

EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2011 OF 0165

BETWEEN:

[1] KATHLEEN TROTTER
(Judicial Trustee of the Estate of V.E. Pemberton
deceased)

[2] FRANCIS EMANUEL

Claimants

AND

[1] JEREMY VITAL

[2] JEFFERSON ALEXANDER

Defendants

Appearances: Mr. Darius Jones Counsel for the Applicants/Claimants
Mrs. Gina D-Munro Counsel for the Respondents/Defendants

2013: October 18th,

2014: February 14th

Re-Issued: February 18th (Rule 42.10 CPR 2000)

RULING

[1] THOMAS, J. [Ag.] Before the Court is an application filed by the applicants/claimants,

Kathleen Trotter and Francis A. Emanuel pursuant to Part 26.7(2) and 26.8 of the Civil Procedure Rules 2000.

The Application seeks the following:

1. That leave be granted to the applicants to file witness statement of the first named claimant, the present Judicial Trustee of the lands which form the subject matter of this case.
2. That leave be granted to the applicants to file witness statements of Dr. Edward Watty, the previous Judicial Trustee of the lands which forms the subject matter of this case.
3. That leave be granted to the applicants to file and serve the witness statements of the said Kathleen Trotter and Dr. Edward Watty.
4. That the witness statements of Francis Emmanuel, Joel Charles, Patrick Paul, Jerome Robinson and Malcolm Belle filed and served on 19th April 2013 be deemed properly filed.
5. Relief from sanctions.

Grounds

[2] A summary of the grounds upon which the application rests is as follows: the unavailability of two witnesses without warning, the failure to appreciate a critical issue in the matter until it was pleaded by defendants; the claimants had inadvertently failed to file witness statements from either the present Judicial Trustee or her predecessor.

[3] It is also stated in the grounds, the defect and inadvertence to file witness statements was unintentional. Also that there will be no prejudice to the defendants and further that any prejudice can be remedied by costs in favour of the defendants. Finally, it is

stated that the grant of the application for leave to file witness statements is critical to the interests in the administration of justice.

Affidavit in support

- [4] The affidavit of Francis Emanuel in effect elaborates upon the grounds of the application. In the end the affiant contends that it is just for the order to be granted in terms of the application.

Submissions

- [5] In submissions in Chambers, Mr. Darius Jones, learned counsel for the applicants elaborated on the grounds of the application, in the context of Parts 26.2 of CPR reference was made to Rules 26(2)(r) and (w) as well as Part 26.8 of CPR 2000.

- [6] Learned counsel also sought to explain his failure to file witness summaries in the circumstances where two witnesses were unavailable without warning. Learned counsel ended his submissions by saying that the overriding objective warrants the granting of the orders sought.

- [7] Mrs. Gina Dyer-Munro, learned counsel for the defendants submitted that: the court's hands are tied in granting the relief which is contained in Part 27.8(4). It is also the contention that Part 26.1 is inapplicable; the affidavit of Francis Emanuel does not seek an extension of time; relief is sought under the wrong rule; the application speaks of witnesses' unavailability yet there's no affidavit of Malcolm Belle, Trevor Robinson or David Golgar filed. The issue of the Judicial Trustee was always on the pleadings and the matter of inadvertence is not spelt out or explained.

Rebuttal

- [8] In rebuttal learned counsel for the applicants submitted that the application looks at substance rather than form; the applicants are asking that the affidavits filed be deemed to be properly filed; the Judicial Trustee had to clarify her position as Judicial Trustee in order to properly deal with the matter fairly.

Ruling

- [9] **Part 26 of CPR 2000** bears the heading: "Case Management – The Court's Powers;" the substantially¹ discretionary powers as set out in Part 26(2). And in particular Part 26.8(1) prescribes the procedure for dealing with applications for relief from sanctions.
- [10] Part 27 on the other hand is specific. It deals with "Case Management Procedure", and Part 27.1 says it concerns the procedure by which the court will manage cases.
- [11] What is in issue here is, in reality, a variation of the Case Management Order whereby witness statements which were ordered filed on or before 15th April 2013, which was not complied with. The court agrees with the submission on behalf of the respondent that **Rule 27.8(4)** is the applicable rule.
- [12] **Rule 27.8** deals with variation of a case management time table and paragraph (1) prescribes certain matters for which an application to the court is necessary, while paragraph (2) prohibits variation which would make it necessary to vary any of the dates mentioned in paragraph (1). The procedures with respect to orders are set out in paragraph (3) and it mandates that the application must be made before the date ordered for filing. In this case -15th April 2013. The present application was filed on 30th April 2013 – in a real sense two weeks late.

¹ Rule 26.7(1) speaks of "the Court must....."

- [13] A further requirement is contained in paragraph (3) of Part 27.8 which says that an application after the date must seek: 1. extension of time and 2. relief from sanctions under Part 26.8.
- [14] Part 26.8 is extensive and for present purposes it will be dealt with in outline. Paragraph (1) requires that an application must be made promptly and supported by affidavit. These are conjunctive. And then paragraph (2) restricts the court by saying that the court may only grant relief if it is satisfied that: (a) the failure was unintentional; (b) there is a good explanation for the failure; and the party in default has generally complied with the relevant rules, practice directions, orders and directions.
- [15] The applicants have not satisfied the court that the failure was not intentional; nor has a good explanation been proffered. Mere inadvertence cannot suffice. Again, the prescriptions are conjunctive. On the whole, failure to appreciate a fundamental part of the pleadings or inadvertence, which is not substantiated, cannot help the applicants' cause.
- [16] It is the view of the court that Part 26.8(3) only arises where other prescriptions have been satisfied and the question of relief arises whereupon these matters are considered. And since the applicants did not apply before the date fixed for filing witness statements and by extension did not act promptly, did not satisfy the court that failure was not intentional and no good reason for the failure was advanced, the matter of granting relief cannot arise so as to trigger Part 26.8(3) of CPR 2000.
- [17] And the overriding consideration must be that under CPR 2000-two weeks is a long time after making any discovery or to deal with any sudden unavailability of witnesses when Part 29.6 of CPR 2000 gives the methodology to be employed in that context.
- [18] As said before; under CPR 2000 time must be of the essence if cases are to be dealt with "expeditiously" in order to give effect to the overriding objective. That is the reality and logic of Part 1.1 of CPR 2000.

[19] In the result, the application is denied. This in turn triggers Part 28.8(4) which prohibits the court, except in exceptional circumstances, to order the respondent to pay the applicants costs. There is no prohibition in ordering the applicants to pay the respondents costs. Accordingly the applicants are ordered to pay the respondents costs of \$500.00.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. An application to vary the case management order or timetable is governed by Part 27.8(4) of **CPR 2000** rather than by Part 26.1 or Part 26.2 of CPR 2000.
2. Given that the Case Management Order required that witness statements must be filed by 15th April 2013, the application having been filed on 30th April 2013 does not satisfy one of the conjunctive requirements of Rule 27.8(3).
3. **Rule 27.8(3)** mandates that an application to vary date in the timetable must seek relief from sanction under Part 26.8 which the application has also failed to satisfy in that it has not been shown that the failure to apply was not intentional and no good explanation was given since mere inadvertence without more cannot suffice.
4. The application has failed to satisfy Parts 27.8(3) and (4) and Part 26.8(1) and (2) of **CPR 2000** and as such consideration of Part 26.8 (3) in favour of the applicants does not arise.
5. On account of the foregoing, the application is denied.
6. The applicants must pay costs of \$500.00 to the respondents.

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JUSTICE ERROL L. THOMAS
HIGH COURT JUDGE (Ag)