**EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS**

**SKBHCVAP2015/0015**

**BETWEEN:**

**ADAM BILZERIAN**

Appellant

**and**

**[1] GERALD LOU WEINER**
**[2] KATHLEEN ANN WEINER**

Respondents

**Before:**

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| The Hon. Dame Janice Pereira, DBE | Chief Justice |
| The Hon. Mr. Mario Michel | Justice of Appeal |
| The Hon. Mr. Paul Webster | Justice of Appeal [Ag.] |

**On written submissions:**

Dr. Dennis Merchant for the Appellant
Ms. Jean M. Dyer for the Respondents

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2016: January 27.

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*Interlocutory Appeal – Application for relief from sanctions for failure to comply with rule – Rule 26.8 of the Civil Procedure Rules 2000 – Bald assertions made in affidavit in support of application for relief from sanctions – Whether adequate for purpose of determining whether criteria satisfied for grant of relief – Rule 29.11 of the Civil Procedure Rules 2000 – Failure to file witness statements in time – Extension of time to file witness statements – Whether learned judge erred in her assessment of evidence placed before her on the application for extension of time – Costs*

The respondents issued a claim against the appellant on 20th April 2012 seeking, *inter alia*, (i) specific performance of an agreement dated 8th April 2010; and (ii) an order directing the appellant to execute and convey to the respondents a Memorandum of Mortgage

which is capable of recordation in Saint Christopher under the Title by Registration Act.[1] At a subsequent case management conference, an order was made directing the parties to file and exchange witness statements by 27th February 2015. Pre-trial review was later scheduled for 17th April 2015. On 10th April 2015, the appellant filed an application for an extension of time to file his witness statements and for relief from sanctions for its late filing. The respondents who were served via email on the same day opposed this application due to short service and expressed their intention to file submissions in opposition. Pre-trial review was consequently postponed and the application for extension of time set for hearing on 12th June 2015.

The grounds of the appellant's application were, *inter alia*, that the witness statements were filed late as a result of the appellant's counsel ending her representation of him to join another law firm shortly before the witness statements were due; that the appellant and other principal witnesses were out of the jurisdiction; and that for some of this time new counsel that the appellant wished to retain was also out of the jurisdiction for medical reasons and took time to prepare the case and execute witness statements.

At the hearing on 12th June 2015, the appellant sought a further short adjournment in order to address the respondents' legal submissions. This request was refused by the learned judge and she then proceeded to dismiss the application for extension of time, award costs in the respondents' favour and order that the appellant appear in person at the next court sitting. However, the learned judge neither provided reasons in the order of dismissal nor did she subsequently produce written reasons for her order.

The appellant appealed the learned judge's decision, submitting in essence that she erred in her evaluation of, or failed to properly weigh the evidence placed before her on the application for extension of time; that there was no basis for the 'sanctions' against the appellant awarded in the sum of $2000 and that the learned judge erred in ordering the appellant to appear in person at the next court sitting as he had filed a duly executed Power of Attorney in favour of his father giving him authority to represent him in the proceedings.

**Held**: dismissing the appeal; and awarding costs to the respondents in the fixed sum of $1200, that:

1. CPR 29.11 outlines that if a witness statement 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. In the present instance, the appellant's application was made some six weeks after the deadline for filing of the witness statements expired and therefore the sanction imposed by CPR 29.11 had already bitten.

[1] Cap 10.9, Revised Laws of Saint Christopher and Nevis 2009

2. In order for an applicant to rely on the conjunctive requirements of CPR 26.8(2) in seeking relief from sanctions for failure to comply with a rule, order or direction, the court must be given a clear, detailed and accurate picture of what caused the failure and the steps taken in an effort to remedy same. The appellant bore the burden of showing that he had met the threshold meriting consideration for the grant of relief by producing credible and particularised evidence. However, he failed to satisfy this requirement as his application predominantly consisted of bald and un-particularised statements. He did not detail the steps he took to comply with the rule, account for the time involved or explain why the application was not made on time. The learned judge was therefore properly of the view that the evidence adduced in support of the application fell woefully short of the stipulated requirements for granting relief.

   **Robin Mark Darby v LIAT 1974 Ltd** ANUHCVAP2012/0002 (delivered 5th June 2012, unreported) applied; **Prudence Robinson v Sagicor General Insurance Inc.** SLUHCVAP2013/0009 (delivered 29th September 2014, unreported) applied; **The Treasure Island Company and Another v Audubon Holdings Limited et al** BVIHCVAP2003/0022 (delivered 20th September 2004, unreported) applied.

