SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.29 OF 2007

BETWEEN:

IRMA PAULETTE ROBERT
qua Administratrix of the Estate of
her minor son JERMAL aka JAMAL ROBERT [deceased]

Appellant

and

1. CYRUS FAULKNER
2. THE ATTORNEY GENERAL OF SAINT LUCIA

Respondents

Before:
The Hon. Mde Ola Mae Edwards — Justice of Appeal [Ag.]

On written submission of Mr. Peter Foster for the Appellant

2007: October 25

JUDGMENT

[1] **EDWARDS JA [AG.]:** This is a procedural appeal under CPR 62.10. The claimant, Ms. Irma Paulette Robert, obtained leave from this court on the 16th August 2007, to appeal the order of a Judge in the High Court made on the 12th July 2007. The learned judge refused to grant an application for relief from sanction for failing to exchange and file witness statements by the 30th March 2007.

Background

[2] The claim in this matter was filed on the 24th May 2006. The claimant alleged that her deceased 12 year old son, died whilst in the custody, care and control of the

defendants at the Boys Training Centre on the 25th November 2005. He had been locked in a cell when a fire broke out, causing him to be asphyxiated and burnt. The claimant alleged that the defendants owed a duty of care to the deceased and were in breach of that duty. The claimant's case also relies on the doctrine of Res ipsa loquitur.

[3] The defence filed denies negligence, and pleads undisputed facts including that the deceased had been placed in confinement due to disruptive behaviour, and that he had been searched and nothing was found on his person prior to being placed in the cell with his mattress.

[4] On the 25th July 2006, case management directions were given. The order required witness statements to be exchanged and filed by March 30, 2007. The order scheduled the trial date for the 3rd December 2007.

[5] The respondents, having filed their witness statements in an envelope in a timely manner, failed to give notice of filing to the appellant's Solicitor or attempt to exchange witness statements with him. The appellant's solicitor, Mr. Colin Foster through inadvertence and disruption in his office among other reasons, failed to file and serve the witness statements he had prepared, on the respondents' solicitors by the 30th March 2007.

[6] On the 6th July 2007, Counsel Mr. Colin Foster discovered that the witness statements had not been filed and exchanged while reviewing his court schedule for the following week. He immediately filed an application for relief from sanction along with the witness statements for the claimant.

[7] In his Affidavit in Support of the Application for Relief from Sanctions, Mr. Colin Foster deposed: "That due to urgent court matters both in the Criminal Courts Magisterial and High Court Division and urgent matters in the civil jurisdiction and due to severe disruption suffered at our Chambers at 42 Micoud Street, Castries

due to termite infestation in which ceilings and floors and partition of our Chambers had to be dismantled and rebuilt and due to side walk restoration in which the cement mixer was placed and operated outside our entrance with inconvenience thereof and noise thereof business was not as usual and in the premises, notwithstanding a firm commitment to the said Court Order of 25th July, 2006 our Chambers were not able to meet the date for the filing of the Claimant's witness statements. In addition thereof there were several attempts made to see the Claimant but all such appointments were either cancelled for the reasons given above or due to the Claimant's own inability to attend our Chambers."

[8] The application came before His Lordship, Justice Cottle on the 12th July, 2007 who made the following order:

(a) "Under CPR 26.8(2)(b) the explanation offered in the affidavit of Counsel is not a good explanation. Court is unable in the circumstances to grant the application for Relief from Sanction. Court also notes that this application cannot be described as prompt although the explanation for delay appears to have some merit. Application for Relief from sanction not granted."

