THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)

CLAIM NO: SKBHCV 1993/0084

BETWEEN:

WYCLIFF H. BAIRD **Applicant**

V

DAVID COLGAR, PAUL B.COBURN,
CARIBE (REALTIES) CANADA LIMITED/
IMMEUBLES CARIBE CANADA LTEE,
BETTS REALTY LIMITED, S.P.A.S. LIMITED
And FIRST SECURITY BANK OF UTAH **Respondents**

Appearances:

Mr. Terence Byron for the Applicant
Mr. Damian Kelsick for the Respondents

2008: February 15,
April 11

DECISION

[1] **Belle J.** The litigation on this matter goes back to 1993 when the Claimant filed his claim and proceedings were initiated. But this is a matter in which the active parties reside outside of the jurisdiction and communicate with their local counsel from their respective locations. There are witnesses located in and outside of the jurisdiction. Both groups of counsel and solicitors have to deal with these circumstances and obviously have been affected by them. It appears that the matter has also been affected by the changing of political fortunes (if Mr. Baird is to be believed). Governments have changed. At least one individual involved has disappeared. Clearly there have been delays in prosecuting the

matter. In the interim the court introduced new rules and a new way of doing business. Some 7 years after the introduction of the CPR 2000 the parties are having difficulty addressing full compliance. It is with this backdrop in mind that the court proceeds to assess the matter at hand.

[2] On the 19th day of March 2007 the Master made an Order that witness statements were to be exchanged and filed by 11th May 2007. The Master also ordered that witness statements were to stand as evidence in chief and all witnesses were to attend for cross examination unless notified otherwise in writing. It is common ground that the applicant failed to meet the deadline for filing his witness statements. Consequently in accordance with the CPR 2000 and following the decision of the Court of Appeal in Civil Appeal No. 13 of 2007 he was obliged to apply for relief from sanction and for an extension of time in which to file the said witness statements.

[3] On May 24th 2007 the applicant applied for an extension of time to file witness statements for himself and one other witness. He also applied for leave to file 3 additional witness statements. The respondents objected on the hearing of the application, on the grounds that the court could not grant the extension of time because the applicant had not first made an application for relief from sanction and secondly even if he were heard on an application for relief from sanction his default was intentional or deliberate and he had no good explanation, pursuant to Part 26.8 of the CPR 2000 for the failure to file and serve his witness statement in time. The respondent's counsel therefore submitted that the application should be refused.

[4] This court agreed on that application including the evidence adduced at that time that the applicant could not show a good reason for the failure to comply with the Master's Order but the extension of time would be permitted and the sanction imposed would be costs. The respondents successfully appealed against this decision in Civil Appeal No 13 of 2007, the court of appeal holding that the application for an extension of time was a nullity and aught to have been dismissed and that the applicant would first have to make an application for relief from sanction. The applicant subsequently made the required

application for relief from sanction, but the court acting on a preliminary point that the issue of there being no good explanation for the failure to comply with the rules had already been determined by the first decision of the court, dismissed the application. The applicant appealed this decision and the Court of Appeal set aside the court's order dismissing the application on the preliminary point of *res judicata*.

[5] On the second application for relief from sanction and an extension of time in which to file the witness statement which was heard on February 15th 2008 the applicant adduced new facts and argued strongly that he should be relieved from sanction in the circumstances. Among the facts and arguments was the contention that the Master's order of 19th March 2007 was unrealistic. Counsel Mr. Byron opined that this view was voiced by the trial judge in response to a trial window set for the month of June in the middle of the Criminal Assizes in a jurisdiction in which only one judge was available to conduct criminal trials at any time. The result was that the criminal list could not be broken to try a civil case in the month of June and the trial date had to be vacated.

[6] The applicant also argued that the volume of work involved made it difficult to complete the witness statements in time. Indeed time was taken to compile additional witness statements and an apparently voluminous list of documents. Mr. Baird argued in his affidavit of February 13th 2008 that the two things were connected and one could not be done without the other.

