BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.22 OF 2003

BETWEEN:

[1] THE TREASURE ISLAND COMPANY
[2] DAVID SIMS

Appellants

and

[1] AUDUBON HOLDINGS LIMITED
[2] NORMAN ISLAND SERVICES COMPANY LIMITED
[3] VALERIE SIMS

Respondents

Before:

The Hon. Mr. Adrian D. Saunders — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]

Appearances:

Mr. Sydney Bennett, QC with Ms. Michele Matthew for the Appellants
Mr. Stephen Moverley Smith, QC with Mr. James Hilsdon and Ms. Keisha Durham for the First and Second Respondents
Mr. Gerard Farara, QC for the interests of Ms. Valerie Sims

2004: July 14;
September 20.

JUDGMENT

[1] SAUNDERS, J.A.: The substantive dispute between the parties to this suit is over mooring fees. Audubon Holdings Limited ("Audubon") claimed that mooring fees were owed to it by the Treasure Island Company Limited ("Treasure Island"). Mr. and Mrs. David Sims own and control Treasure Island. The couple, who sat together during the hearing of the appeal, were also cited as defendants to the action but they were separately represented.

[2] The appeal before us had nothing to do with the substantive dispute or with the law of contract. It concerned pure procedural law. Specifically, the Court was being asked to interpret various provisions of the Civil Procedure Rules (CPR) regarding witness statements. The matter developed in this fashion. In April, 2003, at a case management conference, Justice Rawlins had ordered the parties to file and serve their witness statements on or before 19th May, 2003. The solicitors for Audubon allege (and this allegation is also contained in a sworn affidavit) that they filed a set of their witness statements in a sealed envelope at the Court office on the 20th May, 2003. If this did occur then someone must have misplaced the envelope because it has disappeared without a trace. Moreover, the Registrar has stated that it is not the practice of the Court office to accept for filing sealed envelopes. Rather, the practice is that the documents would first be filed and stamped and then placed in the envelope that is then sealed.

[3] When the matter came on for trial, the learned Judge in the Court below delicately avoided pronouncing as a finding of fact that this sealed envelope was not in fact so filed. She however proceeded on the basis that it was not and I cannot fault her for so proceeding in all the circumstances.

[4] On the 20th May, 2003, Justice Rawlins made a further case management order extending the time for the filing and exchange of witness statements to Friday 25th July, 2003. Neither this order nor the one preceding it contained any sanction for non-compliance. Justice Rawlins' second order also fixed firm trial dates of 3rd to 7th November, 2003 for the hearing of the suit.

[5] On the day appointed for exchanging witness statements, i.e. 25th July, the solicitors for Mrs. Sims wrote to Audubon's solicitors requesting an extension of time, until 31st July, for the exchange of witness statements. They gave as their reason the fact that Mrs. Sims had just undergone a difficult pregnancy and was now taken up with her baby. On that same day, 25th July, the solicitors for

Treasure Island and for Mr. Sims (they were represented by the same firm) wrote to Audubon's solicitors indicating that *their* witness statements were filed at the Court office and intimating a readiness to exchange.

[6] Audubon's solicitors agreed to the request made by the solicitors for Mrs. Sims. They also wrote to the solicitors of Treasure Island and of Mr. Sims suggesting that, in light of Mrs. Sims' request, witness statements should be exchanged on 31st July as proposed by the solicitors for Mrs. Sims. On the 31st July, 2003 the solicitors for Mrs. Sims again wrote to Audubon's solicitors requesting a further extension until 1st August for the exchange of witness statements.

[7] Audubon's witness statements and those of Mrs. Sims were filed on 1st August, 2003. Presumably, all the parties were then ready to exchange but, for reasons that are not quite clear, the exchange of witness statements did not actually occur until the 12th August, 2003. But there was still almost three months to go before the due trial date in November.

[8] Up to that November trial date, the solicitors for Treasure Island and for Mr. Sims never once raised objection to the late filing of Audubon's witness statements. Indeed, their co-defendant, Mrs. Sims, was similarly in breach of the strict terms of Justice Rawlins' order. But no one complained. To all intents and purposes, the trial in November was well and truly on and Counsel diligently prepared for it.

