THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HCVSVG2009/0343

BETWEEN:

PERCIVAL STEWART **CLAIMANT**

-AND-

HARLEQUIN PROPERTIES (CARIBBEAN) LIMITED
HARLEQUIN PROPERTIES (SVG) LIMITED
RIDGEVIEW CONSTRUCTION (SVG) LIMITED **DEFENDANTS**

Appearances: Mrs Kay Bacchus-Browne for the Claimant/Applicant, Mr. Parnel Campbell Q.C. for the Defendants/Cross Applicants.

2015: Jan. 16 & 17
Feb. 16[i]
Mar. 9 & 19

JUDGMENT

BACKGROUND

[1] **Henry, J. (Ag.):** Mr Percival Stewart, an elderly man,[ii] initiated action in the court on October 20th, 2009 to recover damages against the Harlequin Properties (Caribbean) Limited ("Harlequin Caribbean"), Harlequin Properties (SVG) Limited ("Harlequin SVG") and Ridgeview Construction (SVG) Limited ("Ridgeview"). Mr Stewart's claim arises out of injuries he allegedly sustained while employed by Ridgeview. He alleges that Ridgeway is Harlequin Caribbean's and Harlequin SVG's agent.

[2] A case management order made on September 25, 2012 ordered the parties, among other things, to file witness statements on or before March 30, 2013. None of the parties complied with that order. Mr Stewart's subsequent application for extension of time to file his witness statements was granted.[iii] He now applies for summary judgment[iv] against the Harlequin Caribbean and Harlequin SVG who both filed a joint cross-application seeking an extension of time to file their witness statement.[v]

ISSUES

[3] The issues which arise for consideration are:

I. Whether the court should make an order for summary judgment against Harlequin Caribbean and Harlequin SVG? and
II. Whether Harlequin Caribbean and Harlequin SVG should be granted an extension of time to file their witness statement?

Although Mr Stewart's application preceded that of Harlequin Caribbean and Harlequin SVG, a favourable disposition of Mr Stewart's application would render the other application moot. In the normal course of proceedings, Mr Stewart's application would be considered first. However, the court remains mindful of its duty to deal with cases justly by ensuring that each party is afforded an equal opportunity to ventilate its case. In the circumstances of this case and in furtherance of that objective, I have decided that determination of the second issue logically should precede the first. They are accordingly considered in that order.

ANALYSIS

Issue No. 1 – Should Harlequin Caribbean and Harlequin SVG be granted extension of time to file their witness statement?

[4] The application was filed on January 9, 2015, over 33 months after the final date ordered for filing witness statements. It is supported by affidavit of Mr Samuel Everson Commissiong[vi] who was on record as Counsel for Harlequin Caribbean and Harlequin SVG up until January 13, 2015.[vii] No application or order was made for removal of Mr Commissiong as Counsel, or for another legal practitioner to replace him prior to that date, although both the Notice of Application and Affidavit are endorsed with the name of the Law Firm P. R. Campbell & Co. In any event, Mr Commissiong deposes that he has been involved in the proceedings from their inception and is aware of the facts which have impeded its progress. He explains that Harlequin SVG is the holding company for Harlequin Caribbean and that one Mr Dave Ames is the sole director for both companies.

[5] He also explains that he and Mr Ames are the only two persons connected to Harlequin SVG who could or can provide a witness statement because all others have left the country. Mr Commissiong deposes that Mr Ames lives in England and travels a lot globally[viii] making it difficult for him to be in Saint Vincent to testify. Implicit in Mr Commissiong's averments is the notion that for those reasons, it was impossible or extremely difficult to contact Mr Ames, receive instructions from him, or arrange for him to sign a witness statement. I make the observation that the CPR[ix] permits a party to file and serve a witness summary if he is not able to provide a witness statement, and that a witness does not need to be in the jurisdiction to sign or attest either document. Mr Commissiong adds that Mr Ames did in fact make a witness statement which was signed and filed on October 30, 2013. No explanation is given why an extension of time was not sought to file it. He explains that as the dates for the case drew near he realized that Mr Ames might not be able to come to Saint Vincent and the Grenadines to testify so he made a

decision to retain Mr Campbell to present the case and he would give the evidence instead. This deponent did not indicate when he realized this nor when he made the decision to appoint Mr Campbell. Accordingly, that information cannot be factored into the court's consideration. The court notes too that it appears that no consideration was given to Mr Ames testifying via video link which is permissible.[x]

