

EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE COURT OF APPEAL

HCVAP 2012/007

BETWEEN:

GREGORY KNIGHT
(by his lawful attorney Kent Knight)

Appellant

and

FIRST CARIBBEAN INTERNATIONAL BANK LIMITED

Respondent

and

BETWEEN:

KENT KNIGHT

Appellant

and

BRENDA KNIGHT

Respondent

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

On written submissions:

Mr. Derick F. Sylvester of Derick F. Sylvester & Associates for Kent Knight

Mr. Shireen J. Wilkinson of Wilkinson Wilkinson & Wilkinson for First Caribbean
International Bank Limited

Ms. Giselle Whiteman for Brenda Knight

2012: June 8.

*Civil appeal – Failure to comply with case management order – Extension of time to
comply – Exercise of judge's discretion*

A consent case management order made by the learned trial judge required that parties file specific documents, including standard disclosure, on or before 15th February 2012. Brenda Knight failed to comply with the order and, on 17th April, filed an extension of time to file the standard disclosure. The affidavit in support of the application was sworn to by her attorney at law, Ms. Giselle Whiteman, who gave evidence that at the material time she had to undergo a surgical procedure out of Grenada. Kent Knight opposed the application and Ms. Whiteman later filed a supplemental affidavit exhibiting medical certificates and copies of her passport evidencing her travel out of Grenada. The learned trial judge, in the exercise of her discretion, made an order granting relief from sanctions and extending time for Brenda Knight to file the standard disclosure. A written reason for that decision was not provided.

Kent Knight appealed that order on numerous grounds which included that the judge misdirected herself when she ruled that rule 26.8(1)(a) of the Civil Procedure Rules 2000 ("CPR") was complied with by Brenda Knight and that the judge failed to consider that the affidavit of Giselle Whiteman being an attorney in her own cause ought not to be considered or given the weight it was given.

A notice of opposition to the appeal was filed by First Caribbean International Bank Limited which submitted that Gregory Knight failed to pay the costs previously ordered against him on an earlier interlocutory appeal.

Held: dismissing the appeal and awarding assessed costs to be paid by Gregory Knight to First Caribbean International Bank Limited and Brenda Knight within 30 days of this order, that:

1. An appellate court will only interfere with the exercise of a judge's discretion where (i) the judge has misdirected himself or herself with regard to principles in accordance with which his or her discretion had to be exercised; (ii) where the judge in exercising his or her discretion took into account matters which ought not to have been taken into account or failed to take into account matters which ought to have been taken into account; and, (iii) where the judge's decision is plainly wrong. Pursuant to CPR Part 26, the learned trial judge has a discretion to exercise case management powers. In so doing, she considered all matters the CPR required her to consider and she exercised her discretion reasonably.

Imanagement Services Limited v Cukurova Holdings A.S. British Virgin Islands HCVAP 2007/025 (delivered 6th October 2008) applied; **Civil Procedure Rules 2000** Part 26 applied.

2. Where no transcript or reasons are made available to this Court and all parties to the case were present at the time of the making of the order, it can be assumed that oral reasons were given by the trial judge. Furthermore, it can be assumed that counsel for the appellant did not request written reasons for the decision and as such there is no basis upon which the learned trial judge's decision or the

exercise of her discretion can be questioned. Accordingly the appeal must be dismissed.

IPOC International Growth Fund Limited v LV Finance Group Limited British Virgin Islands Civil Appeal No. 30 of 2006 (delivered 18th June 2007) applied.

JUDGMENT

- [1] **MITCHELL JA [AG.]:** This is an appeal against the case management decision of the learned trial judge in this matter, the Hon. Clare Henry J, to allow an application by Brenda Knight for an extension of time to comply with a consent case management order previously made by her on 13th January 2012. That Order provided, among other things, for standard disclosure on or before 15th February 2012, for the filing of witness statements by the same date, and other usual matters.

- [2] On 17th April 2012, Brenda Knight filed an application for an extension of time to file the standard disclosure, attaching a draft of it, and supporting her application by an affidavit of the same date sworn by her attorney at law, Ms. Giselle Whiteman. The explanation Ms. Whiteman gave was that she had been ill. Ms. Whiteman deposed that the failure to file the standard disclosure on time had been inadvertent, and had been due to her, close to the time in question, having to undergo a medical procedure out of the island. Subsequently, she had not been able to attend fully to filing all documents in the case.

