

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2008/005

BETWEEN:

WYCLIFFE BAIRD

Appellant

and

[1] DAVID GOLDGAR
[2] PAUL D. COBURN
[3] CARIBE CANADA LTEE
[4] BETTS REALTY LIMITED
[5] S.P.A.S. LIMITED
[6] FIRST SECURITY BANK OF UTAH

Respondents

Before:

The Hon. Mr. Denys Barrow SC

Justice of Appeal

On written submissions of:

Mr. Terrence V. Byron for the Appellant

Mr. Damian Kelsick of Kelsick, Wilkin and Ferdinand, Solicitors for the Respondents

2008: August 15.

Civil Appeal – Application for relief from sanction for failure to comply with court order – failure to file witness statements in time – whether there was intentional non-compliance – whether there was a good explanation for non-compliance – whether it was appropriate to oppose an application for extension of time - costs -

The appellant (claimant) appealed the refusal of a judge to grant relief from sanction consequent upon his late filing of witness statements, one three days and the other thirteen days late. The explanation the appellant gave was that the time for completing the statements were too short. In his affidavits the appellant gave a very detailed account of the process that was involved in preparing his witness statement. The short version of the

process is that he had 5 banker boxes of documents that related to this litigation. He had to select and organize the documents and make a list, to file and serve as the claimant's list of documents. After complying with the master's order to file his list of documents the appellant and his lawyers were left with 22 days to complete and file his (and the other) witness statement. After compiling the list of documents the appellant then had to attend a number of times on a printing house to have the listed documents copied, collated and bound. The documents comprised 6 bound volumes. By the time this was done the appellant was left with 7 days to complete his witness statement. After obtaining the bound and tabbed volumes, the appellant and his lawyers then had to cross reference his witness statement to the respective volume and tab where each relevant document is to be found. The evidence for the appellant was that his witness statements went through 12 versions before it was finalized and sworn by him. Even after that counsel advised that there was other information that needed to be incorporated so the witness statement had to be further revised. The witness statement contained 105 paragraphs and comprised 30 pages. It contained 45 references to the 6 volumes of documents. On hearing the application the learned judge refused it, stating that while failure to comply was not intentional, there was no good explanation for the failure. On an appeal from that decision.

Held, allowing the appeal, granting the application for relief from sanction, awarding costs of the appeal to the appellant and ordering that each party bears his and its own costs on the application in the High Court for relief from sanction.

- (1) The appellant's witness statement was a model of the proper way to connect a mass of documents to the narrative evidence of a witness. It is hard to overstate the benefit to the trial judge and to the lawyers, the litigants and the trial process of having this done. It takes little imagination to visualize the mind-numbing exercise that would be involved if a judge were left to himself to read and/or skim through 6 volumes of documents, to analyse and identify which documents were relevant to which of 105 paragraphs of a witness statement and then insert the references. As a practical matter it is inconceivable that a judge could do this on his own, before the trial. For a judge to take the time, effort and tolerance to do this cross-referencing in the course of the trial would be the height of inefficiency and mismanagement of litigation. The achievement of this synthesis of documents and testimony was an excellent explanation for the appellant's failure to file his witness statement in time and was of great assistance to the court. The argument in the defendants' affidavit that the appellant could have done his cross referencing to the documents otherwise than by reference to where the documents were located in the bound volumes was misconceived.
- (2) It was wrong for the judge to conclude that the real explanation for the delay was that the applicant's counsel advised him "that an extension of time would always be available" to him. The proper inference which flowed from the stated facts was that counsel advised the applicant at different stages that it was his duty to file a witness statement in proper

form which should include cross references to the volumes of documents and be accurate and complete.

- (3) It is implicit in the grant of relief from sanction for the late filing of a witness statement that the late filing no longer matters. There is no longer a consequence for late filing. Therefore all witness statements and summaries filed by both sides in the proceedings stand as properly filed.
- (4) It was appropriate to depart from rule 65.11(3)(c) which states that where an application is for relief from sanction under rule 26.8 the court must order the applicant to pay the costs of the respondent unless there are special circumstances because, in this instance, there were special circumstances. Firstly, the respondent had also failed to comply with the order to file witness statements by the stated date. Secondly, there was no good reason for opposing the application for an extension of time as the appellant had a good explanation for his non-compliance in the circumstances.