[6] Mr Commissiong indicates that Mr Campbell was brought into the case late and the decision was taken on his advice to apply for extension of time to file the witness statement. He avers further that he was trying his best to comply with court orders to file witness statement and acted on the advice of counsel. No dates were provided of when this advice was received but from the record, it could not have been much before January when the application was made. Suffice it to say, this advice appears not to have been given or taken before January 2015, some 5 years after the case management order. No evidence was provided on this very important point. Mr Commissiong avers also that there was no willful intention to flout the Orders of the court and he includes in his affidavit a request for relief from sanctions, which is noticeably absent from the Notice of Application.

[7] The CPR vests the court with broad discretion to grant extension of time in general and particularly to secure parties' compliance with court orders.[xi] Usually, a party seeking extension of time to file a witness statement must make an application before that date.[xii] The instant application was made long after the deadline date and consequently runs afoul of the general rule. Such an application must include a prayer for relief from sanctions.[xiii] Harlequin Caribbean's and Harlequin SVG's application does not include such a prayer, although a request is mentioned in Mr Commissiong's affidavit.[xiv] This failure is detrimental to the Harlequin companies' application.

[8] An applicant is also required to provide affidavit evidence in support of an application.[xv] While an affidavit was filed in support of the instant application, it is

quite troubling that it is attested to by counsel who at the time of making and filing it was still on the record for Harlequin Caribbean and Harlequin SVG. Without his affidavit, there is no evidence to support the application. Harlequin Caribbean and Harlequin SVG contend that there is no absolute bar against any counsel making a witness statement and being a witness in a matter in which he is appearing as counsel. They argue that the bar is against him appearing as counsel at the trial. They submitted further that up to the date of trial, another counsel could prosecute the matter with the former counsel acting as witness. These submissions conflict with the position adopted by the Eastern Caribbean Supreme Court.[xvi] In fact, the Court of Appeal has repeatedly denounced the practice of a legal practitioner testifying in a matter in which he appears.[xvii] This is a cardinal error which cannot be countenanced by the court.

[9] As noted by George-Creque, J.A. (as she then was), "It is well settled and accepted that it is most undesirable for counsel with conduct of a matter or application to swear an affidavit in that matter… it amounts to giving evidence from the bar table – an unacceptable and wholly inappropriate practice."[xviii] Harlequin Caribbean and Harlequin SVG have subsequently filed[xix] a list of Commonwealth authorities[xx] without commenting on them. The majority of the authorities submitted by Harlequin Caribbean and Harlequin SVG on this issue accord with the pronouncements by the Court of Appeal. In the **Cork, Eastern Division case**,[xxi] from the Queen's Bench Division and in some of the Canadian cases,[xxii] the attorney retired from the case and was called as a witness, without sanction or disapproval. However, in the majority of the cases, the court invariably held that it was undesirable and/or objectionable for counsel to appear in a case both as advocate and witness. While the court will take note of the authorities from elsewhere in the Commonwealth, they are not binding on the court in this jurisdiction. The decisions of the Eastern Caribbean Court of Appeal which are binding will accordingly be applied. The fact remains that when the witness statement was filed, Mr Commissiong was the attorney for Harlequin Caribbean

and Harlequin SVG. Moreover, the instant application is supported by affidavit sworn to by Mr Commissiong while he was on record as counsel for Harlequin Caribbean and Harlequin SVG. The court cannot ignore this glaring departure from proper practice. To do so would be to set a dangerous precedent, contrary to appellate judicial pronouncements.

