

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2005/0144

BETWEEN:

JAMES A.L. BRISTOL

Claimant

and

MARGARET BLACKBURN

Defendant

Appearances:

Mr. G. Archelaus Joseph for the Claimant

Mrs. M. Emmanuel-Steele for the Defendant

2010: May 4, 27

RULING

- [1] **PRICE FINDLAY, J.:** This is an application brought by the Claimant in this action to call a new witness. They submit that it is not an application for relief from sanctions. They submit that the proposed witness was not known at the time of the Case Management Conference nor by the date for the filing of witness statements in the matter.
- [2] They assert that this is an application made under CPR Part 26.1(2)(w) under the Court's general powers of case management.
- [3] The Defendant's position is that this application falls within CPR Part 29.11 and 29.12 which provides for relief from sanction for failure to serve a witness statement within the specified time and the conditions which have to be fulfilled before the Court can grant permission.
- [4] The Court is of the view that this is an application that falls within CPR Part 29.11, as this new witness is being tendered to give evidence on behalf of the Claimant.

[5] No witness statement or witness summary has been filed within the times specified by the Case Management Order in this matter.

[6] The Rule specifies that the Court may not give permission unless the party asking for permission has good reason for not previously seeking relief under Rule 26.8.

[7] Rule 26.8 states:-

- “(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.”

[8] Any application made to the Court has to be made within the context of the CPR 2000.

[9] In the instant case, the Claimant has not applied for relief from sanction; in fact it is their contention that Rule 26.8 does not apply.

[10] CPR 26.1(2)(w) must be read in the context of the other Rules of the CPR, it does not stand alone and the Court cannot apply it in a vacuum.

[11] CPR 26.1(1) states:-

“The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice direction or any enactment.”

[12] It is my understanding that the Rule is meant to be read and applied in conjunction with the other Rules of Court and the other powers which the Court has.

[13] Granted, the Claimant's contention is that the evidence they now wish to adduce was not available to them on the date of the Case Management Order (14th June 2005), or at the date specified for the filing of witness statements (30th September 2005).

[14] The Order of the Court here, as in all civil proceedings, was that the evidence-in-chief of all witnesses would be by way of witness statement. The Claimant has not filed such a statement on behalf of the witness they intend or wish to call.

[15] Even though the witness may not have been known to the Claimant at the time of the Case Management Order and at the date set for the filing of witness statements in the matter, the application is one to vary those Orders by filing a witness statement of this new witness and allowing the witness to give evidence.

[16] Part 27.8 states:-

“(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 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.
 - *Rule 42.7 deals with consent orders.*
- (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.
 - *Rule 26.8 provides for applications for relief from sanctions.*
- (5) The parties may agree to vary a date in the timetable other than one mentioned in paragraph (1) or (2).
- (6) Where the parties so agree, they must –
 - (a) file a consent application for an order to that effect; and
 - (b) certify on that application that the variation agreed will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence;
 and the timetable accordingly varied unless the court directs otherwise.

[17] It is clear that under Part 27.8(4) the party who applies for such a variation after the date in the Order must apply for an extension of time and must apply for relief from sanction. It appears to be a mandatory requirement under the Rules.

[18] In the application before the Court there is neither an application for time to be extended nor for relief from sanction.

[19] I agree with the reasoning of Justice of Appeal Ola Mae Edwards in **Goldgar & Ors. v. Wycliffe H. Baird** – Civil Appeal 13 of 2007 (St. Christopher & Nevis), where she said:-

“An isolationist approach to construing the Rules defies the ordinary canons of construction. The Court is obliged to ensure that the provisions of the CPR are as far as possible interpreted in a way which is coherent and consistent. CPR 1.1 and 1.1(2) mandate that the Court must seek to give effect to the overriding objective when it interprets any rule.”

[20] CPR 29.11 is clear, the consequence for failing to serve a witness statement or summary within the time specified by the rules, that witness may not be called except with the Court’s permission.

[21] The provision that the Court may grant permission is premised on the party so seeking to have a good reason for not previously seeking relief under CPR 26.8. In fact, CPR 29.11 directs the Court and the parties to the rule pertaining to relief from sanction.

[22] I also agree with Edwards, J.A. when she states in the **Goldgar case** that:-

“CPR 29.11 in my view is in very clear and imperative terms. The rule does not permit a tortuous construction of its very clear words in order to accommodate a non compliant Claimant or Defendant.”

[23] An extension of time can only be granted by the Court in accordance with the Rules. The Court cannot and ought not overlook the Rules because it may be just or reasonable to do so.

[24] In order for the Court to exercise its discretion in favour of an applicant it must do so having regard to the mandatory requirements laid down by the relevant rules.

- [25] The first requirement is that the application for relief from sanction ought to be made promptly.
- [26] In this matter, the application was made on the 29th March 2010. The history of this matter is such that Orders were made in 2005, both Case Management and for the filing of witness statements.
- [27] While it may be true that at the time of the making of these Orders the Claimant did not know of this new intended witness, the next question is, when did they become aware of this witness. The explanation in the affidavit of Mr. James Bristol is, to the mind of this Court, woefully inadequate.
- [28] At the very earliest that they ought to have known about the witness was when the Trial Bundle was filed. The Trial Bundle was filed on 17th September 2007. Contained in that Trial Bundle is the transcript from the related Magistrates' Court proceedings. The Magistrates' Court trial was held between June and September 2005.
- [29] At that stage the Solicitors for the Claimant must have been aware of the fact that the intended witness was going to be necessary for the purpose of giving the evidence with respect to the Magistrates' Court proceedings, given the explanation set out in the affidavit of Mr. Bristol as to the reason why they wish to call the witness and have the transcript entered into evidence.
- [30] Once they were aware that they wished to tender or use the transcripts from the Magistrates' Court proceedings, they ought to have been put on notice that certain steps had to be taken for that witness to be allowed to testify. Yet there was no application then.
- [31] The matter came on for trial on 27th September 2007. No application was made on that day.

- [32] The matter came on for trial again on 28th & 29th May 2009. On those days several oral applications were made. The Claimant made no application with respect to this witness.
- [33] Even in the intervening period between filing of the Trial Bundle and the first trial date, no application materialized.
- [34] It is only after the second set of trial dates set in this matter and more particularly after evidence has been heard and the matter adjourned for continuation that this application saw the light of day.
- [35] The Applicants would have failed to mount the very first hurdle to succeed in the application, but alas, they have not applied for relief from sanction. They assert they do not have to. The Court thinks that they are mistaken.
- [36] The Applicants have failed to comply with the Rules with respect to this application. They have failed to make the application in time, and they have failed to give adequate reasons why at this 99th hour the Court ought to exercise its discretion in its favour.
- [37] Accordingly, the application is dismissed, with costs to the respondents in the sum of \$1,000.00.



Margaret Price Findlay
High Court Judge