THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2014/0226

Between:

KEN I YOUNG

Claimant

And

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Ms. Patina Knights for the Claimant
Mr. Kezron Walters for the Defendant

2016: June, 23
July, 20

JUDGMENT

[1] **CORBIN LINCOLN M** : The issue before the court is whether the defendant should be granted an extension of time to file witness statements and relief from sanctions.

Background

[2] The claimant commenced this claim against the defendant for, among other things, damages for assault and battery.

[3] On 14th December 2015 the parties were given directions for trial which included an order that witness statements be filed and served on or before 19th February 2016.

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[4] On 24th March 2016 the defendant filed an application for an extension of time to file witness statements and relief from sanctions.

[5] The ground of the application is that the defendant *"faced several encumbrances including the timely attendance of witnesses to chambers to facilitate the speedy finalizing and filing of witness statements."*

[6] The application is supported by an affidavit of Cerepha Harper which was filed together with the application and an affidavit of J'Lany Williams filed on 23rd June 2016, the morning of the hearing. Counsel for the claimant stated she was willing to proceed with the hearing notwithstanding the late filing of the second affidavit.

The Applicable Rules

[7] **CPR** 26.1 (2) (k) gives the court the power to extend or shorten the time for compliance with any rule or order of the court even if the application for an extension is made after the time for compliance has passed.

[8] **CPR** 27.8 states:

" (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –

(a) a case management conference;

(b) a party to do something where the order specifies the consequences of failure to comply;

(c) a pre-trial review;

(d) the return of a listing questionnaire; or

(e) the trial date or trial period.

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(2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date.

- Rule 42.7 deals with consent orders.

(4) A party who applies after that date must apply for – (a) an extension of time; and (b) relief from any sanction to which the party has become subject under these Rules or any court order.

- Rule 26.8 provides for applications for relief from sanctions. "

[9] The sanction imposed by the **CPR** for failure to serve the witness statement of an intended witness within the time specified by the court is contained in **CPR** 29.11 which states that the witness may not be called unless the court permits.

[10] **CPR** 26.8 states:

"(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.

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(3) In considering 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 party 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.

[11] The application falls to be determined under **CPR** 26.8 since the defendant made the application for an extension of time after the date fixed by the court for filing witness statements and has become subject to the express sanction contained in **CPR** 29.11.

The Approach to CPR 26.8

[12] It is now well established that **CPR** 26.8 (1) does not contain mandatory preconditions for the granting of relief but **CPR** 26.8 (2) contains mandatory conjunctive preconditions to be satisfied. Consequently, a failure to satisfy any of the preconditions in **CPR** 26.8 (2) is fatal to an application. If the mandatory pre conditions in **CPR** 26.8 (2) are satisfied the court must go on to consider the factors in **CPR** 26.8 (3) in determining whether it should grant relief. [1]

CPR 26.8 (1) - The Promptness of the Application & The Filing of An Affidavit

[13] The deadline fixed by the court for filing witness statements was 19th February 2016. The defendant filed the application for an extension of time supported by an affidavit on 24th March 2016, almost 5 weeks after the deadline for filing witness statements.

[1] Robin Darby v Liat (1974) Limited ANUHCVAP2012/002; Prudence Robinson v Sagicor General Insurance SLUHCVAP2013/0009

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[14] Counsel for the defendant submitted that promptness must be viewed in context and it was "impossible" for the defendant to make the application earlier for the reasons outlined in the affidavits. While I agree that promptitude depends on the facts of each case, I am not satisfied that anything in the affidavits supports the contention that it was impossible for the defendant to make the application with more promptitude. I therefore do not find that the application was made promptly.

[15] In **Robin Darby v Liat (1974) Limited** the Court of Appeal held that promptness of the application is not a prerequisite for the grant of relief and consequently I proceed to consider whether the claimant has satisfied the mandatory requirements of **CPR** 26.8 (2).

CPR 26.8 (2) - Was the failure intentional?

[16] The case management directions, which included an order for the filing of witness statements, was made by order dated 15th December 2015 in the presence of all the parties and their legal representatives. The order required witness statements to be filed by 19th February 2016 thus giving the parties approximately two (2) months to prepare and file witness statements.