[10] When considering an application for extension of time, the court must give effect to the overriding objective of the CPR, to deal with cases justly.[xxiii] The court must also have regard to the (1) nature of the failure, (2) length of the delay in respect of which relief is being sought (3) reasons for the delay, (4) effect of the delay, (5) degree of prejudice to the parties if the application is granted;[xxiv] and any other relevant matters which arise from the surrounding circumstances, including any Practice Directions or Rules.[xxv]

Nature of the failure, length of and reasons for delay

[11] Harlequin Caribbean's and Harlequin SVG's witness statement was filed 4 months after the filing deadline[xxvi] and without a court order granting an extension of time. The witness statement was made by Samuel Everston Commissiong, the only attorney on record for Harlequin Caribbean and Harlequin SVG at that time. The court takes judicial notice of the fact that an application for extension of time to file that witness statement and for relief from sanctions was filed on August 21, 2013 but withdrawn. The court also takes judicial notice that a witness statement of David Ames was filed three months later, on October 31, 2013, similarly without an order of the court granting extension of time to do so. No explanation is given why a witness summary was not filed and served within the time limited by the order. Likewise, no reasons are given why Harlequin Caribbean and Harlequin SVG waited for 1014 days after the deadline for filing witness statements to apply for an extension of time to do so. Clearly, the delay has been inordinate.

[12] Mr David Ames' absence from Saint Vincent and the Grenadines is not an excusable reason for the failure to file a witness statement in time. With numerous electronic and other communications media and courier services available globally, in particular in Europe and North America, Harlequin Caribbean and Harlequin SVG had several options available to them to complete and file their witness statement or witness summary. They also could have made their application for extension of time to do so in a timely manner. The explanation that it became apparent that Mr Ames would not be available to travel to Saint Vincent and the Grenadines to testify only as the case was drawing close does not justify a tardy filing of the witness statement or application for extension of time. The record reveals that the trial date in this matter was missed on no less than two occasions, in 2013 and again on November 25, 2014. This application for extension of time was made a month and a half after vacation of the last trial date and only after Mr Stewart applied for summary judgment. I do not accept that the reasons for the delay are reasonable or justifiable. They are feeble at best.

Effect of delay and degree of prejudice to the parties

[13] The claim form was filed 5 years ago. To delay the progress of the proceedings further would undoubtedly be prejudicial to Mr Stewart in achieving resolution of the issues in this case. Harlequin Caribbean and Harlequin SVG would be prejudiced also if they were unable to proffer evidence at the trial in their defence. On balance the prejudice to Mr Stewart would be greater as in the natural order of things, he has already lived most of his life. It would be unjust to require him to wait much longer for disposal of this case.

[14] Harlequin Caribbean and Harlequin SVG have not satisfied any of the criteria which would move the court to exercise its discretion in their favour. The 33 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. Mr Samuel

Commissiong's involvement by making the witness statement is also frowned upon because at the time he made it, he was still on record as counsel for Harlequin Caribbean and Harlequin SVG. This quite likely explains why the earlier application for extension of time was withdrawn. In fact, it is noted that the withdrawn application sought relates to that very witness statement. The application which was improper then is not rendered proper by significant passage of time and because new counsel has been appointed. Even if it were, the other considerations weigh heavily against exercise of the court's discretion in the Applicant companies' favour.

[15] This is a fitting case in which the application for extension of time to file the witness statement should be dismissed. I accordingly dismiss the application for extension of time to file the witness statement. There is no application before the court for relief from sanctions and in any event, the decision on the application for extension of time renders consideration of that issue moot.

Issue No. 2 – Should an order for summary judgment be made?