[9] On 4th November, 2003, the first morning of the trial, the record indicates that the solicitors had prepared and placed before the Court eight volumes of skeleton arguments, core bundles, pleadings, correspondence between solicitors, witness statements, material obtained during discovery, the whole works. I am sure that, as was customary, the learned trial Judge, in preparation for the trial, would have familiarised herself with the case.

[10] The first two hours of the trial were taken up in sorting and putting order to the various documents filed. There was a lengthy discussion on the manner in which the bundles of documents had been prepared. Submissions were made to the Court that Audubon's solicitors had not fully or properly complied with various rules regarding the filing of some of these documents. Counsel for Audubon accepted that some aspects of the pre-trial orders were not faithfully followed to the letter. After much discussion these issues were apparently resolved. After some argument, Counsel present all agreed that they were ready to proceed. The matter was adjourned at 1:20 p.m. It re-commenced at 2:27 p.m.

[11] On the resumption, Counsel for Audubon had begun to open his case when Counsel for Treasure Island and for Mr. Sims indicated that he wished to make a submission. This submission turned out to be quite a bombshell. Argument on it occupied the rest of the day and required a considered ruling from the trial Judge. The Judge ultimately overruled the submission but the hearing of the trial of the substantive matter, on the dates set aside for it, was completely frustrated.

[12] This appeal springs from the overruling of the submission by the learned Judge. The submission made to the Judge was as follows: Audubon had neglected strictly to comply with the case management order with respect to the time limited for the filing of witness statements. In order for Audubon to call the witnesses the Court's permission had to be given[1]. The rules limit the grant of the Court's permission to instances where the party in breach has a good reason for not previously seeking relief[2]. Facilitating a request from Mrs. Sims, it was said, far from being a good reason, is actually proscribed by CPR 26.7(3)(b). Audubon should therefore not be allowed to call their witnesses.

[1] CPR 29.11(1)
[2] CPR 29.11(2)

[13] The trial Judge was sympathetic to some of these points but in the end she noted that the witness statements had been filed almost three months prior to the date for trial. The Judge took the view that she had a discretion given to her by the overriding objective of the rules. She also had regard to the Court's general powers of case management and in particular the general power to dispense with strict compliance with the rules. The Judge found that, as no delay or injustice had been caused by the breach, the witness statements should be deemed to have been validly filed. Treasure Island and Mr. Sims have appealed the Judge's ruling to this Court.

[14] Part 29.11 of the Rules states as follows:

> 29.11 (1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then 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.

[15] Mr. Bennette QC, Counsel for the Appellants, launched a very carefully prepared and highly technical attack on the learned Judge's reasoning and conclusion. His submissions were met with equal skill and no less reliance on technicality by Mr. Moverley Smith QC, Counsel for Audubon.

[16] This Court's view of the matter was never in doubt. There was no way that we could allow skilful advocacy to drive a dagger through the heart of fundamental precepts of the new Civil Procedure Rules. Mr. Bennette QC relies on the English cases of Vinos v. Marks & Spencer[3] and Godwin v. Swindon[4]. He also relies on the decision of Barrow, J. in St. Bernard v. The A.G. of Grenada[5]. I think these cases can be distinguished.

[3] (2001) 3 A.E.R. 784
[4] (2001) 4 A.E.R. 641
[5] Grenada High Court Civil Suit No. 84 of 1999

[17] In the two English cases it is important to note that the Court there was concerning itself with extensions of time beyond limitation periods. Moreover, unlike our CPR, the English rules do not contain an unrestricted power aimed specifically at extending time although I would prefer not to rest the decision in this case on that latter circumstance.