JUDGMENT

- [1] **BARROW, J.A.:** This appeal is from the decision of Belle J dated 11th April 2008 refusing Mr. Baird's application for relief from sanction consequent upon his late filing of witness statements. Mr. Baird is the claimant in a pending High Court claim concerning an uncompleted sale of land. The judge decided that the reasons Mr. Baird gave for not filing witness statements in time did not amount to a good explanation.
- [2] Master Cottle (now Cottle J) had ordered on 19th March 2007 that the parties were to exchange and file witness statements on 11th May 2007. Mr. Baird filed 2 of 4 witness statements on that date; he filed a third witness statement on 14th May and a fourth witness statement (his own) on 24th May 2007. The other side, the defendants, on 11th May 2007 filed a witness summary instead of a witness statement for one witness, David Goldgar, and a witness statement that did not contain a certificate of truth for their other witness, Arthur Sharpe.
- [3] On 1st June 2007 Belle J granted an application Mr. Baird had filed on 24th May 2007 (the first application), by ordering that time be extended to 22nd June 2007 to

file "any documents referred to" in the master's order and that Mr. Baird be permitted to call 8 instead of 5 witnesses. There can be no doubt that order encompassed the filing of documents by both sides; more precisely, that it extended time for the defendants to file witness statements. Subsequent to that order Mr. Baird filed a further witness statement and a witness summary on 22nd June 2007 and the defendants filed a witness statement to replace the witness summary for David Goldgar and a witness statement that contained a certificate of truth for Arthur Sharpe.

- [4] The defendants appealed against the order that Belle J had made extending time for Mr. Baird to comply with the master's order. Edwards JA (Ag.) set aside the order extending time for Mr. Baird to comply and then considered anew and dismissed the first application. The rationale of Her Ladyship's decision was that rule 27.8(4) of CPR 2000 required that Mr. Baird should have applied for an extension of time and should also have made an application for relief from sanctions. Edwards JA held that Belle J had no discretion to grant relief from sanctions on the application that Mr. Baird made or to extend time for compliance with the case management order without Mr. Baird having made an application for relief from sanction pursuant to CPR 27.8 (4) and 26.8 (1).¹ Incongruously, Mr. Baird submitted, the order of Edwards JA left intact so much of the order of Belle J that permitted the other side, the defendants, to file their witness statement and corrected witness statement out of time with no need for them to apply for relief from sanction. It is the fact that Her Ladyship's order made no mention of the documents filed by the defendants, either initially or subsequently but, in fairness, the fact that the order of Belle J also extended time for the filing of documents by the defendants was not in issue on the appeal before Edwards JA and it is not known if either party adverted to it.

- [5] Mr. Baird stated that he and his legal advisers thought it better to make an application to the High Court for relief from sanction rather than appeal the

¹ Judgment in Civil Appeal No 13 of 2007, paragraph [48] (judgment delivered 23 October 2007).

judgment of Edwards JA. Accordingly, Mr. Baird made that application, which Belle J also heard. On the hearing of that application (the second application) the judge considered the criteria for granting relief contained in rule 26.8. The relevant parts of that rule state:

- "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."

[6] Paragraph (1) of the rule is not in issue on this appeal. In relation to paragraph (2) of the rule, Belle J held that the failure to comply was not intentional but, as stated, held that there was no good explanation for the failure. In opposing this appeal the defendants argued both that the failure to comply was intentional and that there was no good explanation for the failure. The judge did consider paragraph (3) and appeared to conclude that those factors told in favour of granting relief from sanction but that the absence of a good explanation constrained him to refuse relief from sanction.

