all his witness statements intended to be relied on at the trial had been filed and served as required by CPR 29.7(3). The court is not seized of any evidence that the claimant had so complied. The claimant filed and served by 2nd September 2014 as was ordered by the court. Even if taken that there was compliance by the claimant with the provisions of Rule 29.7(3) by 2nd September 2014, I am of the view that the service of the witness statements by the defendants on 29th of September 2014 is not unreasonable having regard to all the circumstances in this case.

[19] I have come to the conclusion that this breach, if any, when properly analysed and having regard to all the circumstances of the case, is too trivial to deprive the defendants from relying on their witness statements which were properly filed. Where a witness statement is served by a party after the time specified for service has expired it will be unjust to exclude the party from adducing the evidence at trial save in very rare circumstances, e.g. where there had been deliberate flouting of court orders, or inexcusable delay such that the only way the court could fairly entertain the evidence would be by adjourning the trial.³ This is not the case in this matter. The defendants have been generally compliant with the court orders, rules and procedures. The evidence does not suggest that there will be any material disruption to the trial if relief from sanctions is granted. The claimant will not be taken by surprise as he is fully aware of the contents of the defendants

³ Mealey Horgan Plc v Horgan [199] S. T. C. 711 (White Book 2011).

witness statements which have been in his possession since 29th September 2014. The court notes that it was the claimant who filed an affidavit of service acknowledging that the defendants' witness statements had been served. The claimant did not, at the time of filing the affidavit of service, take any objection to the late service of the defendants witness statements.

[20] The court notes that the discrepancy only surfaced at pre-trial review. I am of the view that to disallow the defendants' witness statements would be too severe a consequence. It would be an unjust result when considered against the background of this case, in particular the fact that it was the claimant who committed the first default. It was the noncompliance by the claimant which caused the defendants to file their witness statements in a sealed envelope. In this regard, any additional breach of service was as a direct consequence of the claimant's default. The court notes that there will not be any material disruption to the court's timetable as a date for trial has not been set. In deciding whether to give permission, the court must always have regard to the overriding objectives of CPR 1.1 to deal with cases justly. The fair conduct of the trial will not be affected if relief from sanctions is granted.

[21] The claimant avers that he would be prejudice if relief from sanctions is granted to the defendants as this would deprive him of summary judgment being entered in his favour. The claimant's assertion is misconceived as summary judgment is not automatically granted by default without the party first proving its case on merits.

[22] Considering the evidence and all the circumstances of this case I am of the view that the defendants' application for an extension of time to serve their witness statements and to deem the witness statements served on 29th September 2014 as properly served should be granted. If relief from sanctions were refused then the defendants who had been compliant with the court's order shall be denied reliance on their witness statements. It would be unjust and too severe a consequence when set against the background of this case. If, and on the other

hand, relief from sanctions were granted, a fair trial could still be had. Accordingly, the defendants are granted relief from sanctions as prayed.

Order

[23] In the circumstances it is ordered as follows:

- (1) The defendants' application for an extension of time to serve and to deem witness statements served on 29th September 2014 as properly served and relief from sanctions is granted.
- (2) The court office shall set this matter before a trial judge for the continuation of pretrial review in preparation for the trial of this matter.
- (3) There shall be no order as to costs.

Agnes Actie
Master