[18] In Vinos, through inadvertence, solicitors had not served a claim form until nine days after the expiry of the four-month period prescribed by the English rules. Those rules contain specific provisions in r 7.6(3) for granting post-expiry applications for extension of time. The Appellant could not bring himself within those specific provisions. Nor could the Appellant bring himself within a general rule – r 3.1(2)(a) - giving the Court a wide discretion to extend time because that latter rule is prefaced with the words "Except where these Rules provide otherwise….". The Appellant unsuccessfully sought shelter firstly, under the overriding objective and secondly, under another rule of broad application – r. 3.10 - that gave the Court a general power to rectify matters where there had been an error of procedure. May LJ noted that essentially, what the Appellant required was an extension of time but unfortunately for the Appellant, r 3.1(2)(a) did not apply because of the introductory words to it and the general words of r 3.10 could not be extended to enable the Court to do what r 7.6(3) specifically forbade. The Court first had to look to whether there was power under the rules to extend the period and the conditions of r 7.6(3) did not apply.

[19] Godwin's case followed the Vinos case. The Court there rejected the notion that the rules had endowed the Court with a discretionary power to dispense with statutory limitation provisions.

[20] The facts in St. Bernard v. The A.G. of Grenada are far removed from the circumstances here. In that case the claimant filed his witness statement three days before the day of the trial. The witness statement of his witness was filed on the morning of the trial. The Court found that no good reason had been adduced

for the failure previously to apply for relief from sanction and accordingly, the Judge disallowed the witnesses from giving evidence.

[21] CPR 29.11 has such severe consequences for a litigant in breach of it that I think that, in keeping with the overriding objective, a Court should liberally approach its second sub-rule. Did the Audubon solicitors have a good reason for not previously seeking relief? The special relationship among Treasure Island, Mr. Sims and Mrs. Sims cannot be discounted. The solicitors for Audubon were actually seeking to accommodate Mrs. Sims. In the context of the length of time available before the trial date, the delay in filing or exchanging the witness statements was inconsequential. No prejudice whatsoever was occasioned by the delay. Most importantly, the solicitors for Audubon could not have imagined that in light of all these circumstances, they were going to be ambushed with this technical point sprung on them on the morning of the trial. Prior to that date the other side had conducted themselves as though they were intent on proceeding with the trial. On 22nd September they had filed a Pre-Trial Memorandum in keeping with CPR 38.5(3) and no indication was given that they intended to take the point of the failure strictly to comply with that aspect of the case management order .

[22] For all these reasons it seems to me that the Audubon solicitors could establish a "good reason" for not previously seeking relief under rule 26.8. It was suggested that their agreement with the solicitors for Mrs. Sims was forbidden by CPR 26.7(3). The Judge below also appeared to have accepted this view. However, a close reading of r 26.7(3) suggests that this was not the case. Rule 26.7(3) states

> (3) Where a rule, practice direction or order -
> (a) requires a party to do something by a specified date; and
> (b) specifies the consequences of failure to comply,
> the time for doing the act in question may not be extended by agreement between the parties.

[23] To be operational this rule requires that the order or rule in question must not only require a party to do something by a specified date but the particular order or rule must *also* specify the consequences of failure to comply. Neither Justice Rawlins' order nor rule 29.11 contains both aspects (i.e (a) and (b)) of r 26.7(3). In those circumstances it could not be said that the agreement made by the solicitors was forbidden by the rules. I however agree with the learned trial Judge that, in line with Part 26.1(6)[6], there existed here special circumstances that could entitle a Court to dispense with strict compliance with Part 29.11 and in my view the trial Judge was right so to do.

[24] Although I have distinguished the cases of Vinos and Godwin, this is not to say that those cases do not contain very helpful statements on the approach that should be taken with respect to the relationship between the overriding objective and specific provisions of the rules. In particular, it must not be assumed that a litigant can intentionally flout the rules and then ask the Court's mercy by invoking the overriding objective. I completely adopt Mr. Bennette's submission that the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself. As May LJ stated in Vinos[7], "Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored".

[6] r 26.1(6) states "In special circumstances on the application of a party the court may dispense with compliance with any of these rules".
[7] Page 789 at Letter J

[25] In all the circumstances, I would dismiss this appeal with costs to the Respondents both here and in the Court below. I would fix those costs cumulatively at $10,000.00.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[Sgd.]
I concur.

Albert Redhead
Justice of Appeal [Ag.]