EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2010/0038

BETWEEN:

[1] TROY LOUIS

Claimant

And

[1] CONSTABLE GLENDON SAMUEL

[2] ATTORNEY GENERAL OF DOMINICA

Defendants

Appearances:

Mr. Stephen Isidore and Mr. Christopher Forde and Ms. Ernette Kangal of Isidore and Associates for the Claimant

Ms. Joelle Harris of the Attorney General's Chambers for the Defendants

……..

2014: May 7th, 20th

……

DECISION

[1] THOMAS, J [AG]: The matter before the court stems from a procedure or event in the trial of the matter at Bar where the court allowed the claimant's witness statements to be filed outside the time limit of the case management order to be entered into evidence. Later however the defendants sought to adduce the evidence contained in their witness

statements which were filed outside the time specified by the court, to be adduced into evidence. There was an objection and an application by learned counsel for the claimant. In both cases there were no applications for relief from sanctions.

[2] The basic procedural events which inform this matter are:

1. The learned Master on 1st February 2012 at the case management conference ordered witness statements to be filed and exchanged by 2nd May 2012.
2. The witness statements on behalf of the claimants were filed on 3rd May 2012.
3. A notice of filing of the witness statements was not filed in the matter and served on the defendants, but the witness statements were filed in a sealed envelope on 3rd May 2012 in accordance with Rule 29.7 (2) of CPR 2000
4. The claimant's witness statements were included in the Trial Bundle filed by the claimant on 31st July 2013.
5. The Trial Bundle of 31st July 2013 was served on the defendants on 21st August 2013
6. The witness statements on behalf of the defendants are stamped as having been filed on 31st July 2012 and are contained in Trial Bundle filed by the claimant on 13th March 2014 and served on the defendants on 13th March 2014.
7. Trial date of 21st October, 2013 was vacated and new date of 13th March 2014 was fixed.

[3] In the context of the application by learned counsel for the claimant, the court ordered submissions to be filed in the matter having regard to the circumstances of non-compliance with the case management order on both sides and the permission granted to the claimant with respect to the witness statements filed outside of the specified time limit.

[4] Learned counsel for the claimant, Mr. Stephen Isidore, in his submissions cited basically the same rules but also cited other cases.[1] Learned counsel on both sides advanced a

[1] The case cited are: Dominica Agricultural and Industrial Development Bank v Mavis Williams , Civil appeal No 2 of 2005; C.O. Williams Construction (St. Lucia) Ltd v Inter Island Drudging Co., HCVAP017/2011. Mitchell v New Group Newspaper Ltd [2013]

number of issues but on the courts calculation the basic issue to be determined is whether the defendants should be permitted to call witness in view of the fact that the witness statements were filed out of the time ordered and no application was made for relief from sanctions

[5] Learned counsel for the defendants, Ms. Joelle A. V. Harris, referred to several provisions of CPR 2000[2] relating to the court's powers to deal with witness statements filed otherwise than in accordance with the case management order. Leading cases[3] were also cited and analysed in this connection.

Submissions

[6] Learned counsel, Mr. Isidore, after making reference to the requirements under Rule 26.8 of CPR 2000 for application to be made promptly in the context of relief from sanctions as enunciated in Robin Mark Darby v Liat (1974) Ltd goes on to give the following summary:

> "1. The oral undertaking by Counsel for the claimant, not to object to the Defendants application for relief from sanctions for the late filing of the Defendant's witness statements is not sufficient to vitiate the need for the Defendant to seek relief from sanctions. The Rules do not provide for oral undertakings to be taken as acquiescence but rather that if the parties to litigate agree to vary the Court's timetable a consent application should be filed. There is no communication evidencing such agreement and no consent application made by the Defendants. In the circumstances, the making of the application for relief was of utmost importance.

---

EWCA Civ 1537; Durrant v Chief Constable of Avon and Sommerset Constabulary [2013] EWCA Civ 1624, Robin Mark Darby v Liat (1974) Ltd HCVAP 002/2012; Wycliffe Baird v David Goldgar et al HCVAP005/2008

[2] The Rules cited are : CPR Rules 1.1 and 1.2
CPR Rule 26.2; CPR Rule 26.2 (6); CPR Rule 26.7 (3);CPR Rule 26.9 CPR Rule 27.8 (1) (2), (5) and (6);CPR Rule 29.11 (1) and (2)

[3] The cases cited are:
Treasure Island Company David Simms v Auderon Holdings Limited et al, BVI High Court Civil Appeal No. 22 of 2003
David Goldgar et al v Wycliffe H Baird St. Kitts and Nevis High Court Civil Appeal No13 of 2007
Irma Paulette Robert v Cyrus Falkner and Attorney General of St. Lucia; High Court Civil Appeal 29 of 2007

2. The Defendant has not satisfied the requirements for the Court to exercise its discretion to grant relief from sanction under Part 29.11 (2) which they seek to rely on. The reason given by the Defendants for not having made the requisite application for relief from sanctions does not fall within the ambit of incidents that the Court would grant relief. Further, the degree of the non-compliance is what the Court regards as serious and inexcusable and thus not entitled to any indulgence from the Court.