3. Pursuant to CPR 64.6(1), making a costs order against an unsuccessful party in favour of the successful party conforms with the general rule regarding exercising the discretion to award costs and there must be good reason for deviating from this general rule. Furthermore, CPR 26.8(4) dictates that the court may not order the respondent to pay the applicant's costs in relation to any application for relief from sanctions, save in exceptional circumstances. The appellant failed in his application for relief and thus on the basis of either principle would have become liable to a costs order once the court so decided.

4. Based on the respondents' affidavit evidence it seems that the learned judge's order directing the appellant's personal appearance was due to a failure to appear at previous case management hearings, as the Rules clearly dictate the importance of participation by the actual parties. This undoubtedly includes an attorney-in-fact and/or in-law, who is in a position to represent the party's interests. However, this direction exercised by the learned trial judge is clearly one within the wide case management powers possessed at the pre-trial review stage and which may not be lightly interfered with without good reason.

Rule 27.4 of the **Civil Procedure Rules 2000** applied.

## JUDGMENT

**[1]** **PEREIRA, CJ:** This is an appeal from the decision of the trial judge made on 12th June 2015, in which she refused the appellant an extension of time and relief from the sanction imposed by rule 29.11 of the **Civil Procedure Rules 2000** (CPR) in respect of the appellant's failure to file and serve his witness statements within the time specified by the court.

### Background Summary

[2] The matter has had a somewhat protracted journey through the court system subsequent to the issuance of the claim in April 2012. Suffice it say however, that after an interlocutory appeal which was determined in May 2013, the matter eventually underwent the case management process and it would appear that one of the orders made following a case management conference (CMC)[2] was that the parties were to have filed and exchanged witness statements by 27th February 2015. It appears that further case management hearings took place up to 10th April 2015, with a Pre-Trial Review hearing listed for 17th April 2015. It appears that on the day of the last CMC, the appellant filed an application ('the Extension Application") for an extension of time to file his witness statements and for relief from sanctions, having regard to the provisions of CPR 29.11. The respondents' counsel was served by email on the said 10th April 2015. However, the court office did not give a date for the hearing of the Extension Application. Counsel for the appellant sought to have the court deal with the Extension Application on the day fixed for the pre-trial review. This was opposed by the respondents due to short

[2] A copy of the CMC order was not furnished.

service. They also expressed their intention to oppose the Extension Application and their need to file affidavit evidence in response.[3] The Extension Application was accordingly set for hearing on 12th June 2015. As a consequence, the Pre-Trial Review was postponed. The court at that point, also noted the appellant's continued absence from hearings in the matter since 2012.

[3] At the hearing on 12th June 2015, it appears that the appellant sought a further short adjournment, said to be for the purpose of addressing the legal submissions made by the respondents.[4] This was not entertained. The learned judge dismissed the Extension Application.

**The Appeal**

[4] By notice of appeal filed 15th October 2015, pursuant to the leave of the Court given on 24th September 2015, the appellant, though formulating four grounds of appeal, ground one[A] of which recites various facts said to be undisputed, in essence, boils down to the following:

(a) Whether the learned judge erred in her evaluation of or in properly weighing the evidence placed before her on the Extension Application.

(b) Whether the Extension Application should have been heard on 17th April 2015 instead of on 12th June 2015 which he says would have avoided the issue of dealing with the extensive 'last minute' legal submissions filed on behalf of the respondents in opposition to the Extension Application.

[3] This was filed more than two weeks later.
[4] Counsel for the Appellant had filed no submissions.

(c) There was no basis for 'sanctions' against the appellant and awarded in the sum of $2,000.00

(d) The order directing the appellant to attend the next court sitting was wrong as the appellant had duly executed and filed a Power of Attorney in favour of his father giving him authority to represent him in the proceedings.

[5] The gravamen of the appellant's complaint to this Court is focused on the distilled ground one as set out above. This issue will accordingly be addressed first.

**Error in Weighing or Evaluating the Evidence**

[6] The order of dismissal dated 12th June 2015 as produced to this Court contains no reason, even briefly, as to the learned judge's reason for dismissal. No written reasons have been produced and there is no indication that the learned judge was requested to furnish her reasons for so doing thereafter for the purpose of assisting this Court in appreciating the basis on which the learned judge exercised her discretion. The Court has in numerous decisions deprecated this practice and emphasised the need for providing reasons, however brief, if the appellate court is to properly carry out its function.[5] Further compounding the matter is the fact that no transcript of the proceedings before the learned judge has been furnished. The transcript, in the absence of written reasons, may have thrown some light on the matters weighing with the learned judge and the basis on which she exercised her discretion. As matters stand, the Court is bereft of this assistance and counsel for the appellant does not appear to have addressed his mind to this issue. Thus, the

