TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/009

BETWEEN:

[1] ANDREW FAHIE
[2] PETRA BENJAMIN

Appellants/Claimants

and

NATIONAL BANK OF THE VIRGIN ISLANDS

Respondent/Defendant

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal

On written submissions of:

Mr. Terrence B. Neale for the appellant/claimant
Mr. O'Neale Webster QC for the respondent/defendant

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2010: January 8.

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JUDGMENT

[1] EDWARDS, J.A.: The appellant obtained the leave of this court on 30th September 2009, to file this procedural appeal against the order of the learned judge made on 12th May 2009, at a Pre-Trial Review Conference. By this order the learned judge granted the respondent an extension of time to file and serve its witness statement, expert report, and its pre-trial memorandum by 12th May 2009. The order further stated that in default of filing the pre-trial memorandum by the stipulated date and time the defendant will be further condemned in costs to sum of $2,000.00. Costs were awarded to the appellants/claimants in the sum of US$750.00.

Background Facts

[2] The relevant undisputed facts may be summarized as follows. The appellants'/claimants' action is for general and special damages for personal injuries they suffered as a result of an armed robbery at the defendant's bank on 15th August 2007. At the case management conference on 28th January 2009, the parties were directed to file and exchange their witness statements by 27th March 2009, which are to stand as examination in chief, and to comply with CPR 38.5 with respect to the preparation of the Pre-Trial Review ("PTR") memorandum for the scheduled PTR date 20th April 2009. The case was scheduled to be tried on 11h and 12th May 2009.

[3] The appellants/claimants filed their witness statements on 27th March 2009. The respondent, having disobeyed the case management directive, on 9th April 2009, filed an application for extension of time and relief from sanction. The grounds of the respondent's application were that its expert witnesses Brian Penn and Lesmore Smith needed the police statements in order to prepare their expert report, and despite requests made to the police and the Director of Public Prosecutions the defendant had not been supplied with these police statements.

[4] On 20th April 2009 the learned judge heard the respondent's application for relief from sanction, and made the following order: "a) The Defendant is to file and serve witness statements and expert evidence by April 20, 2009. b) The trial of the action is to commence on July 13, 2009 for a period of 2 days. c) The Pre-Trial Review in the matter is scheduled to take place on May 12, 2009; and d) Costs of this application in the sum of $500 to the Claimants." The appellants/claimants filed their PTR memorandum on 6th May 2009. The respondent did not comply with this order. Neither CPR 38.5 nor any other rule provides any sanction for failing to file the PTR memorandum.

[5] The respondent made a second application for extension of time and relief from sanction on the ground that its security expert Mr. Brian Penn had special investigative and night time surveillance duties which made him unavailable to

produce his statements within the time period set by the Court. This application was filed on 11th May 2009, at 4:00 p.m., and it was served on the appellants/claimants legal practitioners that same day at 4:30 p.m.

[6] The respondent's application received no hearing date from the Court Office. At the PTR hearing Counsel, Mr. Neale, informed the learned judge that he was served with the respondent's application "yesterday afternoon after 4:00 p.m. with an application for relief from sanction" and that in view of this application, it may well be that the Pre-Trial Review cannot proceed this morning, in which case the appellants'/claimants' would be asking for costs. Mr. Neale also informed the Court that he had just received the expert report of the respondent's Lesmore Smith "filed this morning apparently without leave of the Court as well as a witness statement of Brian Penn which, in our view, of course is a nullity, but we are in a position to proceed with the pre-trial memorandum, which is before the Court this morning."[1]

[7] Learned counsel Mr. Malcolm Arthurs informed the court of his embarrassing dilemma and the reasons for non-compliance with the Court Order. Mr. Arthurs literally fell on his sword. He acknowledged the obvious that the bank was once again in default, and described the default as "not so egregious as to prevent this matter from going forward at all"[2]. He pointed out (at page 6 of the transcript) that it:

> "is within Your Ladyship's right under the rules of pre-trial review, under the case management rules to deal with any matter right now " at the PTR "…if it is,…that this matter has to be put off for Your Ladyship to deal with this application."

The learned judge satisfied herself that all of the respondent's documents had been filed out of time; that the filing of the witness statements late would not compromise the trial date; and that the outstanding pre-trial memorandum would not prejudice or compromise the trial date.

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[1] See pages 4 to 5 of the Transcript of Proceedings
[2] See pages 5 to 7 of the Transcript.

[8] Mr. Neale indicated quite clearly his intention "to vigorously resist." In his view:

> "…. enough is enough having gotten an extension previously on one basis. You cannot come before the Court again, you know. …we are entitled to object, and we are entitled, in fact, to have an opportunity to object."

