IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2008/0203B

IN THE ESTATE OF NORBERY BRIGLAND CARYL PATERSON (DECEASED)

BETWEEN:

WILLIAM B. PATERSON
(Also known as Bill Paterson)

Claimant

AND

WINSTON THOMAS FLEARY
CARYL F. C. PATERSON
DARYL P. THOMPSON
PATRICK PATERSON
GERVA PATERSON
RHINA CAMPBELL
GLORIA JOHN
SONIA JOHNSON
TWISTLETON PATERSON
CARMIK PATERSON
DAVIDSON PATERSON
JOSEPH PATERSON
DONNA COY
LISA GEORGE

Defendants

Appearances:
Mr. Ian Sandy for the Claimant
Ms. Sabina Gibbs for 2nd Defendant

2015: November, 13;
2016: February, 12.

DECISION

FACTS

[1] GILFORD, J.: This matter has had a long history. It began by Fixed Date Claim Form. The claim was filed on the 31st day of March 2008. The claim seeks the revocation of a Grant of Probate of a will of Norbery Brigland Caryl Peterson, which was granted on the 28th day of September 2006. The claim also sought to have a will dated 19th August 2002 pronounced valid together with the probate of that will.

[2] The Case Management Order was made on the 22nd day of January 2015. The order stated:

> "On the 12th day of November 2015, the Claimant/Applicant filed his witness statements one day before the date set for Pre-Trial Review. The witness statements were due to be filed on the 20th day of April 2015,"

[3] On 13th day of November 2015, the date set for Pre-Trial Review, Counsel for the ~~t~~second-~~he 2nd N~~named-Defendant/Respondent objected to the filing of the witness statements. This court granted the Claimant/Applicant leave to file an Application to be relieved from sanctions in order to have the witness statements and witness summary be used at trial.

[4] The Claimant/Applicant filed his Application to be relieved from sanctions and to have the witness statements and witness summary be deemed properly filed on the 17th November 2015. The second-named Defendant/Respondent filed his affidavit in response opposing the Application on the 24th day of November 2015.

Case for the Claimant/Applicant

[5] In support of the Application the Claimant/Applicant deposed that "the Claimant/ Applicant did not meet the 20th April 2015 deadline set for filing witness statements

because he could not locate all of his witnesses in time to comply with the aforesaid 20th April 2015 deadline. This was exacerbated by the fact that the claimant lives in Carriacou and most of the witnesses live in Grenada".

[6] Counsel submitted that before the 20th April 2015 deadline for filing witness statements, he informed the Head of Chambers of the second-named defendant's of his difficulty and requested that the second-named defendant file his witness statements in a sealed envelope. This was done. He was unable to file the statements as ordered by the court and subsequently filed the witness statements on the 12th November 2015.

[7] The Claimant/Applicant has generally complied with all orders and directions made in this action. The second-named Defendant/Respondent has suffered no prejudice as a consequence of the late filing of the claimant's witness statements. The failure to file my witness statements on time was not intentional. A trial date has not yet been set for the trial of this matter and the second-named Defendant/Respondent is not prejudiced in that regard.

Case for the Second-named Defendant/Respondent

[8] In opposition, the second-named Defendant/Respondent deposed that the matter came up for Case Management Hearing almost seven (7) years after proceedings were instituted. On the 20th April, 2015, the same day required for the filing of witness statements, the second-named Defendant/Respondent was informed the Claimant/Applicant would not be ready to exchange witness statements on the said 20th April 2015, and it appeared that the Claimant/Applicant was again finding another way to further delay the matter.

[9] He further deposed that the that the Claimant/Applicant could have filed 'Witness Summary' for his witnesses, pursuant to Part 29.6(1) of the Civil Procedure Rules. He averred that the Claimant/Applicant's failure and/or refusal to file and

serve the witness statements or witness summaries in time should bar him from being able to rely on such witnesses at trial, since they were filed almost seven (7) months after the date ordered by the court.

[10] He further deposed that justice is not being served with the severe delays that he has undergone on account of the Claimant/Applicant's tardiness and apparent lack of interest in meeting the set deadlines of the court. As a result he has been unable to receive the gift from his grandfather made by his Last Will and Testament, forced to rent alternative premises until this matter is resolved, both his brother and himself have endured financial strain as a result of the case and it has hampered his ability to pursue further studies abroad. Furthermore, he deposed that the history of this matter confirms that the Claimant/Applicant has not treated with it in a timely manner and he and the other beneficiaries have endured delays at the hands of the Claimant/Applicant.

