THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Nos. BVIHAD2011/005-009

Between:

CARIBBEAN SAILING (BVI) LIMITED

Claimant

And

THE OWNERS AND OTHER PERSONS INTERESTED IN THE SHIP 'KELLISTE 11"

THE OWNER AND OTHER PERSONS INTESTED IN THE SHIP "LADY ASHLEIGH BRETT"

THE OWNER AND OTHER PERSONS INTERESTED IN THE SHIP "CASSIDY"

THE OWNER AND OTHER PERSONS INTERESTED IN THE SHIP "WAKE ISLAND"

THE OWNER AND OTHER PERSONS INTERESTED IN THE SHIP "HOPEFUL 1"

Defendants

Appearances: Ms. Lorraine La Rose, Counsel for the Claimants
Ms. Marie-Lou Creque, Counsel for the Defendants

2015: October 30th

JUDGMENT

[1] **ELLIS J**: By Notice of Application filed on 22nd January 2013, the Defendants seeks the following orders:

1. Relief from sanctions that apply consequent upon the Defendants' failure to comply with paragraphs 1 and 2 of the case management order made by the Court on 26th September 2012 (case management order).
2. An extension of time by which to comply with paragraphs 1 and 2 of the case management order until 4:30p.m. on 15th February 2013.
3. Further and other relief
4. Costs to be borne by the Defendants in any event to be assessed if not agreed.

[2] The relevant paragraphs of case management order provide:

1. Standard disclosure should be made on October 26th, 2012.
2. The witness statement is to be filed on December 7th , 2012.

[3] The Application was supported by the affidavit of Brian Rose who confirms that the Defendants have not made standard disclosure nor have they exchanged witness statements within the time prescribed. Mr. Rose stated that sanctions would severely prejudice the Defendants and he asked the Court to exercise the discretion in the "interests of achieving the administration of justice" to relieve the Defendants of the sanctions pursuant to CPR Part 26.8.

[4] Mr. Rose noted that the case management order was made four weeks before standard disclosure was due. It appears that during this time he travelled to Canada. Although he had gathered documents which he intended to pass to his attorneys in the BVI, being away from the Virgin Islands throughout this period meant that he did not have access to all relevant documents relating to these proceedings.

[5] He states that he made arrangements to return to the BVI in the week beginning the 12th November 2012 in order to meet with his attorneys Forbes Hare. However, for reasons which he states are not relevant to this application, he decided to seek alternative legal representation in these proceedings.

[6] On 27th November 2012, he was able to secure representation but because of an apparent conflict of interest which was raised by Counsel for the Claimant, he was forced to secure alternative representation. On 7th December, 2012, he approached two other law firms in the BVI but they both were unable to act due to a conflict of interest.

[7] Consequently, he states that despite his best efforts, when the time limit for filing witness statements had arrived, he was without legal representation. Eventually, on 10th December 2012, he consulted his current attorneys SCA Creque and on 18th December 2012 they entered a Notice of Acting.

[8] Mr. Rose states that it was not his intention to fail to comply with the case management order. According to him, the failure to comply stemmed from the logistical difficulties arising from his absence from the BVI which was compounded by his inability to obtain suitable legal representation until 10th December 2012. He states that the Claimant's attorneys were well aware of his efforts to retain legal representation on 6th December 2012 and again when they contacted by SCA Creque on 10th December 2012 in relation to the subject application.

[9] Mr. Rose states that but for the difficulties he experienced in obtaining legal representation, he would have complied with the case management order.

[10] The Application is also supported by two affidavits of James Kay Dixon filed on 26th February 2012 and 22nd May 2013. In that affidavit, Mr. Dixon, makes it clear that this Application is made within the context of a previously unsuccessful application on 20th December 2012. This Application was supported by the affidavit of Adel Clyne, in which the sole explanation for the failure to comply with the said case management order was set out in paragraph 10. In that paragraph she states that:

> "Prior to this firm being instructed by the Defendants, the Defendants' former legal advisers were informed by the Claimants legal advisers of an alleged conflict of interest on the part of the Defendants' former legal

advisers which led to the Defendants' seeking alternative legal representation."