[9] It is well settled that in exercising its jurisdiction as a reviewing body when the exercise of a judge's discretion is challenged, the court will not allow an appeal, "unless the appellate court is satisfied: (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations; and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[10] In **David Shimeld and Others v Doubloon Beach Club Limited**,[1] Rawlins J.A. referring to the explications of Sir Vincent Floissac in **Michel Dufour**[2] on this appellate approach stated[3]:

> (a) "The learned Chief Justice pointed out that the first condition was explained by Viscount Simon L.C in **Charles Osenton & Co v Johnson**[10 [1941] 2 All ER 245 at 250], who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellate tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. However, if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order and an appeal may be justified. The Chief Justice further noted that the second condition was explained by Asquith L.J in **Bellender** (formerly **Satterthwaite v Satterthwaite**[11 [1948] 1 All ER 343 at 345] in language which was approved and adopted by the House of Lords in **G v G**[12 [1985] 2 All ER 225]. Asquith L.J stated that it is of the essence of judicial discretion that on the same evidence 2 different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is plainly wrong, that an appellate body is entitled to interfere."[6]

[11] Since the advent of the CPR it has been stressed further "that this Court should not interfere with case management decisions made by a Judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."[4]

[12] Having considered the grounds of appeal and written submissions on the 15th September 2007, I allowed the appeal and reversed the learned judge's order for

[1] Civ. App. No 33 of 2006
[2] Michael Dufour and Others v Helenair Corporation Ltd. (Civ. App. No. 4 of 1995), paragraph 4
[3] At paragraph 15 of the judgment
[4] Royal Alliance Insurance Plc & Another v. T& N Ltd. [2000] EWCA (Civ) 1964, paragraph 38

reasons to be subsequently given. I made an order granting relief from sanction on terms that the witness statements were to be filed and exchanged within 7 days from the 17th September 2007. I remitted the matter to the High Court for further case management where necessary before the trial date, which had been rescheduled to the 4th October 2007. I also made no order as to costs before the court below or this court, provided the order is complied with. I now give my reasons for having allowed the appeal.

The Rules

[13] Counsel for the Appellant relied on CPR 29.11, 26.7(2), 26.8, 29.7, 1.1 and 1.2 in his submissions.

[14] CPR 29.11 specifies the consequences of failing to comply with a Court Order or direction for the filing and exchange of witness statements. It states:

> "(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.
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> (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] CPR 26.7(2) provides that:

> "If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from sanction, and rule 26.9 does not apply."

(2) It is my view that this provision is not relevant in the present case since, although the Court Order specified the time for exchange and filing of witness statements, it is not the Court Order but CPR 29.11(1) that specifies the consequence or sanction for non compliance. CPR 26.7(2) relates to a Court Order or Rule which states the time for doing an act and that Order or Rule also specifies the consequences

[16] The principles governing the exercise of discretion when the Court is considering applications for relief from sanctions are set out in CPR 26.8(1), (2) and (3). These Rules provide:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-
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> (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.
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> (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;

[17] The overriding objective of CPR 2000, according to CPR 1.1(1) and CPR 1.1(2), states, that the Court deals with cases justly by: (a) ensuring, so far as is practicable, that the parties are on equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate to the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party; (d) ensuring that the case is dealt with expeditiously, (e) allotting to the case an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

[18] CPR 1.2 requires the Court to seek to give effect to the overriding objective when it exercises any discretion given it by the rules or interprets any rule.

[19] In **Vinos v Marks and Spencers**[5] Lord Justice Peter Gibson referring to the

[5] [2001] 3 All ER 784 at 791g-h

English CPR with provisions similar to our CPR 1.1 and 1.2 stated:

> "The Court must seek to give effect to that object when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word "seek" acknowledges that the Court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the Court may be unable to give effect to what it may otherwise consider to be the just way of dealing with the case..."

[20] Learned Counsel Mr. Peter Foster relied on the Judgment of Saunders J.A. in **The Treasure Island Company and Another v Audubon Holdings Ltd and Others**[6] in advancing his submissions for Ground 5 of the appellant's Grounds of Appeal.

[21] At paragraph 24 of the judgment, Saunders J.A. pointed out that: "… 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…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 L.J stated in **Vinos**[7] Page 789 at Letter J , "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."