[17] The natural and ordinary meaning of the word 'intentional' is something done deliberately or by conscious design or purpose.

[18] In the Trinidadian case of **The Attorney General of Trinidad and Tobago and Universal Projects Ltd** ("*Universal Projects*"),[2] Jamadat J.A stated :[3]

> "However, it is one thing to say that the Appellant in pursuance of that intent delayed, defaulted and ultimately run fatally afoul of the CPR, 1998, but it is quite another to say that the Appellant intended the consequences of its inaction and laxity and that the State intended the consequences caused in this case... "Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice,

[2] Civil Appeal No. 104 of 2009 (Trinidad and Tobago) delivered on the 26th February 2010
[3] ibid paragraphs 67 and 69

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> negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order. All of these reasons may be assessed as not providing any good explanation for the breach of the order, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7 (3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7 (3) and wedded to all of the requirements of Part 26.7."

[19] In **Dominica Agricultural and Industrial Development Bank** v **Mavis Williams** the Court found that the appellant had considered whether to appeal the liability judgment entered against it, got legal advice and decided to wait until after damages were assessed to determine whether to appeal. Following the assessment of damages the appellant sought to appeal nine (9) months after the time for appealing had expired. The court found that in those circumstances there was a deliberate disregard for the rules and its consequences and therefore the court held that the appellant's failure to comply was intentional.

[20] A finding of intentional failure to comply with a rule or order appears to require evidence (direct or inferred) of some conscious, deliberate decision not to comply. In this case, unlike the **Dominica Agricultural and Industrial Development Bank** case, there is no evidence that the defendant took a deliberate and conscious decision not to file witness statements within the time fixed by the court. I am therefore unable to find that their failure to comply was intentional.

Is there a good explanation for the failure?

[21] The affidavit of Cerepha Harper, filed in support of the application, states:[4]

> " The Defendant faced several encumbrances such as the absence of Crown Counsel with conduct of the matter from Attorney General's Chambers and the resulting short staff created thereby, and the timely attendance of witnesses to facilitate the speedy framing, finalizing and filing of witness statements.

[4] paragraphs 4-6

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The Defendant was finally able to file and serve all Witness Statements on the 18th day of March 2016.

The Defendant now applies speedily for an extension of time to file Witness Statements…"

[22] The affidavit of J'Lani Williams, filed on 23rd June 2016 in support of the application states:

"4. The Defendant faced several encumbrances such as the absence of Crown Counsel with conduct of the matter from Attorney General's Chambers and the resulting short staff created thereby, and the timely attendance of witnesses to facilitate the speedy framing, finalizing and filing of witness statements.

5. That specifically the said witnesses were to attend chambers on February 9th 2016 to have witness statements finalized for filing. This was not done.

6. That on or around the 1st day of February I proceeded to go on mandatory vacation leave my contract with the Government of Saint Vincent and the Grenadines having come to an end. This resulted in only two Crown Counsel 1 remaining in chambers. I requested of Counsel to follow up with the matter upon the mammoth workload already existing for only two Crown Counsel 1.

7. I am advised and do verily believe the same to be true that Counsel upon getting around to this file send an urgent follow up to the Commissioner of Police on or around March 16, to warn the Officers to attend Chambers so that witness statements could be filed at the earliest convenience.

8. The officers who were now spread across St. Vincent and the Grenadines and now not only members of the RSVGPF, but also of the Rapid Response Unit (RRU) were so warned and did attend chambers on March 18 where Witness Statements were finalized , signed and filed and served on the same day. An

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application for an extension of time to file witness statements and for relief from sanctions followed shortly thereafter.

9. As such I am informed by Counsel and do verily believe ……that failure to file and serve witness statements on time was absolutely not deliberate or intentional. Counsel has sought to comply with all other requirements of the order…

[23] Counsel for the claimant submits that the evidence does not disclose a good explanation for failure to file the witness statements since administrative inefficiency does not amount to a good explanation. Counsel relies on the case of **The Attorney General of Trinidad and Tobago and Universal Projects Ltd** .[5]

[24] Counsel for the defendant submitted that there is a "low threshold" for satisfying the criteria of a "good explanation." Counsel was unable to provide any authority for this proposition. While a "good explanation" does not mean an infallible one I am unable to agree that there is a "low threshold" to satisfy this requirement. The word "good" in its natural and ordinary meaning connotes something of a high quality and standard.