[11] That Application was refused on 15th January 2013 after an *inter partes* hearing.

[12] In affidavits filed in support of this application on 26th February 2013 and 22nd May 2013, Mr. James Dixon asserts that notwithstanding the determination of this earlier application, the Court has the discretion to consider this fresh or renewed Application to include to the extent necessary or desirable, an order amending or revoking the order on the earlier application. He bases this submission on two premises. First, he submitted the CPR Part 2.7(2) confers upon the Court the same power that Rule 3.1 (7) of the English Civil Procedure Rules 1998 confers upon the English courts. Secondly, he submitted that it is well established that evidence of a material change of factual circumstances permits an English court to revisit one of its earlier orders made on an application. In the same way, evidence that in making the earlier order, the judge was misled in some way as to material facts is sufficient grounding for an English Court to revisit one of its earlier orders.

[13] According to Mr. Dixon, innocently or otherwise, counsel for the Claimant innocently or otherwise misled the Court during the hearing of the Defendants' earlier application on 15th January 2013. He claims that this information was within the knowledge of Counsel for the Claimant at the time of the earlier application and should have been placed before the Court in the interest of justice. The failure meant that the Court was not aware of the correct factual position relevant to the earlier application.

[14] The nub of the alleged undisclosed information is found at paragraphs 10 – 12 of Mr. Dixon's affidavit. Mr. Dixon contends that a critical submission made by the Defendants in support of the previous application was the fact that the Claimant's legal adviser had informed the Defendants' former legal advisers of an alleged

conflict of interest which led to the Defendants having to seek alternative legal representation. During the previous hearing, counsel for the Claimant argued that the Defendants did not state the name of the former legal advisers or when such communications would have been made. The presumption was that the former attorneys would have been Forbes Hare.

[15] Mr. Dixon stated that during the hearing of the earlier application, Counsel for the Claimant initially denied that this communication took place but then subsequently contended that no such communication took place ***with Forbes Hare***. Mr. Dixon stated that he later became aware that Mc W. Todman & Co. (in the person of Mr. John Carrington QC) had been approached by Defendants to act as counsel after Forbes Hare. He suggested that Counsel for the Claimant would have been well aware of this and so would have misled the Court. He stated that it was clear that the Claimant's solicitor informed Mr. Carrington of an alleged conflict of interest on the day that the witness statements were due to be exchanged leading to a further delay in complying with the terms of the case management order.

[16] Further, Mr. Dixon pointed out that during the previous hearing, the Court noted that in circumstances where a party was unable to meet a deadline imposed by an order, it was appropriate for opposing counsel to be informed of the difficulties in meeting the deadline and request consent to the extension of time. At paragraph 13 of his affidavit, Mr. Dixon referred to closed correspondence between the Claimant's attorneys and Forbes Hare, which he contends amounted to an agreement that the Claimant would not object to the Defendants' application for relief from sanctions provided that the Claimant's costs of $750.00 were paid.

[17] Mr. Dixon contends that it is appropriate and relevant to bring this agreement to the Court's attention in the circumstances and to lift the veil on without prejudice correspondence to demonstrate that accord. Again, he stated that Counsel for the Claimant would have been well aware of this correspondence and yet she did not refer to their existence in court. However, the Claimant referred to closed correspondence in his second affidavit of Mr. Singh which Mr. Dixon contends is

demonstrates the inapt actions of counsel in not bringing to the attention of the court the existence of at least those elements of the without prejudice correspondence.