The Grounds of Appeal

[22] Grounds 1 to 5 of the appellant's grounds of appeal were that the learned Judge erred-

(1) in law in finding that the application was not made promptly, and failed to consider the undisputed fact that Mr. Colin Foster had filed the application for relief from sanctions as soon as he realized that the witness statements were not filed;

[6] Civ. App. No 22 of 2003

(2) in finding that there was no good reason for failing to comply with the case management order as this was against the weight of the evidence;

(3) when he found that the appellant did not have a good explanation for the delay in filing witness statements, yet found that there was merit in the reasons for the delay in filing, the application for relief from sanctions;

(4) when he failed to consider the respondents' failure to comply with the Order of 25th July 2006 and or seek relief from sanctions when they failed to exchange witness statements with the appellant;

(5) when he failed to deal with the case justly in accordance with Part 1.2 (a) and (b) of CPR 2000.

[23] The other 2 grounds of appeal were: (6) that the learned judge was wrong in principle for failing to grant the application for relief from sanctions and or permission to call his witness at trial and exceeded the generous ambit within which reasonable disagreement is possible; and (7) that the Judge's decision is against the weight of the evidence and cannot be supported. The Order granting leave required the respondent to file and serve an affidavit in opposition on or before the 10th August 2007, and skeleton arguments by 31st August 2007. The Court requested the parties to ask the Registrar of the High Court to request the judge to provide a minute or memorandum of his decision for assistance of the Court if there is a dispute as to the terms or premises of the judge's order. In the absence of any submissions from the respondents or the judge's memorandum of his decision I determined the appeal.

The Submissions and Conclusions

[24] Counsel, Mr. Peter Foster submitted that the application was indeed prompt in view of the circumstances and the explanation proffered for the failure to file the witness statements. He argued that in determining the promptness of the application for relief from sanctions the learned judge ought to have considered

the explanation for the failure to comply with the Court order, the time when the Claimant's Solicitor discovered that the witness statements had not been filed and exchanged, and the date when the application was filed. Mr. Foster contended that in the circumstances of this case, having regard to the undisputed facts that were before the Court for the judge's consideration, the application could not have been any more prompt, in light of judicial statements in **Sayers v Clarke Walker**.[7]

[25] In **Sayers** the Court of Appeal held[8] that when considering whether to grant an extension of time for an appeal against a final decision in a case of complexity, the Courts should have regard to the check-list in Rule 3.9(1) of the English CPR which states:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including-
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> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party."

[26] In considering the merits of the application, having regard to the Rule 3.9(1) English CPR check-list, Lord Justice Brooke stated:

> "The application for relief (item (b) was not made promptly in the strict sense, in that the time for appealing the order made on 12 October

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[7] [2002] 1 WLR 3095, paragraph 26

[8] At paragraph 21

expired on 26 October, and the application for an extension of time was not made until 20 December. However, in the peculiar circumstances of the present case it was made very soon after the defendants' solicitors received notice of the deputy master's direction on 17 December."

[27] Appellant's Counsel has relied on this judicial statement in **Sayers** as authority for saying that awareness of non-compliance is highly significant in determining promptness. While I agree with this proposition, in my respectful opinion, the finding of the learned judge that the application cannot be described as prompt within the context of the learned judge's order, must be placed in its proper legal perspective.

[28] In this case the learned judge did not deliver written reasons for his decision. All that is before this Court is the Order that the Judge made which contains 3 findings, from which the Court may infer from the way the learned judge has decided, whether he must have gone wrong in one respect or the other, having regard to the applicable principles.

[29] The Order discloses that the learned judge made no finding for the other 2 mandatory criteria under CPR 26.2(a) and (c). Neither does it demonstrate that the learned judge had regard to the factors in CPR 26.8(3) against the background and in the context of the overriding objective, in considering whether to grant relief or not. Having regard to the English authorities of **Woodhouse v Consignia**[9] **and RC Residuals Ltd. v Linton Fuel Oils Ltd**[10] the learned judge should have carried out the necessary balancing exercise methodically and explained how he reached his ultimate decision. In my view, the learned judge's order promotes speculation, giving credence to Learned Counsel's submissions in support of grounds (2) and (6) of the Grounds of Appeal.

[30] Having regard to the affidavit of Mr. Colin Foster which supported the application for relief from sanctions, I endorsed the submissions of Mr. Peter Foster that the

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[9] [2002] 1 W.L.R 2559

decision of the learned judge reveals internal contradiction, based on his finding that the explanation for delay appeared to have some merit, yet the explanation offered in the affidavit of counsel is not a good explanation.

