THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 329 OF 2004

BETWEEN:

AVALINE O'GARRO
JANICE RICHEY
MAURICE O'GARRO

Claimants

V

NEIL ROSS
ARTHUR'S TRANSPORT&/OR
HEAVY EQUIPMENT RENTAL CO LTD

Respondents

Appearances:
Ms. Nicole Sylvester for Claimants
Mr. Bayliss Fredericks for First Respondent
Mr. Carlyle Dougan Q.C. and Mr. Grant Connell for Second Respondent

---

2005: June 27th & 28th

RULING

[1] **THOM, J**: (In Chambers) On July 7, 2004 the Claimants instituted proceedings for damages for personal injuries.

[2] A Case Management Conference was held on the 17th day of January 2005 and the Order of the Learned Master was entered on the 20th day of January 2005. The Learned Master ordered at paragraph 6 that witness statements be exchanged and filed on or before the 4th day of April 2005.

[3] The case was listed for hearing on the 27th and 28th days of June 2005.

[4] The Defendants failed to file the witness statements within the time ordered by the Learned Master.

[5] Rule 29.11 provides in effect that if a witness statement is not served within the time specified the witness may not be called at the trial unless the Court grants permission and the Court may not grant permission at the trial unless the party seeking permission has a good reason for not previously seeking relief under Rule 26.8.

[6] The first and second Defendants on June 27 and June 24, 2005 respectively, filed application for relief from sanctions pursuant to Rule 26.8. The application and affidavits in support were served on Counsel for the Claimants on the morning of the 27th day of June, 2005 the day of the trial. The applications were heard jointly. Counsel for the Claimants objected to the applications.

[7] Rule 26.8 makes provision for the Court to grant relief from sanctions, the circumstance in which relief may be granted and the matters which the Court must take into consideration in determining whether to grant relief.

[8] Rule 26.8 requires the applicant to make the application promptly and the application must be supported by evidence on affidavit.

[9] The First Defendant's application was filed on the morning of the trial while the Second Defendant's application was filed on Friday June 24, 2005, three days before the trial. These applications were made almost three months after the time specified for filing the witness statements had expired. The Defendants had more than two months within which to file the witness statements.

[10] Rule 26.8 also sets out the circumstances in which the Court may grant relief. It was not contended that the failure to comply was intentional, nor was it contended that the Defendants had generally failed to comply with all other relevant rules.

[11] Learned Counsel for the Claimants contended that the Defendants had not provided a good explanation for the failure to comply with the Order.

[12] The First Defendant's explanation for failing to comply with the order is outlined in paragraphs 3 and 4 of the Affidavit filed on behalf of the First Defendant. Paragraph 3 reads:

> "Due to the fact that the Defendant works and functions at odd hours in a remote worksite on the Leeward side of the Island it has been extremely difficult contacting the client for appointment with Senior Bayliss Frederick."

Paragraph 4 reads:

> "The First Defendant came to chambers only with the assistance of his employer and neither counsel was present."

[13] The Second Defendant's explanation for failing to comply with the Case Management Order is outlined in paragraphs 3 and 4 of the Affidavit filed on behalf of the Second Defendant. Paragraph 3 reads:

> "The Second named Defendant was unable to comply with this Order as Mr. Carlyle Dougan Q.C. who has conduct of this matter was fulfilling duties as a Magistrate and the hectic schedule of the outer districts resulted in his being absent from Chambers."

Paragraph 4 reads:

> "The Second named Defendant had to leave the country for business purposes on occasion. However, he attended the Chambers but was unable to meet with Mr. Carlyle Dougan Q.C. to discuss the matter."

[14] In essence the First Defendant showed little or no interest in defending this claim. He had to be taken to see his counsel by his employer the Second Defendant. The affidavit does not disclose when the First Defendant was taken to see his counsel.

[15] In the case of the Second Defendant the Affidavit his counsel Leraned Queen's Counsel also sits as a Magistrate. The Affidavit which was sworn to by his Junior Counsel and filed

in support of the Second Defendant's application did not provide any details of the period of time the Defendant had to be out of the country, why he could not consult with counsel while he was out of the country or the time when he attended chambers and was unable to meet with Senior Counsel.

[16] Learned Queen's Counsel for the Second Defendant referred the Court to **The Supreme Court Practice** Volume 1 paragraph 32.10.2 which reads:

> "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 has been deliberate flouting of Court orders, or in excusable delay such that the only way the Court could fairly entertain the evidence would be by adjourning the trial."