[5] See: Charles De Barbier and Another v Ronald Leduc SKBHCVAP2008/0010 (delivered 8th December 2008, unreported); IPOC International Growth Fund Ltd. v LV Finance Group Ltd BVIHCVAP2003/0020 and 2004/0001 (delivered 7th and 8th June 2004, unreported); Amazing Global Technologies v Prudential Trustee Co. Ltd. SKBHCVAP 2008/0008 (delivered 13th January and 4th May 2009, unreported); Casanki Quow et al v Commissioner of Police, SVGMCRAP 2010/0022 (delivered 2nd and 4th June 2010 and 21st February 2011, unreported)

challenge posed to this Court in addressing the very issue which he raises, namely the learned judge's error in the exercise of her discretion, becomes patently obvious: How does this Court determine whether or not the trial judge erred in the exercise of her discretion in the absence of any reasons whatsoever - expressed or discernable - for her decision?

[7] Fortunately, or perhaps unfortunately for the appellant, the respondents have filed an affidavit before this Court on 30th October 2015, in which they have provided details of the 12th June 2015 hearing before the trial judge. Ordinarily, such affidavit evidence would not be allowed at this stage, but in the absence of any material which the appellant ought to have sought to produce, only two options appear open: either that the Court without more dismisses the appeal as showing no basis for disturbing the judge's exercise of discretion having regard to the total lack of reasons by which an assessment of the exercise of discretion may be had,[6] or, alternatively, to have regard to the affidavit evidence of the respondents detailing the flow of the proceedings before the trial judge at the 12th June 2015 hearing in the absence of a transcript of the proceedings, by way of deriving such assistance as this may provide in discerning the basis on which the discretion was exercised.

[8] Neither approach is ideal and legal practitioners are urged to have regard to and comply with CPR 62.10 so as to ensure that the Court is furnished with all the necessary material relevant to a proper determination of the issues raised on an appeal. The appellant has not sought to dispute the statements contained in the

[6] See the case of Verbin Bowen et al v Attorney General of Antigua and Barbuda ANUHCVAP2013/0016 – per Mitchell JA. This decision was discharged by consent based on the facts by the full court of appeal at a sitting of the court in Antigua and Barbuda on 22nd January 2014. The legal principles in the judgment however, were not disturbed.

affidavit of the respondents and accordingly, the Court, in adopting the second approach being the lesser of the two undesirable alternatives, will treat with the affidavit for the purposes of discerning the basis on which the learned judge exercised her discretion coupled with a review of the evidence which was placed before the learned judge on the Extension Application, rather than perfunctorily dismiss this appeal.

**The Principles**

[9] The legal principles guiding an appellate court in reviewing the exercise of a trial judge's discretion are so well settled by authority as to be considered trite. The respondents rely on the oft-cited decision from our jurisdiction, **Michel Dufour et al v Helenair Corporation Limited et al.**[7] The principle was recently restated by the Privy Council in **Nilon Limited and another v Royal Westminster Investments SA,**[8] thus:

> "It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court."

**The Extension Application**

[10] The Extension Application was not made before the deadline for filing of the witness statements expired but some six weeks thereafter, which meant that the sanction imposed by CPR 29.11 had already bitten. The sanction was that the

[7] (1996) 52 WIR 188
[8] [2015] UKPC 2 [16]

appellant would be unable to call those witnesses in respect of whom he had failed to file the witness statements or summaries by the deadline ordered at the trial of the claim unless the court granted permission at the time of the trial. The court however may not grant permission at trial unless that party has a good explanation for not seeking prior relief from the sanction in accordance with CPR 26.8. The Extension Application fell to be treated pursuant to CPR 26.8 as the trial date had not arrived, nor does it seem that one had been at that time fixed.

[11] CPR 26.8(1) says that such an application must be made promptly and be supported by evidence on affidavit. CPR 26.8(2) outlines that the court may grant relief from a sanction imposed '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, … orders and directions'

[12] The conditions under CPR 26.8(2) must be cumulatively observed in order to warrant the exercise of the discretion. These principles were discussed in several decisions of this court, two of the more recent being **Robin Mark Darby v LIAT 1974 Ltd**[9] and **Prudence Robinson v Sagicor General Insurance Inc.**[10] As stated above, the Extension Application was made some six weeks after the deadline had expired. It thus cannot be said that it was made promptly. The appellant, from evidence adduced by the respondents in response, was aware as early as 3rd March 2015 that he had missed his deadline for filing his witness statements and, appears from his email to the respondents' legal practitioners, to be unperturbed by it. It took another five weeks to make the application. It is not at all clear what *"a hotly contested general election"* in the Federation of Saint