A good explanation

[7] The explanation Mr. Baird gave for delivering two witness statements late was that the time for completing them was too short. Mr. Baird is a medical practitioner in

Ontario, Canada and operates two medical offices. His attorney-at-law in St Kitts and Nevis is Mr. Terrence Byron and he is assisted in Ontario by a Canadian lawyer. In his affidavits Mr. Baird gave a very detailed account of the process that was involved in preparing his witness statement. The short version of the process is that Mr. Baird had 5 banker boxes of documents that related to this litigation. He had to select and organize the documents and make a list, to file and serve as the claimant's list of documents. Master Cottle's order had required Mr. Baird to make standard disclosure (file his list of documents) on 19th April 2007. He complied with that order. That left him and his lawyers 22 days to complete and file his (and the other) witness statement.

[8] After compiling the list of documents Mr. Baird then had to attend a number of times on a printing house in Canada to have the listed documents copied, collated and bound. The documents comprised 6 bound volumes. This was done, it appears, on 4th May 2007. That would have left him 7 days to complete his witness statement (which, from the evidence mentioned below, was obviously well in the course of preparation at that point). After obtaining the bound and tabbed volumes, Mr. Baird and his lawyers then had to cross reference his witness statement to the respective volume and tab where each relevant document is to be found. The evidence for Mr. Baird was that Mr. Baird's witness statements went through 12 versions before it was finalized and sworn by him on 11th May 2007. Even after that Mr. Byron advised that there was other information that needed to be incorporated so the witness statement had to be further revised.

[9] The witness statement contains 105 paragraphs and comprises 30 pages. It contains 45 references to the 6 volumes of documents. Mr. Baird's witness statement impresses me as a model of the proper way to connect a mass of documents to the narrative evidence of a witness. It is hard to overstate the benefit to the trial judge and to the lawyers, the litigants and the trial process of having this done. It takes little imagination to visualize the mind-numbing exercise that would be involved if a judge were left to himself to read and/or skim through 6 volumes of

documents, to analyse and identify which documents were relevant to which of 105 paragraphs of a witness statement and then insert the references. As a practical matter it is inconceivable that a judge could do this on his own, before the trial. For a judge to take the time, effort and tolerance to do this cross-referencing in the course of the trial would be the height of inefficiency and mismanagement of litigation. In my view the achievement of this synthesis of documents and testimony was an excellent explanation for Mr. Baird's failure to file his witness statement in time and was of great assistance to the court. The argument in the defendants' affidavit that Mr. Baird could have done his cross referencing to the documents otherwise than by reference to where the documents were located in the bound volumes is misconceived.

[10] It appears that the judge simply did not appreciate or give any proper weight to Mr. Baird's explanation. The single instance in which the judge came within some distance of considering Mr. Baird's explanation in his reserved judgment was when the judge stated that Mr. Baird 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 apparently voluminous list of documents. Mr. Baird argued in his affidavit ... that the two things were connected and one could not be done without the other."²

[11] That statement of the judge does not begin to distil or appreciate what Mr. Baird deposed by way of an explanation for his late filing. After stating he did not think that the reasons Mr. Baird gave amounted to a good explanation, the judge concluded:

"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."³

² Paragraph [6] of Decision dated 11th April 2008.

³ Paragraph [9] of Decision dated 11th April 2008

In my view the judge was quite wrong to so conclude. The judge had no proper basis for drawing that inference and the “always” made it egregious. The proper inference, which was a conclusion that flowed from the stated facts, was that counsel advised Mr. Baird, at different stages, that it was his duty to file a witness statement in proper form, which should include cross references to the volumes of documents and be accurate and complete. Mr. Baird’s witness statement did contain the cross references and, therefore, it is uncontroverted that Mr. Baird must have spent time completing his witness statement so as to include these cross references. Further, both the judge and counsel for the defendants accepted that Mr. Byron told Mr. Baird that the witness statement Mr. Baird signed on 11th May 2007 needed to be further revised, so there is no disputing the fact that this is the advice counsel gave. It was simply not open to the judge to find that “the real explanation” for the delay was that Mr. Baird’s counsel advised him “that an extension of time would always be available” to him. I am satisfied, as I have indicated that Mr. Baird gave a completely satisfactory explanation for his failure to comply with the time limit for filing witness statements and the judge misdirected himself on the facts in coming to the opposite conclusion.