[18] In responding to this Application, the Claimant relied on the affidavit of Chandi Singh filed on 4th February 2013 and 19th February 2013. He asserts that this second application raises essentially the same issues on the same facts as between the Claimant and the Defendants save and except that the second application seeks to give a more detailed account of the events outlined in the first application. He contends that the Defendants are estopped from bringing this second application which also amounts to an abuse of process. Mr. Singh then relates the litany of communications and correspondence which took place between Counsel for the Claimant and the previous attorneys who would have acted for the Defendants.

[19] Mr. Singh does not attempt to explain why the information would not have been disclosed to the Court. Instead, in her oral submissions to the Court, Counsel for the Claimant submitted that the duty to prove one's case rests on the person making the allegations. So that the duty to make full and frank disclosure rested on the Defendants. She stated that the Defendants have failed to discharge that burden and they cannot seek to transfer that burden to the Claimant.

[20] Further, counsel argued at some length that even if it is accepted that non-disclosure occurred, the matters raised by Counsel would not have affected the outcome of the hearing of the previous application.

[21] Finally, Counsel argued that neither she nor her client was under any obligation to agree to waive the Defendants' breaches. She stated that in any event that the communications could only be construed as an offer which would not have been accepted in the email of 30th October 2013. That email contained the response of Michael Pringle of Forbes Hare, (then Counsel for the Defendants') to Counsel for the Claimant's email of 29th October 2013 in which she stated that:

> "Ruth [Ruthilia Maximea] has asked me to advise that she is not minded to object to your application for relief from sanctions and an extension of time to give disclosure provided that we can agree to our costs of that application in the amount of $750.00."

[22] She submitted that response in which Mr. Pringle indicated that:

> "I believe that the Rules provide that a party seeking an indulgence os obliged to pay the costs anyway. We can address this issue when we make the application after disclosure.
>
> Other than this the contents of your email are noted."

[23] Counsel submitted that this response did not confirm any consensus and created no binding agreement between the Parties. She stated that following this agreement, the position had materially changed because the Defendants did not make an application until 20th December 2013 some 2 months after this email and there was no disclosure made within that time.

[24] She further submitted that the Court it was still open to her to object to the application. She having referred the Court to CPR Part 26.8, she contended that the Defendants still have not met the requirements for the relief from sanctions.

ESTOPPEL/ INTERLOCUTORY JUDGEMENTS/ABUSE OF PROCESS

[25] Given the historical and factual context of this case, the Court must first consider whether it is open to the Defendants to renew their original application for relief from sanctions which was disposed of after a full *inter partes* hearing. It is apparent that the decision to refuse the earlier application amounted to an interlocutory decision in the matter.

[26] While there are interlocutory decisions which determine an issue or question in the course of proceedings and which can be deemed to be final and conclusive for res judicata purposes, in general, interlocutory applications are not designed or

intended to adjudicate finally on issues of fact or law raised by the pleadings in an action.

[27] The Court is of the opinion that the principle of issue estoppel does not apply to an interlocutory application in the nature of the instant application. There is general support for this view in **Phipson on Evidence**[1] which provides as follows:

> "The Rule that a judgment is open to challenge unless final is of importance principally in other proceedings on different substantive questions between the same parties. It also has the important practical effect that the failure of an interlocutory application is no bar to its renewal."

[28] The rejection of an interlocutory application is not generally a bar to its renewal if the rejection was *"not a determination of issues, but merely an exercise of discretion and the decision whether or not to grant a discretionary procedural remedy"*.[2]

[29] In the case of **Pockington Foods Inc. Alberta (Provincial Treasurer) [1995] 123DLR (4th) 141**, the Alberta Court of Appeal determined that res judicata and issue estoppel did not apply to procedural interlocutory motions. In that case the plaintiff unsuccessfully applied for disclosure of documents in the defendant's possession over which the defendant claimed public interest immunity. That decision was upheld on appeal. Later, the plaintiff reapplied for disclosure. On the second application, the trial judge determined that the principles of res judicata and issue estoppel did not generally apply to interlocutory procedural applications and concluded that there had been intervening factors since the original motion. On an appeal to the Alberta Court of Appeal the Court referenced and approved the reasoning in **Talbot v Pan Ocean Oil Corp [1977] 4 CPC 107**and held that:

