THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2010/0160

BETWEEN:

ROBIN MARK DARBY

Claimant

AND

LIAT (1974) LIMITED

Defendants

Before:
Master Cheryl Mathurin

Appearances:
Mr. Dane Hamilton QC for the Claimant
Mr. Kendrickson Kentish for the Defendant

2011: 7th December
2012: January 17th

RULING

[1] **MATHURIN, M:** On the 17th November 2010, I ordered that the Claimant do give security for costs of the claim herein in the amount of $20,000.00 within 28 days failing which the matter would be deemed struck out. The matter was adjourned in the event that the order for security for costs was satisfied by payment on the 17th December 2010, to the 12th January 2011. The matter was not heard on 12th January 2011 but was instead listed for the 1st February 2011.

[2] On 1st February 2011, the security for costs had not been paid by the claimant who had filed an application for relief from sanctions on the 28th January 2011. I asked parties to engage me on

whether the matter having been deemed struck out on the date that security for costs was to have been paid if I had the jurisdiction to hear the matter. I disagreed that the matter was one in which I had jurisdiction as it had been deemed struck out and dismissed the application. Subsequently the Court of Appeal allowed an appeal and the matter was remitted to me to hear it on its merits.

[3] The grounds for the application for relief from sanctions is that the arrangements by the Claimant for payment of the security for costs were hampered by the fact that he was employed in Switzerland and he had to make the arrangements for the money to be paid out of his account in England, a process which he submits was time consuming. The Order of the court was made on the 17th November 2010 with the deadline for the deposit of security for costs being the 17th December 2010. The transfer was completed on the 11th January 2011 and the cheque released on the 13th January 2011 which was one day after the original date set down for the hearing in the event that the security was paid. It is not indicated by the Applicant as to whether the security was paid. Counsel for the Claimant states that the failure to comply was unintentional and that all previous directions, rules and orders of the court had been complied with and that in any event, no prejudice would be occasioned to the Defendant by the delay.

[4] Counsel for the Defendant opposes the application stating that the Claimant has provided no explanation as to why the application for relief from sanctions was filed six weeks after the time for the payment of security for costs although an explanation for why the funds were late was stated in the affidavit in support. He submits that the period of delay was not prompt and that in the absence of an explanation, the application should be dismissed. Counsel also challenges the explanation of Counsel for the Claimant stating that it is contrary to this age of instantaneous, transatlantic, electronic communication and transfer of funds. He also challenges the explanation that Counsel for the Claimant gives about attempts to contact the Claimant and that the nature of his work made the payment unavoidably late. Counsel submits that the explanation is unsupported by any details or documents as to how and why the transaction took so long to finalize and submits that the explanation in whole is vague and short of the candid requirements needed in order for the court to exercise its discretion in his favor. He asks that the application for relief from sanctions be dismissed.

[5] Of great concern is the evidence in support of the application. Counsel having sworn the affidavit also has the conduct of the application. This is a practice which has always been frowned upon by the Court. The reasoning is clearly encapsulated in the case of **Teliasonera Finland OYT v Alfa Telecom Turkey Limited** BVIHCV2007/0109 where Thomas J stated as follows

> "Although the case of **CASIMIR v SHILLINGFORD and PINARD** (1967) 10WIR 269 has no direct bearing on CPR 2000, having been decided on 10th June 1967, it does reflect the attitude the Court in relation to the related question of the swearing of affidavits by legal practitioners appearing in a matter. The relevant dictum is that A.M. Lewis CJ at pages 269-270:"
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> "*During the course of the argument, I made reference to the fact that it was not proper (I put it no higher than that) for a barrister who is going to appear in a cause to swear an affidavit in the same cause, even if he swears in his capacity as solicitor. In England, of course, barristers do not practice as solicitors and the rule without the rider which I have added may be found at the back of the white book relating to the conduct of barristers. It puts the court which has to pronounce upon the acceptability of the affidavit in an embarrassing position, when the person who made this affidavit as solicitor appears before it in the same cause as counsel...*"

[6] Also I have considered CPR2000, Rule 30.5(3) which states that an affidavit may not be admitted into evidence if sworn or affirmed before the legal practitioner of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such legal practitioner. It would be odd to say the least, that if an affidavit sworn before a party's lawyer is inadmissible, one sworn by the party's counsel could be acceptable. The weight and admissibility to be given to this affidavit should be minimal if at all.

[7] The requirements for an application for relief from sanctions are that it must be made promptly and must be supported by evidence on affidavit. This is the first hurdle to be met before the Court can satisfy itself as to whether the non compliance was intentional, whether there was a good explanation provided and whether or not the applicant has complied with all other rules, orders and directions of the court. The Claimant has not given any explanation as to why the application for relief from sanctions was made six weeks after the time that payment of security for costs was due

despite the requirement that the application be made promptly as required by Rule 26.8. Rather he has focused on why he did not comply with the order of the court.

[8] I am however guided by the words of Edwards JA in the matter of **Irma Paulette Roberts v Cyril Faulkner, Attorney General** Civil Appeal No 29 of 2007, Saint Lucia, wherein she ruled as follows;

"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.
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 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."

[9] The application for relief from sanctions is one that has to meet a high standard. The fact that it is a sanction imposed by the rule from which relief is being sought emphasizes its importance. The explanation as to why however the security for costs was not paid on time does not satisfy the court. Counsel for the applicant on behalf of the claimant cites exigencies of work and holidays and cross country transactions which I don't find to be satisfactory absent of any evidence apart from bald vague statements that he tried to meet the payments. The affidavit has not stated how the Claimant attempted to make payments, it does not say when efforts started. The applicant has not supplied any information, dates, rosters, bank information to support any assiduous efforts to comply with the court order despite the fact that it carried the very strict sanction of the matter being deemed struck out.

[10] At some point before the time expired it must have become manifest to the Applicant that he needed to make an application for an extension of time upon the clear and obvious realization that the date ordered by the court would not be met. The evidence is also insufficient to establish that the delay was unintentional. It appears at least capricious and given the conjoined requirements of Part 26.8 (2) necessary to satisfy the Court, even though the applicant has complied with all other directions, rules and orders of the court, the application must fail.

[11] The order of the Court in summary is as follows;

(a) The application for relief from sanctions is hereby dismissed and the claim herein is deemed struck out with costs to the claimant.

(b) The parties will address the court if necessary on the issue of costs on the 7th February 2012 at 9:15am.

CHERYL MATHURIN

MASTER