[16] Mr Stewart's seeks an order for summary judgment pursuant to CPR 15.2 on the ground that "the Defendant has no real prospects for successfully defending the claim". It is supported by affidavit of Lynette Jameson[xxvii] who rehearses the grounds of the application, the date of the case management order, the deadline for filing witness statements and the fact that no witness statements have been filed for the cross-applicants/defendants who withdrew their application for relief from sanctions in October 2013. She also recounts that a costs order[xxviii] for payment of $500.00 has not been honoured by Harlequin Caribbean and Harlequin SVG.[xxix] Ms Jameson does not address any of the facts surrounding the claim nor the defence filed in this matter. CPR Part 15.2 empowers the court[xxx] to make an order for summary judgment where it considers that the defendant has no real prospect of successfully defending the claim or issue.[xxxi] The application for summary judgment "must identify the issues with which it wishes the court to

deal."[xxxii] The applicant must supply evidence by affidavit.[xxxiii] If the respondents wish to be heard, they too must file affidavit evidence.[xxxiv]

[17] The case of **Swain v Hillman**[xxxv] outlined the applicable principles which the court must factor into making a determination on an application for summary judgment. The court must conduct an exercise to ascertain whether there is a "realistic" as opposed to "fanciful" prospect of success.[xxxvi] Mr Stewart's application does not touch on this issue in relation to the alleged factual claims made by him. In this regard, it fails to comply with the CPR requirements to identify the issues. Another established legal principle is that the summary judgment authority is not to be utilized to "dispense with the need for a trial where there are issues which should be investigated at the trial," but rather to enable the court to dispose of cases summarily where there is no real prospect of success.[xxxvii] The discretion is not to be exercised without careful consideration of the respective parties' statements of case, and does not arise merely because the court concludes that success is improbable."[xxxviii]

[18] The crux of Mr Stewart's claim is that he was injured while working for Ridgeview, an agent for Harlequin Caribbean and Harlequin SVG. Harlequin Caribbean and Harlequin SVG in their defence deny any employer/employee relationship with him or principal/agent relationship with Ridgeview. While there seems little dispute among the parties (on the pleadings), that Mr Stewart was employed by Ridgeview at the material time, no admission is made by the defendants regarding an agency between Ridgeview and the Harlequin companies. In fact, this is strenuously disputed. A real live issue central to determining liability exists. The viability of the defence cannot be ascertained without a full ventilation of the parties' respective cases. The application for summary judgment is dismissed due to Mr Stewart's failure to identify the issues in his application, and also because Harlequin Caribbean and Harlequin SVG have a real prospect of successfully defending the claim.

ORDER

[19] It is accordingly ordered:

1. Harlequin Properties (Caribbean) Limited's application for extension of time to file their witness statement is dismissed and they shall pay to Percival Stewart costs of $750.00.

2. Harlequin Properties (SVG) Limited's application for extension of time to file their witness statement is dismissed and they shall pay to Percival Stewart costs of $750.00.

3. Percival Stewart's application for summary judgment is dismissed and he shall pay to Harlequin Properties (Caribbean) Limited and Harlequin Properties (SVG) Limited costs of $500.00 each.

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

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Esco L. Henry

HIGH COURT JUDGE (Ag.)

[i] The matter was adjourned for two weeks on application by the defendants who indicated that they were taking instructions on settlement of the matter.

[ii] Approximately 65 years of age. See medical report of Mr Steve V. Mahadeo, dated June 15, 2009 at page 65 of the trial bundle where his age was given as 60 years.

[iii] See Order dated October 7, 2013.

[iv] By Notice of Application filed on November 21, 2014.

[v] By Notice of Application filed on January 9, 2015.

[vi] Filed on January 8, 2015.

[vii] Change of legal practitioner was filed appointing P. R. Campbell & Co. in his place.

[viii] Specifically, England, Canada, Europe and Australia.

[ix] Part 29.6 (1).

[x] CPR Part 29.3.

[xi] Part 26.1(2)(k) of the CPR provides: "(2) 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."

[xii] CPR Part 27.8 (1), (3) states:

> "27.8 (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for-
>
> (a) a case management conference;
> (b) a party to do something where the order specifies the consequences of failure to comply;
> (c) a pre-trial review;
> (d) the return of a listing questionnaire; or
> (e) the trial date or trial period.
>
> (3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date."

[xiii] CPR Parts 11.7 (1) (b) and 27.8 (1), (2), (3) & (4); see also **C. O. Willliams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. SLUHCVAP 2011/017** and **Prudence Robinson v Sagicor General Insurance Inc SLUHCVAP2013/0009**.
CPR 11.7 (1) (b) states:

> "(1) An application must state –
> (a)…

(b) what order the applicant is seeking."

