

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0002

RICHARD FREDERICK

Appellant

and

KENNY D. ANTHONY

Respondent

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

On Written Submissions:

Mr. Horace Fraser for the Appellant

Mr. Peter I. Foster, QC for the Respondent

2013: August 8.

Civil appeal – Failure to comply with court's directions – No sanctions imposed for failure to comply – Judge's discretion to extend time under Civil Procedure Rules 2000 – Exercise of case management discretion – Whether learned trial judge in the exercise of her discretion erred by either failing to take into account or giving too little or too much weight to relevant factors or by being influenced by irrelevant factors and considerations

JUDGMENT

- [1] **MITCHELL JA [AG.]:** This is an appeal from a case management order made by Wilkinson J on 14th January 2013 in a defamation suit before her in the High Court in Saint Lucia. It has been passed to me to deal with as a single judge of the Court pursuant to rule 62.16(1) of the **Civil Procedure Rules 2000**.
- [2] The respondent's attorney failed to comply with the master's earlier direction to file witness statements by a certain date. There was unchallenged medical evidence that the attorney had been ill and receiving hospital treatment just before the date set for the filing. She had given instructions to her clerk to file the witness

statements. The clerk had placed them in the client's file instead of filing them at the Court House. When the attorney returned to work no one brought to her attention the fact that the witness statements had not been filed and served as instructed. As the date for the filing of the pre-trial memorandum approached, she telephoned the attorney for the appellant to agree the terms of the memorandum. It was only then that the attorney for the appellant pointed out to her that she had not filed and served the witness statements as earlier directed. She discovered that the witness statements had been placed on the client's file instead of being filed in the court as she had instructed before she became hospitalised. Counsel for the appellant did not accept her explanation, and did not agree to her filing and serving the witness statements late. She had then, seven months late, and one day after learning that the statements had not been filed and served, filed the witness statements in the court office and applied for relief from sanctions. Her application was resisted.

- [3] The learned trial judge considered the implications of CPR 29.11(1), CPR 26.8 and CPR 26.12 and the fact that there had been no sanction imposed by the master for failure to meet the deadline. She considered the authorities of **Dominica Agricultural and Industrial Development Bank v Mavis Williams**,¹ **Pendragon International Limited et al v Bacardi International Limited**,² **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**,³ and **Irma Paulette Robert qua Administratrix of the Estate of her minor son Jermal aka Jamal Robert [deceased] v Cyrus Faulkner et al.**⁴ She also considered the failure of the respondent's affidavit to comply with CPR 30.3 in several ways, which she detailed, but which are not relevant to this appeal. She weighed the various factors she was called on to weigh in coming to her decision. She noted that, if the attorney for the appellant had agreed to the late filing of the witness statements, it would still have been possible to meet the trial date. She

¹ Commonwealth of Dominica, High Court Civil Appeal DOMHCVAP2005/0020 (delivered 29th January 2007, unreported).

² Anguilla, High Court Civil Appeal AXAHCVAP2007/0003 (delivered 23rd November 2007, unreported).

³ St. Lucia, High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported).

⁴ St. Lucia, High Court Civil Appeal SLUHCVAP2007/0029 (delivered 25th October 2007, unreported).

was satisfied that the application for relief had been made promptly once the default had come to the attention of counsel. She found that the failure had not been intentional, and she set out her reasons for so finding. She considered that she had been given a satisfactory explanation for the respondent's failure to file his witness statements in time. She also found that the respondent had generally complied with all other relevant rules, practice directions, orders, and directions in the conduct of the matter. She concluded that the appellant had not been affected by the failure to file the witness statements in time and that the administration of justice would best be served by allowing the matter to proceed to full trial at the fixed date.