> "While res judicata and issue estoppel do not apply to procedural motions, the court is not powerless to deal with attempts to re litigate issues already decided by it. The Court is entitled to exercise its judicial discretion to

[1] 15th Edition, Sweet and Maxwell 2000 at paragraph 38-05 at page 990-991
[2] Mullen v. Conoco Ltd [1998] QB 382 (CA) at 396 *per* Hobhouse LJ

> determine if under the circumstances a second application is frivolous, vexatious, the object of the court being to avoid re argument and re litigation of issues already dealt with by the court and in respect of which an order has been taken out."

[30] In arriving at its decision the Alberta Court of Appeal clearly considered and applied the applicable English precedents. So although the Court recognizes that this precedent has no binding authority, the Court is satisfied that it should be guided by the persuasive authority of that decision.

[31] However the fact that estoppel/ res judicata does not apply to such applications does not imply that a party can endlessly re-apply for the same reliefs from a court. A court's power to restrain abuse of process can undoubtedly be used to halt unmeritorious and repetitive interlocutory applications. This was confirmed by Smith L.J. in **Stephenson v Garnett** [3], where prescribed the appropriate course which should have been adopted by the judge in the following way:

> "In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that is frivolous and vexatious and an abuse of the process of the court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think that it can be said that it is."

[32] This statement of the principle is accepted as the correct approach which should to be adopted by the Court when exercising its discretion to entertain a second procedural interlocutory application.

[33] Counsel for the Defendants contend that the Court has the ability to re consider their application because there were matters which had not been disclosed on the previous application and which would have been material to the outcome.

[3] [1898] 1 QB 677at page 680

[34] He relied on the case of **Collier v Williams**[4] which approved the following dictum of Patten J in **Lloyds Investment (Scandinavia) Ltd. -v- Ager- Hanssen**[5]**:**

> "Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. **Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ**." Emphasis mine

[35] This dictum has been applied by George-Creque, J as she then was in **Paul Webster v The Attorney General**[6] and by the Eastern Caribbean Court of Appeal **Michael Wilson & Partners Limited -v- Temujin International Limited and others**.[7]

[36] It is apparent to this Court that the Defendants do not seek to rely on the first limb of Patten J reasoning i.e. a material change of circumstances. Like Morgan J, in **Simms v Carr**, this Court interprets this to be "a reference to a case where the circumstances at the date of the first order are correctly understood by the court, but those circumstances changed after the date of the first order and a party

[4] [2006] All ER 177
[5] [2003] EWHC 1740
[6] Unreported Judgment AXA HCV 2008/0015
[7] Unreported Judgment BVIHCV 2006/0307 dated 2nd March 2007

brings the matter back before the court and asks the court to review the first order in the light of the new changed circumstances." This is clearly not the case here.

[37] Instead, the Defendants purport to rely on the second limb referred to by Patten J, that is - where the court does not a have correct understanding of the facts when it makes the first order. The Defendants ask the Court to review its decision in the light of what they now contend to be the correct understanding of the facts.

[38] The Court is fully cognizant that the original application in this matter was determined after a hearing on full notice which gave both sides ample opportunity to put all matters necessary to advance their cases. This Court concurs with the dictum in **Paul Webster,** that the duty to make full and fair disclosure governs an application even on a hearing on full notice.

[39] The Defendants contend that the non-disclosure by Counsel for the Claimant of the fact that she was aware of the identity of the counsel who she alleged was conflicted in the matter and further that she was aware of the exact time when that conflict would have been communicated. Further, Counsel for the Defendants submitted that the failure to disclose that there was a conditional agreement in which the Claimant would not object to the application for relief from sanctions and would consent to an extension of time to comply with the case management order also amounted to material non-disclosure.