[7] Counsel for the applicant argued that the applicant's failure to file the witness statements in time was not intentional and therefore not in breach of Part 26.8 (2) (a) which provides that the court may grant relief only if it is satisfied that the failure to comply was not intentional. Counsel cited the case **Dominica Agricultural And Industrial Development Bank v Mavis Williams,** Civil Appeal No.20 of 2005 where the Appellant applied for relief from sanction for the delay in proceeding with their appeal. In that case the Appellant had stated in its affidavit in support of the application that it was dissatisfied with the judgment but considered that it would be better that the decision whether or not to appeal should await the determination of the assessment of damages. Barrow JA held that even where

"intentional" was defined as "deliberate disregard" the Appellant had some difficulty in escaping the conclusion that the appellant's non-compliance was not deliberate. It did not help either that the appellant had followed its lawyer's advice since the lawyer did not simply fail to take an appropriate step or take an appropriate step without the knowledge of the client

[8] Counsel Mr. Damian Kelsick who said he appeared for the remaining respondents, argued that indeed the applicant had made a deliberate decision not to meet the deadline and that the volume of work involved was not a good reason for the failure to exchange and file the witness statements since the claim was of some vintage, 15 year old, subject to a revival, many previous applications and the claimant of all people should have known his case and the evidence to be adduced at trial by the deadline set by the Master. These points were supported by the affidavit of David Goldgar dated January 28th 2008.

[9] The court has reviewed the facts and finds that as far as the question whether the non-compliance was intentional (deliberate) goes, I think that even though the applicant obviously was advised that he could obtain an extension of the deadline and acted according to that advice, I would not consider that to be a deliberate disobedience of the rule in the sense of being wilful and or acting with intent to delay or frustrate the proceedings. I find that some attempt was made to meet the deadline and these circumstances cannot be compared with those in the **Dominica Agricultural and Industrial Development Bank** decision. As far as the next plank of Part 26.8 is concerned, (2) (b) when considering whether there is a good explanation for the failure to comply I find that even though there are more detailed reasons given than in the first application I still do not think that these reasons amount to a good explanation. In the final analysis I think that the Claimant's counsel erroneously assumed that an extension of time would always be available to his client and so advised the client. This was the real explanation given. The applicant would have to live with the consequences of the decision taken on that advice.

[10] The rules which govern the relief from sanction found in Part 26.8 (1) and (2) of the CPR 2000 not only lay down the conditions that the application for relief from sanction must be made promptly and must be supported by evidence, on affidavit, but also provide that the court may only grant relief 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. The parties did not focus on Part 26.8 (2)) (c).

[11] But Part 26.8 does not end there. It goes on to list a number of things which the court must consider at paragraph (3) as follows,

(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.

[12] I found it somewhat artificial to attempt to separate these rules into categories as they have been expressed, as part of a realistic thought process. I find it impossible to consider promptness without considering the effect of granting relief or not would have on the parties and whether the non-compliance can be remedied within a reasonable time. Indeed the witness statements had been filed and served. I find it impossible to consider the interest of the administration of justice and the effect on the applicant without considering the consequence of refusing to grant relief from sanction if the explanation given by the applicant for his failure is not considered to be a good explanation. But I have to find on the facts that the applicant's failure was due to the advice of his legal practitioner. Finally at this stage I can also state that the applications and the appeals have cost us another trial date and has had an impact on the administration of justice.

[13] I am greatly assisted in my comprehension of the approach to be taken toward Part 26.8 by the writings of one academic scholar, **D.S. Piggott** in the article **Relief From Sanctions and the Overriding Objective,** Civil Justice Quarterly 2005, 24 (Jan) 103-129. In this article Mr. Pigott referred to the guidance in the equivalent English CPR Part 3.9 as the checklist approach. The approach preferred by Mr. Piggott is that the list is to be used for guidance and all of the items are to be considered, but not all of the conditions listed are to be given the same weight. Indeed the English rules provide no guidance as to the weight to be given to the various conditions. But Part 26.8 of the CPR 2000 obviously ascribes greater weight to the conditions found at 26.8 (2) (a) (b) and (c). However the list is not exhaustive. I believe that one may add to the list that if it is unjust in the circumstances to either grant relief or not grant relief then the court should not act unjustly. All of the circumstances must be considered.

