

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. SVGHCV2005/0292

BETWEEN:

PRINCESS MARGARET DIAMOND

Claimant

AND

THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL
SUPERINTENDENT OF POLICE
ELLSWORTH HACKSHAW
SERGEANT 452 WENDELL DIAMOND
SERGEANT 340 JOEL BARNUM
CONSTABLE 437 GARY HORNE
CONSTABLE 384 STIDUSS SOLOMON

Defendants

Before:

Master Cheryl Mathurin

Appearances:

Ms Nicole Sylvester for the Claimant

Mr. Emory Robertson for the Defendants

2007: July 11th, 24th

RULING

- [1] **MATHURIN, M:** On the 11th July 2007, I entered judgment for the claimant (Ms Diamond) in this matter with damages to be assessed. I have reduced to writing my reasons for so doing.
- [2] Ms Diamond was originally unrepresented in this matter in June 2005 when she filed a Notice of Motion against these defendants that her constitutional rights had been infringed.

The Learned Judge clearly decided to treat this matter as a Fixed Date Claim. The respondents never formally acknowledged the Claim but at the first hearing before Justice Gertel Thom on the 7th June 2005, Mr. Andrew Cummings and Mr. Emery Robertson made representations to the Court that they were seeking to have the claim dismissed on the ground that the Claimant had not given notice to the Defendants in accordance with the Public Officers Protection Act Cap 209. Ms Nicole Sylvester as President of the Human Rights Association was invited to appear amicus on behalf of the Claimant. Following submissions and a hearing, Justice Thom dismissed the application of the Defendant with costs of \$1,500.00 to the Claimant and delivered her decision in the matter on the 2nd December 2005.

- [3] The matter was never set down for first hearing. On the 7th February 2007, Ms Diamond applied for the payment of the outstanding costs by the 15th February 2007. The application was heard and determined by Master Cottle as he then was and he ordered that the costs be paid by the 23rd March 2007 and set it down for case management to the 15th May 2007.
- [4] On the 15th May 2007, Mr. Robertson appeared for the fourth named Defendant and Mr. Cummings appeared for all the other Defendants in the matter. At that hearing it was ordered that the Defendants should enter appearances to the Claim and file Defences on or before the 1st June failing which judgment would be entered in favor of the Claimant. This order was made pursuant to Part 26 Rule 7. The matter was then adjourned to the 15th June 2007.
- [5] On the 15th June 2007, the Defendants had not complied with the order of the Court requiring them to enter Defences and the Court extended the time for compliance to the 29th June 2007. The matter was then adjourned to the 11th July 2007.
- [6] On the 11th July 2007, the Defendants had still not complied with the order of the Court. Mr. Robertson appeared at that hearing with his client and made representations that affidavits in reply had been prepared by the fourth Defendant but had not been filed within the extended time as the fourth Defendant who was a police officer, was extremely busy with his duties at that time of the year and had been unable to do so. He urged the Court to further extend the time in accordance with Part 26 Rules 8 and 2(k). There was no appearance for any of the other defendants and no application to vary the case management sitting on that day before the Court.
- [7] I was dissatisfied with the representations of Counsel and chose not to exercise my discretion in extending the time any further on several grounds.
- (a) The Defendants were all aware of the hearing of the 11th July 2007 but had never made an application in accordance with Part 26 Rule 8 which requires an application for relief from sanctions imposed for failure to comply with an order to be made promptly and to be supported by evidence on affidavit. The requirements are mandatory.
 - (b) Rule 2(k) which gives the Court the power to extend the time for compliance even if the application for extension is made after the time for compliance has passed,

has to be read subject to the mandatory provisions of Rule 8 i.e. requiring evidence to be given by affidavit.

- (c) The evidence on affidavit must satisfy the court that the failure to comply was not intentional, that there was a good explanation for the failure and that the party in default has generally complied with all other relevant rules or orders.
- (d) The non compliance of the Defendants was a flagrant violation of the expeditious nature of a fixed date claim which was filed in June 2005 with the decision on the preliminary point being delivered in December 2005, over 18 months ago.

[8] In the event that I was wrong in requiring the mandatory provisions of Rule 8 to be necessary for the application to extend time for compliance, it was my opinion that the Defendants had shown scant regard for the orders of the court and for the rules generally regarding the claim. The Defendants over a period of one and a half years never defended the claim, Ms Diamond had to apply to the Court for payment of the outstanding costs and they had further not complied with the order of the Court to file defences on two separate occasions. I would venture that Ms Diamond's claim has never been given the regard it merits.

[9] I am guided by the words of Barrow J. in **Nevis Island Administration v La Corpropiete Du Navire J31 et al**; Saint Christopher and Nevis Civil Appeal No. 7 of 2005

"It was emphasized that the discretion to extend time was unfettered.¹⁰ In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief under the rules is distinctly fettered and, it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1)."

...

There are mandatory conditions imposed by this rule. It is stated in sub-rule (1) that the application must be made promptly and it must be supported by an affidavit. The application, in this case, satisfies both of these requirements. In sub-rule (2) a strict fetter is imposed upon the court's discretion – the court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default has generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfies the court that the failure to comply was not intentional, there is a good explanation for the failure and the applicant has been generally compliant."

[10] The words of Barrow J are further instructive in the case of **J.R. O'Neal and G.A. Cobham Limited v Cliff Williams** British Virgin Islands Civil Appeal No 10 of 2006.

"...the policy upon which rule 26.8 rests, is that relief from sanction is to be granted as a matter of discretion and that there are conditions that must be satisfied. This is why the rule is framed in terms that the court may grant relief only if it is satisfied that the conditions are met. These are not judge made conditions, which are sometimes open to complaint that they are unsettled, but are legislated conditions, which are settled and certain."

[11] Counsel for the fourth Defendant ventured further that the court did not have the jurisdiction to enter judgment in this matter as it was a fixed date claim. This posture is no doubt following the provisions of Part 12 Rule 2 which provides that;

“A claimant may not obtain default judgment if the claim is –

- (a) a claim in probate proceedings;
- (b) a fixed date claim; or
- (c) an admiralty claim in rem”

The submission of Counsel is, in my opinion, misconceived. The judgment in this matter is not one in default but it is one pursuant to the Defendants' noncompliance with the orders of Court and as such, those provisions would obviously not apply.

[12] In summary, the order of the Court made on the 11th July 2007 is that Judgment is hereby entered for the Claimant with damages to be assessed upon application.

**CHERYL MATHURIN
MASTER**