[11] The second-named Defendant/Respondent further averred that the Claimant/Applicant has not applied to this court to lead expert evidence in the person of Dr. Sonia Johnson and that her evidence does not comply with the requirements of the CPR with regard to expert evidence.

[12] Part 26.7 (2) of the Civil Proceedings Rules, 2000 (hereinafter "CPR") states,

> "If a party has failed to comply with any of these rules, a direction or any court order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply."

[13] Rules 29.11(1) and (2) of the CPR 2000 state:

> (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 asking for permission has a good reason for not previously seeking relief under rule 26.8.

[14] The law regarding an application from relief from sanction is set out in Part 26.8 of the Civil Procedure Rules 2000 which states as follows:

(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(a) Made promptly; and

(b) Supported by evidence on affidavit.

(2) The court may grant relief 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, practice directions, orders and directions.

(3) In consideration whether to grant relief, the court must have regard to –

(a) The effect which the granting of relief or not would have on each party;

(b) The interests of the administration of justice;

(c) Whether the failure to comply has been or can be remedied within a reasonable time;

(d) Whether the failure to comply was due to the part or the party's legal practitioner; and

(e) Whether the trial date or any likely trial date can still be met if relief is granted.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[15] In the case of the Attorney General v Keron Matthews,[1] Lord Dyson, on examination of rules 26.6, 26.7 and 29.13(1) of the Trinidad and Tobago CPR, which are similar to rules 26.7, 26.8 and 29.11(1) respectively of the Eastern Caribbean Court CPR 2000, stated:

> "Rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from sanction imposed for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, 'any sanction for non-compliance imposed by the rule ... has effect unless the party in default applied for and obtains relief from sanction" (emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits."

[16] The coupled effect of rules 26.7(2), and 29.11(1) and (2) is that a witness statement or summary is automatically excluded if a party fails to comply with an order of the court and the witness will not be permitted to testify at the trial. In relation to the case at bar the failure of the Claimant/Applicant to file his witness statements on or before the 20th April 2015 falls within sanction.

[17] Therefore, a party who fails to comply with an order of the court must seek permission to obtain relief from the expressed sanction imposed by rule 29.11 of the CPR. It therefore follows the Claimant/Applicant non-compliance with the Case Management Order (CMO) of the court of the 22nd day of January 2015 resulted in automatic sanctions pursuant to rule 29.11(1)[2] of the CPR. As a result of this sanction the onus then fell on the Claimant/Applicant to apply to the court to be relieved from sanctions. In an effort to determine whether the court should

[1] [20011] UKPC 38 at para 15

[2] Rule 29.11 (1) provides "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".

exercise its discretion to grant the relief sought, the court will now look at the guiding principles under rule 26.8 to determine whether Defendant/Applicant should be granted the relief prayed for.

[18] In the case of Robin Darby v LIAT (1974)[3], Pereira JA as she then was stated,

> "[15] This rule says in effect that an application for relief must be made promptly and be supported by affidavit. The relevant part of this rule which is critical to the court's exercise of its discretion to grant relief is contained in sub-rules (2) and (3). Sub-rule (2) states as follows:
>
> "The court may grant relief only of 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, practice directions, orders and direction."
>
> These may be termed the compendious conditions circumscribing or the prerequisites for the exercise of discretion. Once these are satisfied, sub-rule (3) then sets out the considerations by which the court is to be guided in exercising the discretion."

[19] In the case of Irma Paulette Robert and Cyrus Faulkner and others,[4] the Court of Appeal allowed an appeal where an application for relief from sanctions was initially refused by the court of lower standing. Edwards JA [AG] stated:

> "[34] It is important to note that CPR 26.8(1) (b) establishes no criteria for granting an application for relief from sanctions…CPR 26.8(1) does not create a sanction for failing to make an application for relief from sanction promptly. Any such sanction would have to be created by a court order or other rule. CPR 26.8(1) does not

[3] ANUHCVAP 2012/002
[4] Saint Lucia Civil Appeal No. 29/2007

preclude the court from hearing an application for relief from sanction that has not been made promptly…

[36] In the absence of any order invalidating an application for relief from sanction that has not been made promptly, the court may proceed to determine the application on its merit in my view, based only on the mandatory criteria established by CPR 26.8(2) and having regard to the factors prescribed in CPR 26.8(3), while seeking to give effect to the overriding objective."