[31] The learned Judge's Order, in my view, compels the inference that he must have taken into account and given significant weight to his finding that the application was not made promptly, in arriving at his conclusion that the explanation of Mr. Colin Foster was not a good explanation.

[32] Learned Counsel, Mr. Peter Foster's submissions concerning the promptness of the application, has elevated the Judge's finding that the application was not made promptly, wrongly, in my view, ascribing to it the status of a mandatory criterion under CPR 26.8(2). The provisions under CPR 26.8 (2) and (3) were designed to encourage structured decision making by the Court in the exercise of its case management discretionary powers to grant relief from sanctions. In **Dominica Agricultural and Industrial Development Bank v Mavis Williams**[11] [delivered 18th September 2006] Barrow J.A. gave guidance as to the manner in which a Court should approach the task of applying CPR 26.8 (1), (2) (3) for applications for relief from sanctions. Barrow J.A. said at paragraphs 19 - 21: "…..Rule 26.8 ordains that the sanctions imposed for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down…under rule 26.8 (2), the Court may not grant relief from sanction if the failure to comply was intentional…Under our rules the consequence of intentional non-compliance is more than a matter of likelihood; intentional non-compliance is fatal."

[33] In **Richard Frederick v Owen Joseph and Others**[12] Rawlins J.A. a single judge considering an application for leave to amend the Notice of Appeal for extension of

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[10][2002] 1 W.L.R 2782
[11] Civ. App. No. 20 of 2005
[12] Civ. App. No. 32 of 2005 (October 16, 2006) (unreported)

time to file and serve the Record of Appeal, stated[13]:

> (b) "Rule 26.8 (1) (a) is in imperative terms. It requires an application for an extension of time to be made promptly. I have found that the present application was not made promptly and that the explanation for the delay is unconvincing. Rule 26.8(2) which states the only criteria on which the Court may grant relief for non compliance is compendious. The Court may only extend time if all criteria are satisfied.

[34] It is important to note that our CPR 26.8(1)(b) establishes no criterion for granting an application for relief from sanctions, unlike Rule 2.9(1) (b) of the English CPR. CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanction promptly. Any such sanction would have to be created by a court order or other rule. CPR 26.8(1) does not preclude the Court from hearing an application for relief from sanction that has not been made promptly. In such a case it appears that CPR 26.9 would be applicable. CPR 26.9 states that where the consequence of failure to comply with a rule has not been specified by any rule, the failure to comply with a rule does not invalidate any step taken in the proceedings unless the Court so orders, and the Court may make an order to put matters right on or without an application by a party, bearing in mind, of course, the overriding objective in CPR 1.1. and 1.2 which the Court must seek to give effect to.

[35] CPR 26.1 (2) (w) also states that the Court may take any steps, give any direction or make any other order for the purpose of managing a case and furthering the overriding objective.

[36] In the absence of any order invalidating an application for relief from sanction that has not been made promptly, the Court may proceed to determine the application on its merits in my view, based only on the mandatory criteria established by CPR 26.8(2), and having regard to the factors prescribed in CPR 26.8(3), while seeking to give effect to the overriding objective.

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[13] At paragraph 20 of the judgment

[37] Unlike Rule 3.9(1) of the English CPR, our CPR 26.8(2) and (3) do not require the Court to "consider all the circumstances including" the factors stipulated in CPR 26.8(3). In my view the absence of the words "all the circumstances including" in CPR 26.8(3) confines the Court to have regard to only the factors listed in CPR 26.8(3) (a) to (e) when considering applications for relief from sanctions.

[38] Since CPR 26.8(3) does not direct the Court to have regard to whether or not the application has been made promptly in considering whether to grant relief, the learned judge seemingly erred by taking into account his finding that the application had not been promptly made when deciding not to grant relief from sanctions.