14] The court must therefore take into account the effect of Part 1.1, the overriding objective to do justice. But in following Part 1.1 the court must be cognizant of the plain words of the rules and the obligation to impose a normative culture of compliance. All of the cases cited by counsel for the respondents including indeed the decision of Edwards J.A . (Ag) in this very matter in Civil Appeal No 13 of 2007 and the authorities cited therein lead me to this conclusion. Special reference should also be made to the decision of Barrow J.A. in **Nevis Island Administration v La Coppropretе Du Navire** Civil Appeal No.7 of 2005 and the case cited above **Dominica Agricultural And Industrial Development Bank v Mavis Williams.**

[15] In the interim it has been drawn to the court's attention that a remedy may lie in Part 26 .2 (w) which states that except where these rules provide otherwise, the court may take any step, give any other direction, or make any other order as to costs for the purpose of managing the case and furthering the overriding objective.

[16] However I believe that the language in the Part 26.8 is plain. It provides clear guidance as to where most of the weight should be placed in considering any application for relief from sanction. It is not open to the court in spite of Part 26.2 (w) to ignore this plain language

and impose a meaning of its own even if the case appears deserving. Indeed in dealing with cases justly the court must also consider the normative value of compliance or using the opportunities provided by the rules to face the other side in a transparent manner and ask to vary the Master's timetable or, at the very least in the proper circumstances to file a witness summary.

[17] The broad question is whether the applicant has complied with the rules or orders or practice directions. This question is already answered. The second question is what is the appropriate sanction? The court of appeal has held that the appropriate sanction is that pursuant to Part 29.11 the applicant would not be able to call the witness unless he is relieved from sanction. This is a sanction imposed by the rules, which need not be stated in the relevant order.

[18] Part 29.11 (1) states that 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. Part 29 .11 (2) states that the court may not give permission at trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8

[19] Considering all of the matters, which I have discussed above, I am not able to find a basis for granting the applicant relief from sanction. The respondents have made the point that this is a case of some vintage in which both facts and issues ought to have been known to the applicant and his counsel. In that context in light of the rule available for varying the case management timetable before the sanction is applied, namely Part 27.8, the possibility of communicating with counsel for the other side and asking for an agreement to vary the timetable, and or filing a witness summary in place of the witness statement pursuant to part 29.6, and in the absence of something quite unforeseen, the applicant would have no good explanation for failing to comply with the Master's Order.

[20] I should state at this juncture that Counsel for the applicant's apparent grievance that the respondents filed witness summaries and not witness statements in some instances is

misconceived. The fact is that Part 29.6 states that a party who is required to provide and is not able to obtain a witness statement may serve a witness summary instead. This rule provides some relief before sanction is applied, but imposes an obligation to expose the salient facts, which will be adduced in evidence by the relevant witness, in summary.

[21] The applicant is at fault in not complying with the Master's order. He has refused to embrace the normative culture of compliance, even through there were options or opportunities available which provided for him to give the other side some notice of his intention in relation to the witness statements. Indeed it may be argued that the applicant could have got the witness statement filed in time since he was in contact with his lawyer and had produced a draft witness statement by the date of the stated deadline.

[22] In the circumstances the applicant is not granted relief from sanction for failing to comply with the Master's Order of 19th March 2007. I note that the applicant has not pursued his application for an extension of time in which to file his witness statements. But he would not have been permitted such an extension in any event.

[23] The applicant is ordered to pay the respondents' costs of the application to be assessed if not agreed.

Francis H V Belle

High Court Judge