[9] ANUHCVAP2012/0002 (delivered 5th June 2010, unreported)
[10] SLUHCVAP2013/0009 (delivered 29th September 2014, unreported)

Christopher and Nevis would have to do with the appellant or indeed with compliance with timelines imposed by the court. This delay or lack of promptitude however, as the cases above-cited show, is not fatal. It is however a factor to be weighed generally in the exercise of the discretion. The court must then look to the evidence put forward in support of the application in order to determine whether the cumulative conditions set out in CPR 26.8(2) have been satisfied.

[13] The affidavit in support of the Extension Application, as far as material for the purposes of CPR 26.8(2), stated:

> "5. That former counsel for the Applicant, Ms. Janine Johnson, stopped representing Applicant in mid-February to join another firm, and did not timely file the witness statements.
>
> 6. The Applicant was out of the jurisdiction during the relevant time frame and remains out of the jurisdiction. Counsel that Applicant wishes to engage was also out of the jurisdiction for medical reasons during this same period of time."

This is the extent of the evidence placed before the learned trial judge which bears any relevance to satisfying the cumulative requirements of CPR 26.8.

[14] The learned judge was of the view that the evidence adduced in support of the application fell woefully short of what was required to satisfy the conjunctive requirements of CPR 26.8(2) for granting relief, containing, as it did, bald and un-particularised statements. I would be hard-pressed, based on the dearth of evidence, to arrive at a contrary view.

[15] The onus was on the appellant to show by credible and particularised evidence that he had met the threshold warranting consideration for the grant of relief. He was required to clearly demonstrate to the court that his failure to file his witness

statements was not intentional – in essence that he had taken all reasonable steps to meet the timeline and then to show why notwithstanding taking such reasonable steps, that he was unable to meet it. I agree with the learned judge that the information that the appellant chose to put forward for the judge's consideration was woefully inadequate. He ought to have detailed what inquiries he made of his prior counsel, and what steps he took upon becoming aware of his prior counsel's move to a new place of employment to seek to comply with the timeline. He ought to have explained when he retained new counsel, and the steps he took in seeking to comply and the time involved. The court must be given a clear, detailed and accurate picture of what occasioned the failure and what was done in seeking to remedy it. Up to the time of the hearing, there was no evidence produced that the witness statements had been signed and were ready for exchange far less exhibited in an effort to demonstrate diligence. It has not been explained why application for further time was not made before the deadline expired, which resulted in the sanction taking effect even though the appellant was aware of his deadline. He seemed content to treat his default and its remedy as mere 'run of the mill'. This approach was a most unfortunate one.

[16] Further, he was also required to show that he had generally complied with all other rules, orders and or directions. No attempt whatsoever was made to address this. A litigant would do well to appreciate that making a bald statement that the failure to comply 'was not intentional' *does* not advance their case in persuading a court on this question. Rather, sufficient and cogent evidence must be placed before it from which it can conclude that the failure was not intentional.

[17] In my view, the appellant has signally failed to address in any serious way the matters on which he was required to demonstrate to the court that he merited favourable consideration in being relieved from the sanction from which he had

become subject. The fact that the rule itself expressed the sanction shows the seriousness and importance of compliance with such a step and ought not to be treated with laxity. The consequence, as here is dire and thus it behoves a litigant to put forward fulsome and cogent information which will assist the court in the proper exercise of its discretion and in furthering the overriding objective of dealing with cases justly. Dealing with cases justly does not mean that a litigant can ignore the clear requirements of a rule, order or direction and then seek to suggest when the consequence bites that it is unjust when he has failed to avail himself adequately or at all of the opportunities given for redemption. Unfortunately, the appellant has placed more particulars in his written submissions before the court and statements set out in his first ground of appeal than in the evidence he adduced. A discretion may not be exercised in a vacuum even when given in broad terms and far less so where, as here, the discretion is circumscribed by the clear rules contained in CPR 26.8. As Saunders JA said (and with which statement I agree) in **The Treasure Island Company and Another v Audubon Holdings Limited et al,**[11]

> "The overriding objective does not of itself empower the court to do anything or grant to the court any discretion. It is a statement of the principle to which the court must seek to give effect upon its interpretation of any provision on which it exercises any discretion specifically granted by the Rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself."

