GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.22 OF 2005

BETWEEN:

BRADFORD NOEL

Appellant

and

FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Gerard Farara, QC with Mr. Ian Sandy and Claudette Joseph for the Appellant
Mr. Anthony Astaphan, SC with Mr. Trevor St. Bernard for the Respondent

---

2006: February 21;
April 13.

JUDGMENT

[1] GORDON, J.A.: By Notice of application dated 4th October 2005 (hereafter "the First Application") the respondent, as applicant, applied to the court for an order that it be given permission to serve a witness statement for Robert Weir and be given permission under Civil Procedure Rules 2000 (hereafter CPR) Part 29.11 to adduce the said evidence at the trial and to call Robert Weir to give oral evidence and be cross-examined. The grounds advanced for the grant of the order all related to the relevance of Mr. Weir's proposed evidence. No reason was disclosed as to why leave was required nor was the application accompanied by an affidavit in support. The application was heard on the 14th October 2005 and

the learned trial judge ruled that the application before the court was flawed. According to the judge's notes the proper application should have been an application for relief from sanctions pursuant to Part 26.8 of CPR and further as no affidavit evidence was filed no satisfactory reason had been advanced for the failure to file and serve the witness statement of Mr. Weir.

[2] On 18th October 2005 the respondent filed another Notice of application (hereafter "the Second Application") this time applying for an order under CPR Part 26.8 and/or 29.11 giving the respondent relief from the sanction in Part 29.11(1) and giving the respondent permission to call Mr. Weir. This Second Application was accompanied by an affidavit sworn by Trevor St. Bernard, Junior Counsel for the respondent. In that affidavit it was revealed, for the first time, the circumstances in which the court was being asked to exercise its discretion.

[3] The learned judge allowed the second application and the appellant has appealed against that decision.

[4] The principal ground of appeal is that the learned judge erred in law in holding that the issue of estoppel did not arise with respect to the Second Application notwithstanding that the learned judge had dismissed the First Application.

[5] A suitable starting point would be to reproduce CPR Parts 26.8 and 29.11 for ease of reference:

> "26.8 (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.

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, 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."

[6] Learned Queen's Counsel for the appellant commenced his argument by reference to the well known and much used Henderson v Henderson[1] and in particular to the statement of the rule against re-litigating an issue that has already been litigated or might have been litigated in proceedings which have taken place. Learned Queen's Counsel then referred the Court to Fidelitas Shipping Co ltd v V/O Exportchled[2] wherein Diplock LJ stated:

> "In the case of litigation the fact that a suit may involve a number of different issues is recognized in the Rules of the Supreme Court which contains provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue.

[1] (1843-1860) All ER 378
[2] [1966] 1 QB 630

> They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application would only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence"

[7] I am of the view that the short answer to the appellant's point lies in the arguments laid before the learned trial judge by learned Counsel for the appellant on the hearing of the First Application as appears from the judge's notes of evidence which I reproduce hereunder:

> "Critical issue is no affidavit evidence has been adduced in support of the application. No evidential basis so Court cannot exercise any discretion in the Applicant's behalf.
>
> The Defendant's application is fundamentally flawed. They have sought permission to introduce the witness statement of Mr. Weir before first applying for relief from sanction.
>
> At Case Management Conference parties were ordered to file and serve witness statements by 23rd September, 2005.
>
> Defendant has failed to comply in respect of Mr. Weir's statement which they are now attempting to put in.
>
> Refers to Part 29.11 of the CPR.
>
> The application should be one for relief from sanction pursuant to 26.8. It must be made promptly, 26.8(1). It must be supported by evidence on affidavit. No affidavit evidence is before the Court. Court cannot exercise any discretion under 26.8(2). The application to introduce Mr. Weir's statement should be dismissed.
>
> Before one approaches the Court for permission one must seek relief from sanction pursuant to 26.8."

It is perfectly clear that what learned Counsel was urging, and he was successful, was that the application, as it stood, was wrongly conceived. The ruling of the learned trial judge on that First Application adopted the position of learned

Counsel for the appellant in the First Application. The note of his ruling reads, in part, as follows:

> "Ruling
> The application before the court is flawed. The proper application should have been one for relief from sanction pursuant to Rule 26.8 supported by affidavit evidence. That has not been done in the present case. No affidavit evidence is led. No satisfactory reason advanced for failure to file and serve witness statement of Mr. Weir. The application is accordingly dismissed."

[8] In other words, the application considered and rejected by the learned trial judge (the First Application) was in both substance and form fundamentally different from that which he granted (the Second Application).

[9] In Johnson v Gore Wood[3] Lord Bingham said the following, which I find to be most helpful:

> "…and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not… Whilst the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

[10] In the circumstances of this case I do not find that the Second Application was an "unjust harassment of a party". In my view this ground of appeal fails.

[3] [2002] 2 AC 1

[11] The second ground of appeal is that the learned judge erred in law and/or in fact in holding that there was no prejudice to the appellant in allowing the introduction of the witness statement by Mr. Weir. The learned judge found that the statement of Mr. Weir did not introduce any new evidence that had not been before the court in interlocutory proceedings and on that basis held that there would be no prejudice to the appellant. Much of the appellant's argument on this ground of appeal is related to the credibility of the statement. I have no doubt that such argument will be renewed at the trial of this matter, which is the more appropriate time. I find no merit in this ground.

[12] The third ground of appeal was that in allowing the respondent to file the witness statement of Mr. Weir the trial judge failed to have regard for the provisions of Part 29.7. Part 29.7 reads as follows:

> "Procedure where one party does not serve witness statement by date directed
>
> 29.7 (1) This rule applies where –
>
> (a) one party (the "first party") is able and prepared to comply with the order to serve witness statements; and
>
> (b) the other party fails to make reasonable arrangements to exchange statements.
>
> (2) The first party may comply with the requirements of this Part by –
>
> (a) filing the witness statements In a sealed envelope at the court office by the date directed; and
>
> (b) giving notice to all other parties that the witness statements have been filed.
>
> (3) Statements filed pursuant to paragraph (2) must not be disclosed to the other party until the other party certifies that the witness statements or summaries in respect of all witnesses upon whose evidence the other party intends to rely have been served."

As I understand the argument of the appellant once a party fails to file a witness statement on time and the procedure proposed by Part 29.7 is not used by the other party, then the first party should forever be barred from filing a witness statement. In

Mealy Horgan Plc v Horgan[4] it was held that where a party serves a witness statement after the time specified for service has expired it will generally be unjust to exclude the party from adducing the evidence at trial save in very rare circumstances, for example where there had been a deliberate flouting of court orders or inexcusable delay such that the only way the court could fairly entertain the evidence would be by adjourning the trial. Reflection leads to the conclusion that the alternative could easily lead to injustice and make CPR an unwilling accomplice. This I have no doubt was not the intention. This ground of appeal also fails.

[13] The final ground of appeal was against the order of the learned trial judge, having granted the Second Application, that costs be costs in the cause. CPR Part 65.11 (3) states that unless there are special circumstances the court must order the applicant to pay the costs of the respondent in any application for an extension of time for doing any act under an order of the court. The learned trial judge has adverted to no special circumstances and so this court is entitled to exercise its discretion de novo. There were no special circumstances urged either in argument by Counsel for the respondent in the court below, nor was there any mention of such in the affidavit accompanying the Second Application. In the circumstances that part of the trial judge's order is varied to read that costs of the application at first instance be costs to the respondent (applicant) in any event.

[14] The appeal is dismissed with costs to the respondent and the order of the learned trial judge is confirmed save to the extent varied by paragraph 13 above.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[4] The Times July 6, 1999