[40] While the Court has grave concerns about the conduct of Counsel for the Claimant in these matters, it is clear that having advanced the application for relief from sanctions; it is the Defendants who were obliged to disclose all matters which supported their application. Despite the multiplicity of affidavits filed in support of this Application, the Defendants have failed to indicate whether this information was available to them or whether it was capable of being put into their possession at the time of the earlier hearing. Such an averment would be critical because it

would plainly be inappropriate if the Defendants were to attempt to reargue matters which ought to or could have been argued at the earlier hearing.[8]

[41] Having read the affidavits of Adel Clyne, Brian Ross and James Dixon, the Court is not satisfied that this information would not have been available to the Defendants or that it could not have come into their possession following reasonable inquiry. Indeed nowhere in the evidence is it contended that the Defendants were themselves unaware of this information or that the information would have been unavailable to them. What Mr. Dixon seems to contend, is that the current counsel may not have been aware of some of the relevant background.

[42] It seems to the Court that in circumstances where the Defendants' affiant can state plainly that "*the Defendants' former legal advisers were informed by the Claimants legal advisers of an alleged conflict of interest on the part of the Defendants' former legal advisers which led to the Defendants' seeking alternative legal representation*"[9], such an averment could not have been made without proper knowledge of the factual underpinning. Moreover, the transcript of the proceedings of 15th January 2013, reveal at pages 22 – 23, that Counsel would have had knowledge of the relevant narrative.

[43] The Court is of the same view when it comes to the information concerning the purported conditional agreement reached between the former counsel for the Defendants and counsel for the Claimant. There is no plausible reason advanced to explain why this could not have been deployed at the earlier hearing.

[8] Simms v Carr and Bagani Stiftung v (1) JMV Fixed Income Arbitrage Performance Partners, Ltd et al. AXA HCV 2008/0042 in which the Court expressed the view that "where a matter has come on for hearing on full notice and an order has been made, it is not open to a party on a later application to set aside the order or seek to reargue or invite a review of the same material to the court being persuaded to come to a different conclusion thereon. That would be tantamount to the court acting as an appellate court in review of its own order".

[9] Paragraph 10 of the Affidavit of Adel Clyne filed in support of the original application

[44] In **Simms v. Carr**[10] a case involving the revocation of an order for security for costs, Morgan J explained the second of Patten J's two types of circumstance as follows, at paragraph 46:

> "The second case referred to by Patten J is where the court does not have a correct understanding of the facts when it makes the first order. The party then wishes the court to review its first order in the light of a correct understanding of the facts, which are then for that purpose communicated to the court. **As Patten J makes clear, the court will not consider an application to revoke or vary the first order where the facts could have been, but were not, correctly stated first time round." Emphasis mine**

[45] In the Court's judgment, the Defendant cannot now seek to rely on matters which were available and which were known at the time of the earlier hearing but which they failed to deploy for the purpose of putting their full case forward. In any event, the Court is not satisfied that the matters complained of are sufficiently material. Material facts or information are those facts which may bear on the outcome of the matter.

[46] It is readily apparent from the transcript of proceedings on 15th January 2013 (at pages 27, 29-31, 34-35, and 39), that the Court was wholly dissatisfied with the paucity of the original Application. Within that context, it could not have been sufficient for the Defendants to simply say that the Claimant had agreed not to object to the Application. It is plain that the Court would in any event be obliged to apply the factors prescribed in CPR Part 26.8[11] rather than operate as a rubber stamp. And it is now settled law that a litigant must satisfy a threshold test of promptitude, intentionality, good reason and general compliance.