[17] I find that this paragraph is of no assistance to the Defendants since witness statements have not been filed by either Defendants up to the time of the hearing of the applications. In fact a careful reading of the paragraph shows that one of the rare circumstances in which the evidence should be excluded is where there is inexcusable delay and the only way the Court could fairly entertain the evidence would be by adjourning the trial. As stated earlier the delay in filing the applications for relief is almost three months. The applications were made on the eve and on the date of the trial. The trial would have to be adjourned.

[18] Learned Counsel for the Claimants referred the Court to the case of **St. Bernard v The Attorney General of Grenada et al** Grenada High Court Civil Suit No. 84 of 1999.

[19] In the **St. Bernard** case the Case Management Order was made in October 2002 and the parties were ordered to file and serve witness statements on or before the 3rd day of March 2004 and trial was scheduled for the 24th day of March 2004. The Claimant filed his witness statements on the 21st day of April 2004 and his witnesses statements were filed on the morning of the trial. No application for relief from sanction was sought by the

Claimant and Counsel for the Defendants referred the Court to Rule 29.11. The Court in refusing to grant permission to call the Claimant to lead evidence stated at paragraph 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 there would need to be vacated to accommodate late compliance that had been permitted upon late application."

[20] Learned Queen's Counsel also referred the Court to the overriding objectives of CPR 2000 as outlined in Part I. In the case of **The Treasure Island Co et al v Audubon Holdings Ltd et al** BVI Civil Appeal No. 22 of 2003 the witness statements were to be filed on or before the 25th day of July 2003 but by agreement of the parties Audubon Holdings Ltd witness statements were not filed until August 1, 2003 which was three months before the scheduled trial date in November 2003. On the date of trial the Appellants made an objection to the Respondent witness statements. The objection was overruled and the Appellants appealed. In dismissing the appeal Chief Justice (Ag.) Saunders as he then was stated at paragraph 24:

> "Although I have distinguished the case of Vinos this is not to say that these cases do not contain certain 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 flaunt the rules and then ask for the Court's mercy by invoking the overriding objective. I completely adopt Mr. Bennette's submission that the overriding objective does not 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 upon it interprets any provision on which 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:

> 'Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain seem what they do not mean, nor that the plain meaning should be ignored.'"

[21] Rule 26.8 gives the Court a discretion to grant relief from sanction. The Court must seek to give effect to the overriding objectives when it interprets the provisions of Rule 26.8 and exercises the discretion granted.

[22] Having considered the provisions of Rule 26.8 I find that the applications were not made promptly. There was inordinate delay on the part of the Applicants/Defendants. The applications were made almost three months after the time expired. On the eve of the trial in the case of the Applicant/Second Defendant and on the day of the trial in the case of the Applicant/First Defendant. Learned Queen's Counsel who appears for the Applicant/Second Defendant is sitting as a Magistrate in this jurisdiction. An application for relief from sanction is a matter which could be dealt with by Junior Counsel. The explanation given by the Defendants for failure to comply with the Order were not good explanations. The Applicant/First Defendant had to be taken to see his counsel by the Applicant/Second Defendant, while the Applicant/Second Defendant's counsel Learned Queen's Counsel is serving as a Magistrate in this jurisdiction the Applicant/Second Defendant provided no evidence to show the period he was out of the country, whether he made efforts to contact his counsel while he was away or when he tried to contact his lawyer while in the country.

I adopt the statement of Justice Barrow (Ag.) as he then was in the **St. Bernard case** at paragraph 14:

"The excuse that Chambers have been unable to contact the clients 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."

At 8:50 a.m. on July 28, 2005 I was provided with a copy of a witness statement of the Applicant/First Defendant which was filed on the 27th day of June 2005 at 3:10 p.m. and a witness statement of James Arthur a witness on behalf of the Applicant/Second Defendant which was filed on the 27th day of June 2005 at 3:55 p.m.

While the Applicants have indicated through their counsel that the witness statements are now ready to be filed and served if relief is granted the trial date would have to be vacated. The reasons for failure to comply were due mainly to the litigants themselves, their unavailability to meet with their counsel.

[23] The Applications for relief from sanctions are denied. Costs shall be costs in the cause.

.....

Gertel Thom
HIGH COURT JUDGE