- [3] The application was opposed by Kent Knight, and his attorney's secretary swore and filed an affidavit in support of his opposition. On 9th May 2012, Ms. Whiteman filed a supplemental affidavit exhibiting a medical certificate from her doctor to the effect that Ms. Whiteman had had to travel to Barbados to undergo a medical procedure which could not be done in Grenada. The nature of the procedure was such that Ms. Whiteman would have suffered side effects and would have spent the majority of the three weeks following at home. Ms. Whiteman would be admitted to the General Hospital for another procedure on 9th May 2012 and if it was successful she would be discharged on 11th May 2012. Ms. Whiteman also

exhibited copies of her passport with the relevant stamps from the Grenada and Barbados Immigration authorities evidencing her trip to Barbados.

[4] The learned trial judge dealt with the application in Chambers on 11th May 2012. After reading the affidavits and hearing from counsel for the parties she made an order granting relief from sanctions and extending time for 7 days for Brenda Knight to file the standard disclosure. It is this order which is appealed.

[5] The notice of appeal filed on 18th May 2012 was to the effect that there had been no sufficient legal basis for the granting of the relief from sanctions pursuant to rule 26.8 of the **Civil Procedure Rules 2000** ("CPR"), and that Brenda Knight had failed to satisfy the requirements of CPR 26.8. The grounds of appeal were that (1) the judge misdirected herself when she ruled that CPR 26.8(1)(a) was complied with by Brenda Knight; (2) the judge failed to consider that the affidavit of Giselle Whiteman being an attorney in her own cause ought not to be considered or given the weight it was given; (3) the judge failed to consider that Brenda Knight having failed to comply with the previous order for the appointment of an expert; and (4) the judge had failed to take into consideration the fact that there have been two attorneys on record representing Brenda Knight.

[6] CPR 26.8 provides:

- "(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)...
- (4)..."

[7] Gregory Knight's submissions in support of his appeal were filed on 18th May 2012. On ground 1, whether CPR 26.8 was complied with, counsel relied on the High Court decision of Harris J in the case of **The Attorney General of Antigua and Barbuda v Antigua Aggregates Limited et al**,¹ and the Court of Appeal decision of Barrow JA in **Ferdinand Frampton v Ian Pinnard et al**.² These authorities support the approach, in dealing with applications for the grant of an extension of time, of relying on the criteria found in CPR 26.8. On ground 2, the swearing of the affidavit by an attorney in the case, counsel referred to **Parry Husbands v Warefact Limited**,³ in the Court of Appeal.⁴ In the Court of Appeal, Barrow JA advised that a legal practitioner should spare the court the embarrassment of having to deal with his credibility by swearing and filing an affidavit when he was personally pleading the issue before the court. Even where counsel is not the litigant, and he swears an affidavit on behalf of his client, he is expected to have another counsel appear. On ground 3, failure to appoint an expert, counsel relied on dicta of Sir Allen Lewis CJ in **Casimir v Shillingford et al**⁵ for the proposition that unjustifiable delay should not be sanctioned by the court. On ground 4, counsel urged that the judge had failed to take into account that there have been two attorneys of record representing Brenda Knight. Winnifred Duncan-Phillip had appeared at some of the hearings on behalf of Brenda Knight.

[8] On 25th May, counsel for Brenda Knight filed a notice of opposition to the appeal, in the form of submissions why the decision of the trial judge should be upheld. She urged that the learned trial judge had not misdirected herself when she ruled that Brenda Knight had been compliant with CPR 26.8(1)(a). The affidavits of Giselle Whiteman provided the High Court with sufficient reason for non-compliance. Winnifred Duncan-Phillip had only appeared in speaking to some of

¹ Antigua and Barbuda Claim No. ANUHCV2005/0492 (delivered 11th January 2007).

² Commonwealth of Dominica Civil Appeal No. 15 of 2005 (delivered 3rd April 2006).

³ St Lucia Civil Appeal Nos. 7 and 8 of 1997 (delivered 9th November 1998).

⁴ That decision went to the Privy Council, but on another point: *Husbands v Warefact Limited* (2003) 62 WIR 53.

⁵ (1967) 10 WIR 269.

the applications and did not have the responsibility of preparing any of the court documents on this matter.