Arguments opposing the grant of relief from sanction

[12] Before reaching that last conclusion, which substantially disposes of the appeal, I considered fully the affidavit and arguments for the defendants. The first argument for the defendants was that on the hearing of the second application before Belle J counsel for Mr. Baird told the court he was not pursuing the application for an extension of time. Mr. Kelsick, counsel for the defendants, submits that Edwards JA had dismissed Mr. Baird’s application for an extension of time so Mr. Baird does not have an extension of time for filing the witness statements and Edwards JA had ruled that Mr. Baird needed to apply both for an extension of time and relief from sanction. The short answer to that argument, in my view, is that it is implicit in the grant of relief from sanction for the late filing of a witness statement that the late filing no longer matters. There is no longer a consequence for late filing. To

my mind, the converse also applies: in an application for an extension of time to deliver a witness statement it is implicit that there is contained an application for relief from sanction, when the only sanction that is provided is the sanction that will take effect in the future – when the trial comes on. It would be otherwise, in my view, if there had been a sanction that had present effect, such as a provision in the case management order that if there was default in filing witness statements in time the party's case would stand dismissed. In that scenario a more particular application for relief from sanction would be required and greater weight would attach to the factors mentioned in rule 26.8 (3) as to whether it would be appropriate to grant relief from sanction. That thinking, along with a number of other considerations, makes me respectfully disagree with the decision to the contrary effect of *Edwards JA* but, of course, I recognize that to be a binding decision. I therefore confine myself to the statement I have made, that it no longer matters that the witness statements were filed late. For the avoidance of doubt, I expressly grant the order Mr. Baird had sought on the second application, and not abandoned, as an alternative to an extension of time for filing witness statements, namely, that the witness statements that were filed and served late (and I extend this order to all witness statements and witness summaries) stand as properly filed and served.

- [13] The form of that last order makes it unnecessary to deal with the second argument for the defendants, that it is *res judicata* that Mr. Baird needed to apply not just for relief from sanction but also for an extension of time.

Was there intentional non-compliance?

- [14] The third argument for the defendants is that Mr. Baird intentionally filed his witness statement late and this argument has a number of limbs. The defendants argue that by choosing to attend to the demands of his medical practice over choosing to go to his Canadian lawyer's office to sign the witness statement Mr. Baird intentionally failed to sign the witness statement in time. The defendants

argue Mr. Baird gave no particulars of what these demands were; he gave no indication of when his appointments were made, the nature of any particular illnesses which he was attending on that date and so on. The burden of proof is on him and he has failed to discharge it, the defendants argue. They say this was a deliberate, intentional act and Mr. Baird cannot now claim that it was unintentional.

[15] Another limb of the defendants' argument is that in paragraph 50 of his affidavit Mr. Baird stated that he completed his witness statement in Ontario on 11th May 2007⁴ and that he signed it on that date. Mr. Baird stated however, that local counsel, Mr. Byron was in possession of several pieces of information which Mr. Baird had not included and on counsel's advice Mr. Baird agreed to once again revise his witness statement.

[16] Mr. Kelsick submits that this evidence clearly states that Mr. Baird agreed to revise the witness statement and this notwithstanding that it would mean he would be late in filing it. Counsel submitted that it was this evidence on which Belle J relied to infer that Mr. Baird must have been advised that if he was late in filing he could always get an extension of time. Mr. Kelsick submits that while Mr. Baird strongly challenges the propriety of this finding by the judge, it was a fair inference on this evidence. Why else, counsel asked, would Mr. Baird be advised to deliberately not file on the deadline date unless he was also advised he could rectify any late filing afterwards?

[17] Further, Mr. Kelsick submits, the evidence in paragraph 51 suggests that Mr. Baird could have concluded the statement on 11th May but for the new information in Mr. Byron's possession. However, counsel submits, he gives no details whatsoever as to (i) what this information was; (ii) when Mr. Byron came into possession of this information; (iii) why it was not communicated to the appellant before 11th May

⁴ In a later affidavit Mr. Baird indicated this was the correct date and not the date that actually appeared in the affidavit.

