GRENADA

IN THE HIGH COURT OF JUSTICE

CIVIL CASE NO. 0084 OF 1999

BETWEEN

KENTON COLLINSON ST. BERNARD

Claimant

AND

1. THE ATTORNEY GENERAL OF GRENADA
2. ANDY WILLIAMS
3. DENNIS CHARLES

Defendants

Appearances:

Mr. F Alexis for the claimant
Ms. A. Trotman for defendant

2003: March 24, April 6

RULING

[1] BARROW J (Ag.) In their Defence to Kenton St. Bernard's claim for damages for police brutality the police say that the injury to his left eye, photographed to great effect as evidence of the alleged brutality, was caused by the claimant colliding into an object when he tried to escape lawful arrest. The claimant says the police beat him on three separate occasions the night they arrested him: at a dance, on the way from the dance and at the hospital in the presence of his mother who had been alerted.

[2] The claimant may not get to tell his story because he did not comply with the case management order that was made last October. That order required both sides to exchange and file witness statements on 3rd March for a trial that was scheduled for 24th March.

[3] It was not until 21st March that the witness statement for the claimant himself was filed and it was not until the morning of the trial that the witness statement for his witness was filed. In contrast, the witness statements for the police were filed on the date ordered.

[4] When the trial was about to begin counsel for the police pointed to rule 29.11 of the Civil Procedure Rules 2000. That rule says that if a witness statement is not served in the time specified the witness may not be called unless the court permits. The court may not give permission at the trial, the rule states, unless the party seeking permission has a good reason for not previously seeking relief under rule 26.8.

[5] This provision is of arching importance as it distills the essence of the new Rules. Before CPR 2000 it was a matter for the broad discretion of the court how to treat non-compliance, which had become commonplace. There was nothing in the old rules standing in the way of the court deciding, as the claimant's counsel has invited the court to decide in this instance, that since there was no prejudice to the defendants it would waive the non-compliance. This was the accepted way of proceeding. In Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 at 1671 the English Court of Appeal described the reluctance that had become established in the courts to apply sanctions even where there had been violations of peremptory orders. The courts hesitated to act because they did not want to be draconian.

[6] Non-compliance has continued to be commonplace under the new rules, in the daily experience of these courts. Case management orders are often flouted. The breadth of this practice may have given acceptability to it. In truth, that very acceptability stands as a reproach. Casual accommodation of non-compliance with orders is a violation of clear rules. It is a subversion of a fundamental objective of the rules which was precisely to put a stop to habitual non-compliance. The rules need to be obeyed, they need to be enforced.

[7] In our small societies personal as opposed to purely professional relationships are unavoidable and those relationships may cause or may be perceived as causing reluctance to enforce the rules. The approach of the new rules to non-compliance eliminates the operation of the personal factor. CPR 2000 took away the wide discretion formerly reposed in the courts to determine what should be the consequence of non-compliance. A basic part of that discretion had been to determine whether, in fact, there was to be any consequence. How a given judge or how different judges responded to non-compliance depended on the individual exercise of discretion. That exercise was unavoidably affected by the dynamics of the relationships between different lawyers,

between different chambers and between different lawyers or chambers and different judges. Results were understandably seen as arbitrary.

[8] CPR 2000 set a fixed sanction for non-compliance. Rule 29.11 states that the person whose witness statement has not been delivered in time may not be called as a witness at the trial. I reject out of hand the suggestion of counsel that this means that the late witness statement is to be received and used but the witness himself may not testify. That would not be a sanction; instead it would be the ultimate reward because it would admit the evidence of a witness but relieve him of exposure to cross-examination. The rule could not have intended to reward default.

[9] The setting of a fixed sanction for non-compliance results in the elimination of the wide discretion of old and this last is completed by limiting the court's ability to grant relief from sanction. The court can only consider granting relief, at the trial, if the defaulting party gives good reason for not having previously applied for relief. A tight structure is therefore established to deal with non-compliance. However convincing may be the explanation for non-compliance the court cannot even start to consider it, far less allow itself to be affected by any explanation, unless the defaulter has a good reason for not having made a formal application for relief from sanctions. The effect of rule 29.11 is that a defaulter may have a good explanation for non-compliance but no good reason for having failed to previously apply for relief from sanction and in that event the defaulter must suffer the sanction.