[9] On 30th May 2012, First Caribbean International's notice of opposition was similarly filed. The Bank complains that the appeal should be dismissed, principally on the ground that Gregory Knight has not yet paid the costs of \$1,500.00 previously ordered against him on 20th January 2012 on an earlier interlocutory appeal.

[10] The learned trial judge was exercising a case management discretion given to her by CPR Part 26. From the recitals in the filed Order, it appears that she considered all the matters that the Rules required her to consider, and that she made her decision based on her findings. The role of the Court of Appeal in reviewing the exercise by a trial judge of a discretion given by the Rules of Court is not in doubt, and has been the subject of several decisions of this court in recent years.⁶ An appellate court will only interfere with the exercise of such a discretion if it is clear that that exercise was clearly wrong or exceeded the judge's discretionary remit. The judge of first instance must not merely have preferred an imperfect solution which is different from an imperfect solution which the Court of Appeal might have adopted, but must have exceeded the generous ambit within which a reasonable disagreement is possible. Or, as Edwards JA put it in **Imanagement Services Limited v Cukurova Holdings A.S.**,⁷ the circumstances in which this court will interfere with the judge's exercise of discretion are (i) where the judge has misdirected himself or herself with regard to principles in accordance with which his or her discretion had to be exercised; (ii) where the judge in exercising his or her discretion took into account matters which ought not to have been taken into account or failed to take into account matters which ought to have been taken into account; and, (iii) where the judge's decision is plainly wrong. Where a judge has failed to give any reasons for the way in which she has

⁶ See particularly the judgment of Rawlins CJ in *IPOC International Growth Fund Limited v LV Finance Group Limited* British Virgin Islands Civil Appeal No. 30 of 2006 (delivered 18th June 2007) at [24].

⁷ *British Virgin Islands HCVAP 2007/025* (delivered 6th October 2008) at [35].

exercised her discretion, then it falls to the Court of Appeal to reconsider the matter afresh and to exercise its own discretion and to give reasons for the manner of its exercise: **IPOC International Growth Fund Limited v LV Finance Group Limited**.

[11] The written transcript of what was actually said in Chambers by counsel and by the judge on the hearing of the application for an extension of time and for relief from sanctions is critical for a ruling on the merits of the grounds of appeal. But no transcript has been made available to this Court, nor is there any explanation given why this is so. There is only the Order as filed. This reveals that all three parties were represented by counsel on the hearing in Chambers. The Order is in the usual form, and does not include the reasons for its making. The Order only indicates that, after reading the application and the affidavits, and after hearing counsel, the judge made a ruling finding that the application was made promptly, and that the court was satisfied that the failure to comply with the order of 13th January 2012 was not intentional and that there was a good explanation for the failure, and the court was satisfied that the party in default had generally complied with all other relevant rules, practice directions, orders and directions. The record of appeal does not contain any written reasons given by the judge for the making of the Order.

[12] There is no suggestion in the submissions of counsel for the appellant, as there was in the **IPOC** case, that the learned trial judge failed to give any reasons for her decision. I assume that, as is normal, oral reasons were given by the judge at the time the ruling was made. The absence of a transcript is understandable. There is no reason to believe that a stenographer is provided for a judge in Chambers in Grenada. It is unlikely that a transcript is routinely or ever made of case management conferences. I assume that no stenographer is provided and that no transcript of this hearing or of the judge's oral ruling was made. Nor is there any suggestion in the appeal record that counsel subsequently applied to the judge for the oral reasons to be put into writing, and was refused. A judge in our jurisdiction cannot reasonably be expected to prepare written reasons for every oral case

management decision made in Chambers. A judge would always prepare and promptly deliver written reasons when asked to do so in the event of a proposed appeal. Failure to do so would be an additional ground of appeal. I have to assume that in this case counsel for the appellant simply failed to request written reasons for the decision.

[13] In the circumstances, finding as I do that the learned trial judge gave reasons for her decision, but those reasons have not been provided for this court to consider, finding that counsel for the appellant did not take the trouble to provide a transcript if one was available, or to request written reasons from the trial judge, if a transcript of the oral reasons was not available, there is no basis upon which I can question the decision made by the learned trial judge.

[14] The appeal will be dismissed with costs which I assess at EC\$1,500.00 to be paid by Gregory Knight to First Caribbean International Bank and in the same amount to be paid by Gregory Knight to Brenda Knight. Those costs are to be paid within 30 days of this order.

Don Mitchell
Justice of Appeal [Ag.]