Mr. Neale also told the learned judge that the appellants'/claimants' counsel were entitled to 7 days notice under CPR 11.11, and they were taken by surprise to get a mass of documents, which speak to a number of different things. They had not been able to take any instructions from their clients on the matter.[3] The Transcript shows at pages 10 and 11 that the judge, having no doubt appreciated the submissions of Mr. Neale, asked Mr. Neale what he was seeking today from the court. Mr. Neale's response on two occasions was as follows:

(1) "We are seeking to, in fact deal with the matter which is before the court this morning, the pre-trial review. As far as we are concerned there is no application before the court with respect to relief from sanction. We were only served yesterday afternoon, and what we find confusing, the two issues seem to be somehow interlinked or intertwined together, and, with respect, we think they are two separate matters. If my friend has not filed his pre-trial review and is not in a position to deal with the pre-trial review, he should say so."[4]

(2) "We are seeking nothing. We are in a position to proceed with the pre-trial review. My friend is the one who, if he wants an adjournment should say so. We are not seeking. We are ready to proceed."[5]

[9] Thereafter, the learned judge focused on the purpose of the PTR. Mr. Arthurs urged the judge to deal with the matter in the manner the court thinks fit. Mr. Neale voiced his final objections at page 16 of the transcript, pointing out that the late application of the respondent's counsel is as yet unheard, and the appellants'/claimants' counsel had been given no opportunity to object, and it cannot be right to say the only thing left to be done is to file the pre-trial memorandum.

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[3] See pages 9 to 11 of the Transcript.
[4] See pages 10 to 11
[5] See page 11

[10] The transcript shows at page 18 to 19 that the learned judge proceeded to deal with the application to extend time in the following manner:

> "THE COURT: I'm going to grant you an extension of time. I have looked at the matter. The trial date will not be compromised if I give you an extension of time to this afternoon, 4:00 o'clock this afternoon to file your pre-trial memorandum and serve it on the Claimant.
>
> MR ARTHURS: Yes, My Lady.
>
> THE COURT: I will also extend time. You said you filed it this morning?
>
> MR ARTHURS: And served, My Lady, already.
>
> THE COURT: Serve and file the witness statement the same 12th of May, that's today. I know you have filed it already, but I need to extend time - -
>
> MR ARTHURS: I am guided, My Lady.
>
> COURT: Since you have filed it out of time."

The Notice of Appeal

[11] It is necessary to remind counsel as to the contents of the Notice of Appeal under CPR 62.4(1). Where the learned judge has made no findings of fact counsel is forbidden to state undisputed facts as findings of fact. In this case the appellants'/claimants' counsel has inappropriately devoted two and one half pages in the notice of appeal to undisputed facts.

[12] The grounds of appeal complain that the learned judge erred in law in (a) hearing the application; (b) failing to consider CPR 11.11; (c) failing to give the appellants/claimants the opportunity to be heard on the application; (d) failing to give sufficient consideration to the Pre-Trial Review by adjourning the hearing or giving specific trial directions on the matter; (e) improperly exercising her discretion since she made her decision without reviewing either the application for relief or the witness statements which were not on the court file before her; (f) making a confusing order which appears not to make any sense. All of these grounds can be determined by considering simply: whether the learned judge exercised her discretion improperly at the PTR hearing in extending as she did

the time for the respondent to file its witness statement and expert evidence upon the late application of the respondent.

The Pre-Trial Review Hearing

[13] The Civil Procedure Rules 2000 envisage the PTR as an integral part of case management. CPR 38.2 contemplates that the PTR will "enable the court to deal justly with the claim." The rules distinguish the PTR from a Case Management Conference. Significantly, Part 27 governs Case Management Conferences while the PTR is governed by Part 38. CPR 38.3 states that "Parts 25 and 26, where appropriate, apply to Pre-Trial Review as they do to a case management conference". The PTR seeks to prepare the case for trial from the court's perspective, and it provides an opportunity for the judge who may be conducting the trial to set a program and timetable for the trial. CPR 38.6 stipulates the matters to be considered at the PTR hearing which may include the time estimate for the trial, the time required for examination and cross-examination of witnesses, contents of and the time for filing the trial bundles, other administrative matters, how the case should be conducted at the trial in any particular respect, and any other matter that the court considers appropriate for the fair, expeditious and economic trial of the issues and the efficient conduct of the trial.

[14] Part 38 seems to anticipate that the parties have complied with the case management directions of the court made previously, and that case management conference issues have already been addressed. In particular, Part 38 when read with CPR 27.7(5) envisages that procedural applications made prior to Pre–Trial Review will be determined by the judge or master who conducted the first case management conference where practicable.[6] Further, Part 38 when read along with the rules relating to listing questionnaires contemplates, in my view, that prior to the PTR hearing date, the court will have already ascertained the readiness and preparation status of the parties for the trial by way of the listing questionnaire

[6] CPR 27.7(5) states: "So far as practicable any adjourned case management conference and procedural application made prior to a pre-trial review must be heard and determined by the judge, master or registrar who conducted the first case management conference."

mandated by CPR 27.5(4) and 27.9. Under the corresponding English Civil Procedure Rules the listing questionnaire is called a pre-trial check list.