3. The Claimant's witness statement though submitted to the Court on the due date but stamped as having been filed half an hour in the first business hour of the following day, 8:30am in keeping with Registry's policy decision, was not filed at variance with the Case Management Order, as there is no practice direction or rule which states that this is the correct procedure. However, any application for relief by the Claimant would have been favourably granted as the Court would deem narrowly missing the deadline for filing half an hour into the first business hour of the next working day as trivial and excusable and would usually over look such triviality. Thus, the Claimant's witness statement would more than likely have been tendered as evidence which is proper before the Court. In any event, this is a non-issue. The Claimant has already closed its case.

4. The effect of the Claimant having tendered its witness statements and closed its case would be regarded as evidence which is proper before the Court which the Defendants had an opportunity to cross examine on. Consequently, the Defendant's assertion that the Claimant's witness statement be deemed also to have been filed out of time cannot be entertained having regard to the fact that the claimant's witness statements are already in evidence"

[7] The following extracts are taken from the submissions on behalf of the defendants:

"36. The Defendants' witness statements were filed several months after the expiration of the time required in the 1st February, 2012 Order of the court. As such, CPR 29.11 was invoked. The Defendants applied thereunder and rely on the fact that the parties had agreed to the Defendants' late filing of witness statements and that Counsel for the Claimant had made all assurances that he would not object to same. This said assurance was again expressed before the court on the 13th March 2014 when Counsel declared that everything was in Order concerning the documents forming part of the Trial Bundle.

37. The facts in Treasure Island case, a Court of Appeal matter, a very similar and the issues raised therein are almost identical to those raised in the present case. It is submitted that the principles applied in *Treasure Island* must be applied in the present case in light of the fact that similar 'special circumstances' arise out of the behavior of the parties (who accommodate each other until the "ambush" at the trial on the 14th April, 2014). It is further submitted that, following the ruling in Treasure Island expecting the Claimant, on his assurance, to not object to the late filing and service of the Defendants witness statement must be considered a "good reason" satisfying CPR 29.11 (2) in the circumstances. And, as such, the Defendants ought to be allowed to call their witness.

38. The judgment handed down by Justice Saunders in the Treasure Island case sets out the relevant principle clearly and succinctly. CPR 26.7 does not preclude

parties from agreeing to vary the time within which to file witness statements, thereby varying the timetable of the court,. In the present case the Defendants' witness statements were served some three (3) months prior to the first trial date set by the Court (Oct 28th and 29th) and some seven (7) months before the 13th March, 2014- the date on which the trial actually commenced. The decision in Treasure Island establishes that, where the parties show all indications of being willing to carry on through to trial without objection, one non complain party will not be allowed to rely on the failure of the parties to file a consent order under CPR 27.8 (6): and the court may, in determining the party's application under CPR 29.11, invoke rule 26. 1 (6) and dispense with the requirement of CPR 27.8 (6) for a consent order certifying the nature of the agreement and the varied timetable.

39. It is further submitted that the court does not have the power to involve rule 26.1 (6) on its own initiative and can only do so on an application from a party. The claimant did not and has not made an application, under CPR 29.11, to be allowed to call his witness whose witness statements were not served in compliance with the relevant court order. Therefore, at that time, the court could not have, pursuant to CPR 26.1 (6), dispensed with the Claimant's requirements to comply with CPR 29.11 or 26.8 or 27.8 (6). "

The Law

[8] At the heart of the matter rests principally on Rule 29.11 of CPR 2000. It deals with "Consequence of failure to serve witness statements or summary" and it is in these terms:

" 29.11 (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 unless the party asking for permission has a good reason for not previously seeking relief under Rule 26.8"

Thus the narrower issue turns on whether the defendants have a good reason for not previously seeking relief under Rule 26.8.