[18] I am afraid that the appellant has failed to adequately avail himself of the opportunity provided to him for demonstrating to the court why the discretion relieving him from the sanction ought to have been exercised in his favour. The material he placed before the court was simply too scanty and thus the trial judge cannot be faulted for paying it scant regard. I am in no better position than the trial

[11] BVIHCVAP2003/0022 (delivered 14th July & 20th September 2004, unreported)

judge and could not, on the bare and generalised assertions contained in the affidavit, arrive at a conclusion different to the conclusion reached by the trial judge. The appellant in my view is the author of the hardship of which he now complains and cannot seek refuge in praying in aid the overriding objective of the **Civil Procedure Rules 2000** whilst not comporting with the said Rules governing the exercise of the discretion.

**Hearing should have been on 17th April instead of being adjourned to 12th June 2015**

[19] This complaint could hardly lie in the appellant's mouth. Had he wished the application to be considered on 17th April 2015 then he ought to have filed and served it earlier than 10th April 2015 so as to comply with the due service requirements imposed by the CPR, namely CPR 11.11(1)(b), which requires at least seven days' notice before the court is to deal with the application. No good reason has been advanced as to why the short service of the Extension Application ought to have been allowed. As to the complaint about the late filing of skeleton arguments by the respondents is yet another that it does not do well for the appellant to make, the appellant having failed to file any for the purpose of assisting the court. Merely because the respondents filed skeleton arguments for the purpose of assisting the court in dealing with the opposing position albeit at a later stage than the appellant would have liked, can hardly be a justified criticism in the absence of any assistance from the party whose application it is. The Extension Application was simply not properly before the learned judge on the 17th April 2015, and thus she could not be faulted for fixing a later date for its hearing

which would have allowed time for proper service on the respondents in accordance with CPR.

**The Costs *'Sanction'***

[20] This complaint can be dealt with shortly. Firstly, CPR 64.6(1) outlines that making a costs order against an unsuccessful party in favour of the successful party comports with the general rule in respect of exercising the discretion to award costs. There must be good reason for deviating from the general rule. The learned judge awarded costs on the dismissal of the Extension Application in the amount of $2,000. The appellant seems to suggest that costs ought not to have been awarded and, if awarded, the sum of $2,000 was in any event excessive. This complaint is unsustainable. Secondly, where a party is seeking relief from a sanction, CPR 26.8(4) says in effect that the court may not order a respondent to pay the costs of a party who succeeds on such an application unless exceptional circumstances are shown. The rationale for this rule is immediately obvious. It is the applicant who is seeking to redeem himself from his own default. Accordingly, a costs order on such an application is ordinarily made against the applicant even where the application succeeds which reflects the respondent having been put to incurring costs due solely to the applicant's default. Here the position is worse. The appellant failed in his application for relief and thus on the basis of either principle would have become liable to a costs order once the court so decided. As to the quantum, no good reason has been put forward for interfering with the sum awarded.

**The Power of Attorney**

[21] It is not clear whether the Power of Attorney produced in the record of appeal and which appears to have been executed outside of the Federation was recorded in

the Registry in St. Kitts. However, a notice of filing of the Power of Attorney was filed in the proceedings on 26th May 2015. It is not clear whether the learned judge had regard to this Power of Attorney on the hearing of the application. The uncontroverted affidavit of the respondents seems to suggest that an order directing the appellant's personal appearance was due to a failure to appear at previous case management hearings having regard to the importance of participation by the actual parties in those processes, as made clear by CPR. CPR 27.4(2) would clearly encompass a person such as an attorney in-fact and/ or in-law, who is in a position to represent the interests of that party. However, the trial judge has wide case management powers at the pre-trial review stage and such a direction is clearly one within the plenitude of the powers which may be exercised and which may not be lightly interfered with unless there is good reason for so doing.

[22] The respondents say in their affidavit that no evidence or representations were put forward by counsel at the hearing setting out the reasons for the appellant's inability to attend the further pre-trial hearings. This court is not aware of the considerations weighing with the trial judge which led her to make this direction. It may very well be, based on the respondents' affidavit, that the fact of the existence of the Power of Attorney and the reasons for the appellant's inability had not been sufficiently explained. But this alone does not permit me to vacate the direction as being without basis. I consider that it is one best left to be properly brought to the attention of the judge below in respect of the future conduct of the proceedings.

**Conclusion**

[23] For the reasons which I have given, I would dismiss this appeal with costs to the respondents fixed in the sum of $1,200.00

**Dame Janice M. Pereira, DBE**
Chief Justice

I concur.

**Mario Michel**
Justice of Appeal

I concur.

**Paul Webster**
Justice of Appeal [Ag.]