[20] It is apparent that the cumulative effect of the case law above is that the lack of promptitude in making an application to be relieved from sanction is not an immediate bar to such an application unless there is a sanction attached. What are the important factors to be considered are rules 26.8(2) and 26.8(3) of the CPR, the latter rule only to be considered if rule 26.8(2) is satisfied.

Rule 26.8(1)

[21] The Claimant/Applicant has complied with rule 26.8(1) (b) in so far as the application is supported by affidavit sworn to by the Claimant.

[22] Rule 26.8(1) (a) requires that an application of this nature should be made promptly. It follows therefore that with regard to rule 26.8(1) (a) the court must ask itself whether the Claimant/Applicant acted promptly in making his application to this court for relief from sanctions.

[23] In light of Irma Paulette Robert and Cyrus Faulkner and others,[5] considering promptness only becomes effective if there is a sanction. Learned Pereira JA in Robin Darby v LIAT (1974)[6], further stated:

"Rule 26.8 of the Civil Procedure Rules does not direct the court to have regard to whether or not the application for relief from

[5] Supra n4
[6] Supra n3

sanction has been made promptly in considering whether to grant relief. Therefore, the Master erred in placing undue emphasis on what has been viewed as a lack of promptitude in applying relief."

[24] In the case of Prudence Robinson v SAGICOR General Insurance Inc.[7], Baptiste JA, stated:

> "The witness summary, in respect of which the application for relief from sanctions was made, should have been filed on 19th December 2008. The application was seven months late and therefore was not made promptly (in breach of rule 26.8(1) (a)."

[25] Counsel for the Claimant/Applicant submits that rule 26.8(1) does not create a sanction for failing to make an application for relief from sanctions promptly and as such sanction would have to be created by a court order or other rule. Counsel for the second-named Defendant/Respondent contends that application was not made promptly, having been made almost seven months after it was ordered by the court.

[26] The witness statements were filed on the 12th day of November 2015, almost seven months after the deadline set by the CMO[8]. The application to be relieved from sanctions was filed on the 17th day of November 2015, five days after the date set for the pre-trial review and after it was brought to the attention of counsel and by prompting of the court. Furthermore, paragraph 8 of the 26th January 2015 Order, "the Order" provided for liberty to apply on or before the 2nd day of October 2015, which provision counsel for the Claimant/Applicant failed to utilize. It is the view of the court that implicit in the liberty to apply clause is the preclusion of any further application if not made within the specified time. It is time that all court users, especially counsel, adhere to the orders of the courts. These orders are working guidance to ensure that the court machinery function smoothly, in an effort to ensure optimum justice in the shortest period possible for those who are

[7] SLUHCVAP2013/0009, para 9
[8] Statements were due to be filed on the 20th day of April. 2015.

aggrieved. It cannot be said, as in the case of Prudence Robinson v SAGICOR General Insurance Inc.[9] that the Claimant/Applicant acted with promptitude in making this application.

[27] On an application for relief from sanction the court must be 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, practice directions, orders and directions.

These are pre-conditions which must be satisfied before the court proceeds to make any other considerations.

The failure to comply was not intentional

[28] The Claimant/Applicant has proffered no explanation outlining why his failure to comply with the order of the court was not intentional.

Has the claimant provided a good explanation for the failure to comply?

[29] In Prudence Robinson[10] per Baptiste J A, stated:

> "I agree with the judge that the failure to comply was not intentional. To my mind, however, the explanation offered by Ms. King in the affidavit is substantially deficient and did not meet the threshold of a good explanation for the delay. The affidavit evidence does not condescend to particulars.... In the circumstances it cannot be said that there was a good explanation for the failure. The pre-condition stated in rule 26.8 (2) (b) was therefore not met. That is fatal to the case in relation to rule 26.8."