- [4] The appellant appeals against the order of the learned trial judge on the ground that the judge misdirected herself and erred in law by exercising her discretion in relation to the application for relief despite failure to satisfy the mandatory requirements of CPR 26.8(1) and (2). He also appeals the failure to award costs on the ground that the judge's failure to do so operated to his prejudice. He sought an order setting aside the decision and an order that the respondent not be allowed to give evidence at the trial, as well as an order for costs in the court below and on the appeal. The nub of the appeal is that the finding by the learned trial judge that the attorneys had filed the witness statement as soon as they realised it had not been filed is a conclusion not supported by any legal authority. In addition to the above authorities, the appellant refers to **John Cecil Rose v Anne Marie Uralis Rose**,⁵ **Reeves v Platinum Trading Management Ltd**,⁶ and **The Attorney General v Universal Projects Limited**.⁷

- [5] Byron CJ first set out the applicable principles in our jurisdiction to govern the exercise of a discretion to extend time in his judgment in the **John Cecil Rose** case (above) under CPR. In that case, the trial judge made an award of an amount of the matrimonial property to Mrs. Rose in proceedings ancillary to a

⁵ St. Lucia, High Court Civil Appeal SLUHCVP2003/0019 (delivered 22nd September 2003, unreported).

⁶ (2008) 72 WIR 195.

⁷ [2011] UKPC 37.

divorce. Mr. Rose applied 3 months late for leave to appeal the judge's award. His excuse for his delay in filing his application was his alleged difficulty in communicating with his attorney. Byron CJ reviewed the relevant authorities both under the old rules and the new rules.⁸ He came to the conclusion that Mr. Rose's reason for delay in the case in question was unacceptable. He therefore refused leave to appeal.

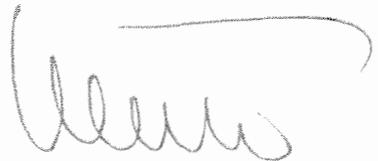
[6] In the more recent **Universal Projects** case (above) in the Privy Council from Trinidad, the trial judge had granted the defendant an extension of time for service of a defence. She imposed a term that in default the claimant had leave to enter judgment. This was a sanction within the ordinary meaning of the term. On the defendant's failure to file the requisite defence, the claimant entered judgment. The reason for the delay in filing the defence seems to have been that the defendant's State advocates thought that outside counsel should be retained. Such a decision required input from the Solicitor General. The position of Solicitor General was vacant at the time. There was no explanation why some other officer in the department could not have discharged the duties of the Solicitor General. The trial judge did not accept that this was a good explanation for the failure to comply with the direction, and refused an application for relief from sanctions. The defendant appealed. The Court of Appeal also did not accept that this explanation for the defendant's delay was a good one, and dismissed the appeal. Lord Dyson, in delivering the judgment of the Board and dismissing the appeal, opined that it was difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.

[7] The real issue before me is the exercise by a trial judge of a case management discretion. The appellant has filed detailed submissions and a bundle of the authorities referred to in the submissions, all of which I have read. The appellant has, however, failed to demonstrate to me that the learned trial judge in the exercise of her discretion, and in the words of Sir Vincent Floissac CJ in **Dufour**

⁸ Although strictly speaking the CPR does not apply to divorce proceedings.

and *Others v Helenair Corporation Ltd and Others*,⁹ (i) erred in principle either by failing to take into account or giving too little or too much weight to relevant factors or by being influenced by irrelevant factors and considerations; and that (ii) as a result of the error the judge's decision exceeded the generous ambit within which reasonable disagreement is possible. Rawlins CJ has more recently reiterated in the case of *Employers International and Others v Boston Life and Annuity Company Ltd*.¹⁰ the principles on which a trial judge is entitled to exercise a case management discretion. Those principles have been repeatedly applied in our courts.¹¹ They are the principles which the learned trial judge applied in exercising her discretion in this case.

- [8] In the circumstances, I would dismiss this appeal with no order as to costs in the absence of any submissions by the respondent. I would refer the matter back to the trial judge for further directions to be given to have the matter readied for trial.



Don Mitchell
Justice of Appeal [Ag.]

⁹ (1996) 52 WIR 188.

¹⁰ Territory of the British Virgin Islands, High Court Civil Appeal BVIHCVAP2007/0005 (re-issued 6th November 2008, unreported).

¹¹ See also *Attorney General of Grenada et al v Andy Redhead*, Grenada, High Court Civil Appeal GDAHCVAP2007/0010 (delivered 17th June 2005, unreported); *Irma Paulette Robert qua Administratrix of the Estate of her minor son Jermal aka Jamal Robert [deceased] v Cyrus Faulkner et al* St. Lucia, High Court Civil Appeal SLUHCVAP2007/0029 (delivered 25th October 2007, unreported).