2007; or (iv) why it was not discovered before, bearing in mind that this case was filed in 1993 and involves matters that occurred between 1989 and 1991.

[18] Still further, the defendants submitted, the witness statement filed on 24th May 2007 bore the date 11th May 2007. It is therefore clear that no revisions were in fact made to the witness statement signed by Mr. Baird on 11th May 2007 notwithstanding what is said in paragraph 50 of his affidavit. It is submitted that this further establishes a conscious decision not to file the witness statement in the time ordered and that there was no new information that required a revision of the witness statement.

No intentional non-compliance

[19] I deal with these limbs of argument together because the facts against which they are directed are offered in support of the broad proposition that the time for preparing Mr. Baird's witness statement was not enough; each fact is not offered as complete in itself but in conjunction with the others. As to the first limb, I must confess that I would have no interest in reading in an affidavit any of the details of a medical practitioner's appointments and would be content to accept that he has patient demands that draw upon his time for preparing for a trial. The fact that these patient demands meant that Mr. Baird was able to sign his witness statement only late in the afternoon of the deadline date rather than the day before or earlier on the deadline date hardly matters in the context of all that Mr. Baird has stated. The witness statement would still have been delayed because of the need for the further revision that Mr. Byron brought to Mr. Baird's attention.

[20] As regards the further revision, again in the context of the facts of this case I would have no interest in knowing the details of the information that Mr. Byron thought needed to be included in the witness statement that Mr. Baird had already signed in Canada. I repeat that this was a 30 page, 105 paragraphs witness statement. It is easy to accept, in the nature of trial preparation, that the need for further

[21] The premise of the third limb of the defendants' argument is that the witness statement that was signed by Mr. Baird in Canada on 11th May 2007 was exactly the same document that was filed on 24th May 2007 so it is untrue that there was any revision that was done after the date of signature. That premise is pure assumption. It is too well known to merit discussion how easy it is to send documents electronically, to substitute pages, and to retype multiple parts of a document while retaining the page numbering and signature page of an earlier version. In the face of the sworn statement of Mr. Baird that the document was revised the defendants' argument that this was untrue is baseless.

[22] A fourth argument for the defendants is that Mr. Baird knew that he was not obliged, before or at the stage of preparing witness statements, to prepare the bundle of documents and he perversely undertook a task he was not then obliged to perform at the cost of delaying a task he was obliged to perform by a specific date. As I stated above, there was no better way of incorporating the documents that were relevant to his testimony into Mr. Baird's witness statement, which had been ordered to stand as his evidence in chief. Identifying where, in 6 volumes containing 265 documents, a particular document is to be found is almost as important to a litigant's case as the existence of the documents. As I have found, Mr. Baird and his lawyers *needed* to compile the volumes of documents before completing the witness statement.

Remaining arguments in opposition

- [23] The defendants' case in relation to the second criterion in rule 26.8 (2) -- whether there was a good explanation for failure to comply -- in addition to relying on the preceding arguments also relied on the argument that Mr. Baird should have applied before the time had expired for a variation of the filing deadline, since Mr. Baird was aware as he stated, from the time Master Cottle made the case management order, that the time frames were unrealistic. I find no merit in this argument because it is plain that Mr. Baird did all he could to meet the deadline and sign his witness statement by the deadline date. In fact Mr. Baird actually managed to sign his witness statement on the deadline date. Because he was targeting compliance there would have been no pressing reason to apply for a variation.
- [24] The remaining argument for the defendants that merits passing mention is that Mr. Baird did not address in substance the other requirements of rule 26.8, that he should show that he had generally been compliant with other rules, practice directions, orders and directions. In his first and in his supplementary affidavits Mr. Baird stated that he has generally complied with all relevant rules etc. He stated that he has dutifully travelled from Canada to attend various hearings before the court which the other side did not attend. I believe Mr. Baird's evidence and the submissions on his behalf identifying some of the orders with which he has complied were sufficient to satisfy the third requirement of rule 26.8 (2) (c). In any case, Belle J did not deny relief from sanction on this ground, so it does not arise.
- [25] A final matter that I should specifically mention is the witness statement of Steele Douglas, which was filed on 14th May 2007. The explanation Mr. Baird gave for the late filing of this witness statement was that this witness had been undergoing