[15] Regrettably, CPR 27.5(4) and 27.9 have not been utilized by our courts for the case management of claims before PTR or trial. The listing questionnaire is designed to assist litigants with timely communication to the court about essential matters pertaining to the conduct of their case including any difficulties they might have with the previous directions of the court, ensure compliance with the directions of the court, permit a realistic estimate of the time that should be allocated by the court for the trial and trial date, whilst allowing timely, realistic and reasonable rescheduling of dates for compliance where appropriate at minimal costs to defaulting parties. There needs to be a change in culture. Otherwise, as frequently is the case, the court cannot effectively maintain supervision and determine whether a case is off track before any scheduled Pre-Trial Review date. This failure to utilize listing questionnaires presently results in litigious drift with a flurry of procedural applications being filed near to the PTR date, owing to non-compliance with court orders. Such procedural applications usually result in an adjournment of the PTR hearing, or the conversion of the PTR hearing into a case management conference for determining procedural applications.

[16] Despite the above observations, I am of the view that there are no limits on what can be raised at the PTR. The court has power until the trial is concluded, to give and continue to give suitable directions in order to properly and adequately manage and direct the cases on the lists. Any outstanding matters including procedural applications can be resolved before a judge conducting the PTR, who may be the trial judge.

[17] Although the respondent's application could have been determined by the learned judge at the PTR hearing, the nature of the application and the date it was served on the appellants/claimants called for the judge to consider and apply the rules under CPR 27.8(3) and (4), 29.11, 26.8, 11.11(1)(b) and 11.11(3) along with the overriding objective in keeping with CPR 1.2. The application for relief from

sanction does not appear to have been addressed in the order of the learned judge and it is not clear from the transcript of proceedings that the learned judge dealt with that part of the application.

The Rules

[18] Under CPR 27.8(3), a party seeking to vary a date fixed by a case management order which creates no sanction for the filing and serving of witness statements, without the agreement of the other parties, must apply to the Court, and the general rule is that the party must do so before the fixed date. CPR 27.8(4) states that a party who applies after the fixed time limit has expired must apply for – "(a) an extension of time; and (b) relief from sanctions to which the party has become subject under these rules or any court order". In the instant appeal it is not the court order but CPR 29.11 which contains the sanction.

[19] CPR. 29.11 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.
>
> (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."

[20] CPR 26.8 states:

> "(1) an application for relief from 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, 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."

[21] The respondent's application was made with notice and the general rule is that a notice of an application must be served (a) as soon as practicable after the day on which it is issued; and (b) at least 7 days before the court is to deal with the application.[7] Where notice of an application is given but the period of notice is shorter than the period required "the court may nevertheless direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application."[8]

[22] The transcript of proceedings does not show that the learned judge gave the direction contemplated by CPR 11.11(3). Moreover, having regard to counsel for the appellants'/claimants' clear indication that he wished to take instructions from the appellants/claimants with a view to opposing the application, such a direction would have been inappropriate in the circumstances. It appears further, despite the submissions of respondent's counsel that the learned judge omitted to consider all of the criteria in CPR 26 in determining the application. Though she did consider the important and relevant matters of prejudice to the appellant, and whether the trial date would be compromised by the late filing of the witness statement and expert evidence; that was not sufficient for determining the application for relief from sanction.

[23] Having regard to the applicable rules, and in particular the criteria for relief from sanction under CPR 26.8, which have been the subject of numerous decisions[9] by this court, it appears to me that the learned judge exercised her discretion improperly.

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[7] CPR 11.11(1)
[8] CPR 11.11(3)
[9] Dominica Agricultural and Industrial Development Bank v Mavis Williams: Civil Appeal No. 20 of 2005 (Dominica) Barrow JA; Richard Frederick v Owen Joseph and Others: Civil Appeal No. 32 of 2005 (St. Lucia) Rawlins JA; Nevis Island Administration v La Coppropretе Du Navire: (St. Kitts & Nevis) Civ. App. No. 7 of 2005 Barrow JA; David Goldgar and others v Wycliffe H. Baird: (St. Kitts and Nevis) Civil Appeal No. 13 of 2007 Edwards JA (Ag); Wycliffe Baird v David Goldgar and others: (St Kitts and Nevis) Civil Appeal HCVAP 2008/005 Barrow JA; Vena McDougal v Reno Romain: (Dominica) Civil Appeal No. HCVAP 2008/003 Thomas JA (Ag); Irma Paulette Robert qua Administratrix of the Estate of

[24] I would allow the appeal; set aside the order made on 12th May 2009, direct that the appellant file and serve their response to the application within 14 days from the date this judgment is served and remit the matter to the court below for the application to be determined by another judge. I would also award costs to the appellant to be agreed by the parties, otherwise costs are to be determined pursuant to CPR 62.13(b).

Ola Mae Edwards
Justice of Appeal

Jermal aka Jamal Robert (deceased v Cyrus Faulknor and A.G. St Lucia: Civil Appeal No, 29 of 2007 Edwards JA (Ag)