CPR 27.8 (1), (2), (3) & (4) provide:

> "(1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –
> (a) a case management conference;
> (b) a party to do something where the order specifies the consequences of failure to comply;
> (c) a pre-trial review;
> (d) the return of a listing questionnaire; or
> (e) the trial date or trial period.
>
> (2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).
>
> (3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.
>
> (4) A party who applies after that date must apply for –
> (a) An extension of time; and
> (b) relief from any sanction to which the party has become subject under these Rules or any court order." (underlining mine).

[xiv] See para. 9 of Affidavit of Samuel Everston Commissiong filed on January 8, 2015.

[xv] CPR 11.9 states:

> "Evidence in support of an application must be contained in an affidavit unless a –
> (a) court order;
> (b) practice direction; or
> (c) rule;
> otherwise provides."

[xvi] **Casimir v Shillingford (1967) 10 W. I. R. 269;** and **Richard Frederick et al v Comptroller of Customs et al SLUHCVAP2008/037.**

[xvii] Ibid. **Casimir v Shillingford** and **Richard Frederick et al v Comptroller of Customs et al.**

[xviii] **Richard Frederick et al v Comptroller of Customs et al, at para. 49;** see also **Casimir v Shillingford at page 270 letter I and page 271 letters A and B.**

[xix] On March 16, 2015.

[xx] Reported in summary in The English and Empire Digest. 1978 Reissue, Replacement Volume 3 at paragraphs 3732, 3733, 4812, 4813 and 4824, including **R. v Secretary of State for India, Ex. P.**

Ezekiel [1941] 2 All e. R. 546; Cork Eastern Division Case (1911) 6 O'M. & H 318; Stones v. Byron (1846) 4 Dow & L. 393; Shields v Mc Grath (1847) 3 Kerr 398 (Can.); Benedict v Boulton (1847) 4 U.C. R. 96 (Can.); also **Richard Frederick et al v Comptroller of Customs et al SLUHCVAP 2008/037,** and **Casimir v Shillingford (1967) 10 W.I.R. 269.**

[xxi] Supra.

[xxii] **Cameron v. Forsyth (1847) 4. U.C.R. 189**

[xxiii] CPR Part 1.2 (a) which provides:

"The court must seek to give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules;"

[xxiv] **Carlene Pemberton v Mark Brantley SKBHCVAP 2011/009 at para. 13** per Pereira J.A. (as she then was); See also **John Cecil Rose v Anne Marie Uralis Rose SLUHCVAP 2003/0019.**

[xxv] **C. O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. SLUHCVAP 2011/017.**

[xxvi] July 22, 2013.

[xxvii] Filing clerk at legal firm of Kay Bacchus Browne chambers, attorney on record for Mr Stewart.

[xxviii] Made on September 29, 2014.

[xxix] This sum has since been paid. See page 2, paragraph 1 of Percival Stewart's "Submissions Re Application filed on 9th January, 2014".

[xxx] Pursuant to CPR Part 15.4 (1) which states:

"15.4 (1) Notice of application for summary judgment must be served not less than 14 days before the date fixed for hearing the application."

[xxxi] CPR Part 15.2 (a).

[xxxii] CPR Part 15.4 (2) which states: "The notice under paragraph (1) must identify the issues which it is proposed that the court should deal with at the hearing."

[xxxiii] CPR Part 15.5 (1) & (2) provide:

"15.1 (1) The applicant must –

(a) file affidavit evidence in support with the application; and

(b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought;

not less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must –

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the application;

at least 7 days before the summary judgment."

[xxxiv] Ibid.

[xxxv] **[2001] 1 All E. R. 91, C.A.** See also **Geddes v. Mc Donald Milligen (2010) 79 W.I.R. 376.**

[xxxvi] Ibid. Per Lord Woolf M.R. at para. 7.

[xxxvii] Ibid. para. 20.

[xxxviii] Ibid. Per Lord Justice Judge at para. 29.