Conclusion and costs

- [26] For the reasons given, I set aside the order Belle J made on 11th April 2008 refusing relief from sanction consequent upon the late filing by Mr. Baird of two witness statements and awarding costs to the defendants. In place of that refusal I grant relief from sanction for such non-compliance. I order that all witness statements and summaries filed by both sides in the proceedings stand as properly filed.
- [27] Mr. Baird has succeeded on appeal and I award him costs of the appeal in the provisional sum of \$5,000.00 based on the factors stated in rule 64.6. If either side wishes to make representations on quantum they must file a skeleton argument within 21 days of the date appearing at the end of this decision and the other side may file a skeleton argument in response within 14 days.
- [28] As regards the costs in the High Court of the second application the starting point is rule 65.11 (3)(c) which states that where an application is for relief from sanction under rule 26.8 the court must order the applicant to pay the costs of the respondent unless there are special circumstances. It occurs to me that there are special circumstances in this case.
- [29] Firstly, the defendants also failed to comply with Master Cottle's case management order. No doubt it was helpful that they filed a witness summary for Mr. David Goldgar, intended to be replaced by a witness statement when they were able to get the witness statement signed. No doubt, also, it was helpful that

they filed a witness statement for Arthur Sharpe that did not contain a certificate of truth, intending to correct the non-compliance later. However, the fact that it was appropriate or helpful for the defendants to deal with their non-compliance in that way neither converts their non-compliance into compliance nor means that Mr. Baird needed to deal with his non-compliance in identical or even similar fashion. How to deal with non-compliance is almost always a question of what is reasonable in the particular circumstances.

[30] I can think of a number of reasons why it would have been imprudent for Mr. Baird to have filed his incomplete and inaccurate witness statement as a witness summary and later file the finalized version. Not least is the invitation that such a course would have presented to counsel for the defendants to cross-examine, at great length, on the 'discrepancies' between the two, impugn the credibility of the witness and contend that particular portions of one as opposed to the other version were correct. I consider it fortunate, because it avoided distraction and time-wasting, that counsel for Mr. Baird, forced by the particular circumstances to be non-compliant, decided not to file the witness statement until it was revised. In my view Mr. Baird was in no greater default of compliance with the master's order than the defendants and both sides were equally in need of an extension of time to comply. For that reason alone I would not award the defendants costs of the second application in the court below.

[31] A second special circumstance I find is that even if the defendants had not also themselves been non-compliant and therefore unjustified in opposing the extension of time in favour of Mr. Baird, there was in any event no good reason for opposing the extension of time. I have found that Mr. Baird did not intentionally fail to comply, that he made a significant effort to meet the deadline and that he had a good explanation for his failure. In considering whether to oppose an application such as the second application a party must balance his right to insist on compliance with the rules with a proper appreciation of when it is fair and reasonable to do so.

[32] One of the observations the judge made in the judgment under appeal is that it would have been a simple matter for Mr. Baird's counsel to have sought the agreement of the defendants' counsel, pursuant to rule 27.8, to a variation of Master Cottle's order and an extension of the time for filing and serving the witness statements. It does not matter that such agreement would have been most unlikely, as the stance of the defendants suggests; the judge's observation is a good indication of how easily Mr. Baird's non-compliance could have been dealt with. In these circumstances there was no need or justification for the defendants to vindicate the principle underlying CPR 2000 that the rules must be complied with and casual non-compliance will not be tolerated, because there was no casual or unjustifiable non-compliance by Mr. Baird. Therefore, it was unhelpful and ultimately a waste of time for the defendants to have opposed the application for relief from sanction: a possible trial date has slipped badly as a result. I would therefore order that each party bears his and its own costs of the second application.

Denys Barrow, SC
Justice of Appeal
(19th September 2008)