[10] Rules 26.7 and 26.8 express the central idea that the fixed sanction for non-compliance will take effect unless there is a prompt application for relief supported by evidence on affidavit. The requirement underscores the imperative that the defaulter must act. The defaulter cannot sit by until the day of the trial, as was the old practice, because not even an excuse of superior merit can save the defaulter if he does not act promptly to seek relief from sanction. It is mandatory that such an application must be made promptly because if an application for relief could be made any old time there would be no certainty to trial dates since these would need to be vacated to accommodate late compliance that had been permitted upon late applications. The companion requirement to promptitude, that there must be evidence on affidavit, emphasizes the weightiness of

satisfying the stated conditions and eliminates the old practice of counsel merely trotting out an excuse from the bar table.

[11] In this case there was no application for relief from sanction. The rule says I may not permit the witnesses to be called unless the claimant has a good reason for not previously seeking relief. The reason given by counsel for the default and, presumably, for not previously seeking relief, is that his chambers had been unable to find the claimant and chambers only recently discovered that the claimant is in prison. After I had adjourned the trial to deliver this Ruling, which would determine how the trial was to continue, the claimant filed an application pursuant to rule 26.8 to seek relief from sanction. That is an extreme example of a late application and demonstrates why the rules preclude late applications. To entertain it I would need to delay the ruling and the trial to hold a hearing of that late application. That would make a mockery of the requirement of promptitude. I refuse to do so.

[12] The inability of chambers to contact clients has been presented frequently to these courts as an excuse for non-compliance and as reason for an adjournment. Lawyers need to now recognize that such an excuse will not work as easily as it did before. In this case the excuse given at the trial has been formalized in the affidavit of the principal law clerk in chambers. That affidavit is unsatisfactory. It does not say when efforts began to contact the claimant, what were these efforts, why his whereabouts were not obtained from his mother who was his star witness, how his location became known, when it became known and why the application for relief from sanction was not made when the deadline approached or at some time before the trial.

[13] It turns out that the seed of the present misfortune began to bear fruit from the stage of the case management conference. The claimant had, at that stage, been in prison for some six months and was not present at case management conference. He ought to have been. He ought to have been contacted by chambers to be advised of the conference date. It was from then that the rules required contact between lawyer and client. When the attempt to contact him failed – I assume there was an attempt - was anything done at that stage?

[14] The excuse that chambers have been unable to contact the client contains the hidden premise that it is the duty of chambers to contact the client but there is no duty on the client to contact chambers. That premise is false. When a litigant is going to be, or has become, unreachable at his previous address or by previous methods the litigant has a duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer. The client needs at all times to be involved with the litigation. This truth was ignored under the old rules and practice. The new rules position that truth as a centerpiece. This is seen in the general rule that the litigant or his representative (which means someone other than the lawyer) must attend the case management conference or pre-trial review and in the sanctions provided for non-attendance, see rule 27.4. A litigant, therefore, who neglects to tell his lawyer how to reach him is likely to end up in breach of a primary obligation that rests on him rather than the lawyer, that is, the obligation to be present at the various stages of his case. In this case, one assumes, the claimant had an abundance of time to think about his pending case and the probability that his lawyer would need to reach him. It does not appear that the claimant did anything about informing his lawyer on how to reach him.

[15] In the circumstances I cannot find that the claimant had good reason for having failed to previously apply for relief from sanction. The sanction for non-compliance imposed by rule 29.11 therefore has effect, as rule 26.7 (2) directs. The late witness statements are excluded. The two witnesses, including the claimant himself, may not be called at the trial.

[16] The consequence of this ruling is that the claimant is incapable of proving his case. Pursuant to rules 15.2 and 26.1 (2) (i) I strike out the case and enter judgment for the defendants.

Denys Barrow SC
High Court Judge (Ag.)