[39] In all the circumstances I concluded that in the exercise of his judicial discretion the learned judge erred in principle by taking into account and being influenced by irrelevant considerations. I also concluded that the learned judge erroneously exercised his discretion by failing to give any weight to relevant considerations under CPR 26.8(2) (a) and (c), CPR 26.8(3) and the overriding objective under CPR 1.1 and 1.2. I therefore allowed the appeal.

[40] Section 28 (1) of the Eastern Caribbean Supreme Court (Saint Lucia) Act[14] states that:

> "On the hearing of an appeal from any order [of] the High Court in any civil cause or matter, the Court of Appeal shall have power to-
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> (c) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further order or other order as the nature of the case may require;
>
> (d) draw inferences of fact;

[14] Cap. 2.01 (2001 Revised Laws of Saint Lucia)

[41] CPR 62.20 (1) states that "in relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26."

[42] Based on my conclusions at paragraphs 38 and 39 above, I was therefore entitled to interfere with the Judge's order, set it aside, and exercise my discretion afresh, having regard to the relevant factors under CPR 26.8 (2) and (3), and against the background and in the context of the overriding objective.

Fresh Exercise of Discretion

[43] There was no evidence that the appellant had intentionally failed to comply with paragraph 3 of the case management order entered on the 4th September 2006.

[44] The appellant seemed to have generally complied with the other relevant directions although standard disclosure took place in an untimely manner on the 19th January 2007 instead of on the 29th December 2006. I noted that the respondents' disclosure was also untimely, having taken place on the 23rd January 2007.

[45] I agreed with the learned Judge that Mr. Colin Foster's explanation for delay or non-compliance with paragraph 3 of the relevant order, has merit. In the absence of any evidence that there was deliberate flouting of or flagrant disregard for the Order, I regard the explanation as a good one.

[46] The claimant's failure to comply advances the defendants' case, to the detriment of Ms. Robert. If the claimant is not granted Relief from Sanctions she will be unable to prove her case. She would then have no real prospects of succeeding on the claim. Under CPR 15.2 (a) and CPR 26.1 (2) (i) her claim would more than likely be dismissed with costs to the defendants. The consequences would be very grave for the claimant. This would shut her out from the seat of justice.

[47] The interests of the administration of justice dictated that this case be determined on its merits. In this case, both sides had breached the rules and the case management order. To date, the respondents had not served their witness statements on the claimant or given the required notice to the claimant under CPR 29.7 (2) (b). It would, in my view, be unjust to prevent the claimant from adducing evidence at trial in circumstances where the trial date could have been met. The non compliance was not intentional, the defendants were also in breach of the Rules and Court Order, and the defendants would not be significantly prejudiced where the claimants were allowed to serve the witness statements filed within a reasonable time before the trial date. I also took into account the fact that the case presented issues of public importance concerning the duty of care owed by the State to its wards in Public Institutions, Places of Safety and, more particularly, in the Boys' Training Centre.

[48] The failure to comply had partially been remedied with the filing of the claimant's witness statements on the 6th July 2007. There was still sufficient time for the witness statements to be exchanged before the trial date which had been rescheduled for the 3rd October 2007.

[49] The failure to comply was mainly due to the claimant's solicitor. It was obvious to me on the 15th September when I granted the Relief from Sanction that the trial date could still be met.

[50] Having weighed all of these matters in the balance, I concluded that the appellant should be granted relief from sanction so as to ensure that the parties are on equal footing on the day of trial. I accordingly made an order on the terms previously stated.

[51] Although the Appellant was the successful party in this appeal, the nature of the order which was the subject of the appeal was taken into account in making no

order as to costs. CPR 65.11(3) creates the exception to the general rule that the successful party should be awarded costs, by providing that an applicant who has made an application to extend the time specified for doing any act under a court order, or who is applying for relief from sanction under rule 26.8 must pay the costs of the Respondent unless there are special circumstances. The absence of any indication that the Respondents were present or actually participated in the hearing on the 12th July, 2007, provided, in my view, the special circumstances for making no order as to costs in the Court below. The Respondents did not appear or participate in the appeal.

Ola Mae Edwards
Justice of Appeal [Ag.]