[9] As noted before, learned counsel relies on the case of Treasure Island Company and David Sims v Audubon Holdings Limited et al which involves the said Rule 29.11 in which there was a certain agreement or understanding between counsel with respect to the late filing of witness statements. However, at the start of the trial this led to an application under the said Rule 29.11 which was denied. And on appeal this is how the

then learned acting Chief Justice summarized the issue after detailing the understanding between the parties regarding the filing of witness statements:

> "11. On resumption, counsel for Audubon had begun to open his case when Counsel for Treasure Island and for Mr. Sims indicated that he wished to make a submission. This submission turned out to be quite a bombshell. Argument on it occupied the rest of the day and required a considered ruling from the trial judge. The Judge ultimately overruled the submission but the hearing of the trial of the substantive matter, on the dates set aside for it, was completely frustrated."

[10] The learned acting Chief Justice went on to address the issue of 'good reason' within the meaning of CPR 29.11. These are the relevant parts of his reasoning:

> "21. CPR 29.11 has such severe consequences for a litigant that in breach of it that I think that in keeping with the overriding objective, a Court should liberally approach its second sub-rule. Did the Audubon Solicitors have a good reason for not previously seeking relief? The special relationship among Treasure Island, Mr. and Mrs. Sims cannot be discounted. The solicitors for Audubon were actually seeking to accommodate Mrs. Sims. Most importantly, the solicitors for Audubon could not have imagined that in the light of all the circumstances, they would be ambushed with this technical point sprung on the morning of the trial. Prior to that date the other side had conducted themselves as though they were intent on proceeding with the trial.
>
> 23. For all these reasons it seems to me that the Audubon Solicitors could establish a 'good reason' for not previously seeking relief under Rule 26.8. It was suggested that their agreement with the Solicitors for Mrs. Sims was forbidden by CPR 26.7 (3). The Judge below also appeared to have accepted this view. However on close reading of Rule 23.7 (3) suggests that this was not the case."

[11] The acting Chief Justice Saunders went on to explain what is required to render CPR 26.7 (3) to be operational which it was not in that case. His Lordship also spoke to Rule 23.1 (6) in this way: "I however agree with the learned trial judge that, in line with Part 26.1 (6) there existed here special circumstances that could entitle a court to dispense with strict compliance with Part 29.11 and in my view the trial judge has right to do so."

Reasoning and Conclusion

[12] Based on this liberal approach rule laid down by the Court of Appeal, the defendants case must now be put in context. The case is that there was an understanding between the parties regarding the filing of witness statements in light of negotiations that were on going

with a view to settlement. At the opening of the trial when the application was made the defendants were permitted to lead evidence in this regard. The crown counsel was cross examined by lead counsel for the claimant and then discharged from the case. This was in the context where there were no affidavits filed and given the timing of the application and the need to have some evidence as to the reason with non-compliance with CPR 26.8.

[13] The challenges to the defendants' position are that the reason for non-compliance cannot amount to a good reason given the fact that the witness statements were filed approximately one year and two months after the due date. It is also contended that the overriding objective cannot be used as a shield.

[14] The rule with respect to CPR 29.11 (2) is that it must be given a liberal interpretation in view of the serious consequences. The submissions on behalf of the claimant overlook this ruling and the fact that the circumstances in the Treasure Island case are similar in that there was certain correspondence between respective attorneys-at-law and there was no application for relief from sanctions.

[15] One of the submissions on behalf of the claimant even suggest that: "The reason given by the defendants for not having made the requisite application for relief from sanction does not fall within the ambit of incidents that the court would grant relief." But it must be that good reason contemplates, in effect, an infinite number of reasons because of the different circumstances that must arise for consideration. Like negligence, the categories of reasons are never closed. And to the contrary, without good reason learned counsel for the claimant is suggesting that the categories of good reason are closed.

[16] On the whole therefore the court comes to the determination that the defendants have good reasons for not seeking relief from sanctions, being the negotiations to settle and the oral undertaking by learned counsel for the claimant application

[17] The remaining aspect of the conclusion has to do with CPR 26.1 (6) which says that: "In special circumstances on the application of a party the court may dispense with

compliance with any of these rules." In the Treasure Island case the court held that special circumstances existed which allowed the court to dispense with the strict compliance with CPR 29.11. And by parity of reasoning the same reasoning must be applied in this case.

[18] Accordingly the decision of the court in that the defendants have a good reason for failure to seek relief from sanctions, and the claimant's application to strike out the defendants' witness statement is denied.

[19] There is no order as to costs.

Errol L. Thomas

High Court Judge (Ag.)