[9] Supra n7

[10] Supra n7, para 10

[30] In Harold Simon v Carol Henry and Tracey Joseph,[11] Satrohan Singh, JA stated:

> "In my view, it is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has been done in this case. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the rules by lapse of time."
>
> It was suggested by counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the court should take it as proof that there was this alleged financial embarrassment. The answer to that, in my view, is two-fold. First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material."

[31] In the case of John Cecil Rose v Anne Marie Uralis Rose[12], Byron C.J., as he then was, stated:

> "Details of Mr. Rose's failed efforts to communicate with his attorney were not adduced in evidence…The first issue that is necessary to emphasize is that in matters of this nature, the points being made must be proved by evidence.."

[32] In support of rule 26.8(2)(b), the Claimant/Applicant averred[13] that he "did not meet the 20th April deadline set for filing witness statements because he could not

[11] Civil Appeal Suit No. 1 of 1995, p. 3
[12] Civil Appeal Suit No. 19 of 2003 SLU, para 4

locate all of his witnesses in time to comply with the aforesaid 20th April 2015 deadline. This was exacerbated by the fact that the claimant lives in Carriacou and most of the witnesses live in Grenada". However, the court finds the explanation of the Claimant/Applicant unacceptable, in light of the fact that the Claimant/Applicant made no effort to file his own witness statement, which was open to him to do. He tenders no reason why he failed to file his witness statement in a timely manner. The court concurs with counsel for the second-named Defendant/Respondent that the Claimant/Applicant simply relies on "bald assertions" without any particulars as to what active steps he took to ensure that he made contact and communicated with his witnesses, who are all living in Grenada and not in some remote or unknown part of the world. To simply say without more that one was unable to locate one's witness does not constitute a good explanation. This is having regard to the dicta of the cases outlined above. Above all, the claimant has not identified any positive step that he took in an effort contact his witnesses.

[33] A number of reasons were put forward as to why the witness statement was not filed in a timely fashion. Counsel submitted that "the process of engagement and getting the appropriate response so as to make a determination for the way forward is causing some delay. The court in the case of Cecil Rose and Anne Marie Rose[14] held that "the difficulties experienced in communications…In my judgment therefore was no acceptable reason for the inordinate delay".[15] The affiant in the affidavit filed in support of this matter averred counsel in the matter had been "in communication with the claimant's counsel on the issue of settlement. By analogy and in the view of the court the failure of the claimant to contact his witnesses does amount to an acceptable reason for the failure to file the witness statement in a timely manner.

[13] At paragraph 5 of his affidavit filed on the 17th day of November 2015
[14] Supra n12
[15] Grenada Civil Appeal No. 11/2011 at paragraph 16

[34] Furthermore, the court agrees with the submission of counsel for the second-named Defendant/Respondent that there was nothing hindering the Claimant/Applicant from proceeding in accordance with rule 29.6[16] of the CPR, if indeed he was exercising all diligence in prosecuting his claim. To wait more than seven months is an inordinately long period.

The party in default has generally complied with the orders of the court

[35] The second-named Defendant/Respondent averred, and this is not disputed by the Claimant/Applicant, that the Claimant/Applicant has been generally non-compliant with the orders of the court in that the Lists of Documents as well as the Pre-Trial Memorandum were filed out of time and that to date the Listing Questionnaire has not been filed.

[36] The Claimant/Applicant averred that he has generally complied with the orders of the court without more, despite the fact that it is clear to the court that there was obvious non-compliance. Moreover, there was failure on the part of the Claimant/Applicant to give an explanation for the non-compliance with the CMO.

[37] The court finds that the claimant has not acted with promptitude in making his application. In addition, the claimant has failed to provide the court with a good explanation and convince this court that he has generally complied with the order of the court. The court finds that the claimant has failed to satisfy the court with regard to the pre-conditions stated in Rule 26.8 (2) of the CPR and this is fatal to the case in relation to Rule 26.8.

[38] In light of the above, it is hereby ordered:

(a) the application to be relieved from sanctions is dismissed.

(b) Costs to the defendant in the sum of $2,500.00.

(c) Judgment for the Defendant/Respondent.

[16] Rule 29.6 provides for "[a] party who is required to provide and is not able to obtain a witness statement may serve a witness summary instead…

(d) Matter is set down for trial on 24th October 2016.

Paula Gilford
High Court Judge