> "These questions of promptitude, good reason, general compliance and intentionality are all the sign posts of efficient litigation built on our

[10] [2008] EWHC 1030 (Ch)
[11] CPR Part 26.7(3)

experience of the delay which burdened litigation under the previous rules".[12]

[47] In **Ferdinand Frampton**[13] after referring to the provisions of Part 26.8, the Court stated at Paragraph 17:

> "These are mandatory conditions imposed by this rule. It is stated in sub rule (1) that the application must be made promptly and it must be supported by an affidavit. In sub-rule (2) a strict fetter is imposed upon the Court's discretion and the Court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default as generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant's affidavit) to decide if that evidence satisfies the Court that the failure to comply was not intentional, there is a good explanation for the failure and the applicant has been generally compliant."

And in paragraph 19:

> "The rule is uncompromising that the Court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...The rules are not draconian; where a party has made a slip, the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief."

[48] The original application before the Court fell woefully short of this obligation.

[49] Further, while it may have been somewhat useful for Court to be made aware of the exact timing when the former attorneys' conflict of interest would have been identified, the Court is not satisfied that it would have had any bearing on the outcome of the application. It was clearly before the Court that the Claimant had identified a conflict of interest, which meant that the Defendants had to seek

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[12] *per* V. Kokaram J in Karen Tesheira V Gulf View Medical Centre et al. Unreported judgment CV2009-02051, Trinidad and Tobago

[13] Civil Appeal No. 15 of 2005

alternative counsel and it was clearly before the Court that the conflict involved another law firm and not Forbes Hare. (page 24 of the Transcript)

[50] It follows, applying the principles approved by the English Court of Appeal in **Collier v. Williams**, that there has not been shown to the Court, facts which were not available in January 2013, but which would have been material to the exercise of the discretion on that occasion. On the way that Defendants have chosen to advance this application, the Court is compelled to conclude that there was a conscious choice not to deploy the so called relevant material whether in evidence or argument.

[51] The result is that the Defendants are really seeking to re-argue the application, on grounds which were available to them then, but on which they chose not to rely and that is not a course which, in my judgment, it is open for this Court to take.

Conclusion

[52] During the course of the hearing, it became clear to the Court that Defendants had initiated discussions with a view to arriving at consensus position. This is certainly laudable. In the words of V Kokaram J in **Karen Tesheira V Gulf View Medical Centre**[14]**:**

> "First this Court will encourage parties at all stages in litigation to arrive at consensus in procedural applications. Protracted procedural applications are a waste of judicial and litigants resources. Where there can be agreement parties should work towards consensus. This applies to extensions of time, admissibility of documents, disclosure, expert evidence, further information, filing joint statements, the entire list of procedural matters that will involve managing a case towards a trial. Indeed it is the duty of the Court in actively managing cases to encourage the parties to co-operate with each other in the conduct of proceedings. Rule 1.3 CPR also imposes an obligation on the parties themselves to co-operate with one another to further the overriding objective."

[14] Unreported judgment in Claim No. CV2009-02051 Trinidad and Tobago

And later:

> "The proliferation of procedural disputes should be minimized. If the credo of procedural consensus is adopted as part of the philosophy of civil litigation, cases may be managed more efficiently and effectively. It will also reduce the temptation to engage in procedural wrangling for mere tactics or as battles for costs. Of course this will be subject to the monitoring and authorization of the Court. To give an example I have frequently indicated to parties that relief from sanction applications can be reduced if parties collaborate and make joint applications to vary the court's timetable under rule 27. These can be dealt with in chambers without a hearing and via electronic means.

[53] Notwithstanding the conclusions drawn herein, the Court has no doubt that good faith efforts were made by Counsel for the Defendants which resulted in an agreement in principle and which ultimately was not honoured by the Claimant. Further, the cagey and less than forthright submissions made on behalf of the Claimant demands that the Court exercise its discretion under CPR 64.6 to make no order as to costs.

[54] **For the reasons indicated above, the Court's order is therefore as follows:**

i. The Application is dismissed

ii. No order as to costs.

[55] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

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Vicki Ann Ellis
High Court Judge