[25] In **Universal Projects** Lord Dyson, reading the judgment of the court said:

> "Mr Knox submits that the Court of Appeal did not make sufficient allowance for the difficulties which caused the delay in preparing the defence. There was no evidence that it was known as at 20 February that getting approval to instructing outside counsel would take as long as it did. But more importantly, Mr Knox submits that the court's reasoning proceeded on the mistaken premise that in law a "good explanation" requires the party in default to show that he was not at fault, with the result that he cannot rely on such things as administrative inefficiency, oversight or errors made in good faith. To interpret "good explanation" as requiring absence of fault would impose an unreasonably high test, because in practice virtually all breaches are the result of some fault. Rather, he submits, a "good explanation" is one which "properly explains how his breach came about, which may or may not involve an element of fault such as inefficiency or error in good

[5] Civil Appeal No. 104 of 2009 (Trinidad and Tobago) delivered on the 26th February 2010

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faith" (para 26 of the Defendant's written case in the present appeal). Any other interpretation would be inconsistent with the overriding objective of dealing with cases justly and should therefore be avoided under r 1.1(2).

Applying that test, Mr Knox submits that the State did have a good explanation for its failure to serve a defence by 13 March. It needed to instruct outside counsel (given the size of the claim), but this took some time with the result that they were not instructed until 10 March because the matter had to be passed to the Attorney General.

The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the Defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency.

The Board cannot find any fault in the reasoning of Jamadar JA. It wishes particularly to emphasise the points made in the last part of para 56 of his judgment. The proceedings were served on the Defendant on 16 December 2008. On 20 February the Defendant was granted an extension of time of three weeks (until 13 March) for the service of the defence. In these circumstances, it was incumbent on the Defendant to do everything that it reasonably could to meet the extended timetable. The Court of Appeal was entitled to regard the delay in instructing outside counsel as inexcusable. Even more perplexing was Ms Baptiste-Samuel's failure to seek a further short extension of time for service of the defence. She knew that the defence would not be served in time. Instead of applying for an extension of time, she wrote the letter of 13 March 2009 referred to at para 5 above. There is no reason to suppose that, having regard to the size of the claim, Gobin J would not have granted a further short extension of time. In that event, there would have been no breach of the order of 20 February at all." (emphasis mine)

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[26] Having considered the defendant's evidence, I am not satisfied that the explanation provided for the failure to file witness statements within the time ordered by the court amounts to a good explanation for the following reasons:

(1) Ms. Harper states that one of the reasons for the failure to file the witness statements was the absence of counsel with conduct of the matter and the resulting short staff it created. Mr. Williams does not state that he was counsel with conduct of the matter but I infer from his affidavit that he was. I do not find that the absence of counsel with conduct of the matter amounts to a good explanation in circumstances where Mr. Williams' evidence is that prior to proceeding on leave he handed the matter over to another counsel in chambers.

(2) Mr. Williams states that witnesses were scheduled to attend chambers on 9th February 2016. He proceeded on mandatory leave on 1st February 2016 prior to the date arranged for the attendance of the witnesses.

(3) There is no evidence of what steps, if any, were taken between 15th December 2015 when the order was made and 1st February 2016 when Mr. Williams proceeded on mandatory leave in relation to the preparation of the witness statements. Specifically, there is no evidence of what prevented witness statements from being prepared during this period.

(4) Mr. Williams states that he "*requested of Counsel to follow up with the matter upon the mammoth workload already existing for only two Crown Counsel 1.*" I understand Mr. Williams to be saying that the two Crown Counsels already had a mammoth workload when he requested of Counsel to follow up on this matter. Pressure of work or having a large volume of work is not in my view a good reason for failing to comply with an order of the court.

(5) There is no evidence that the counsel to whom Mr. Williams handed over the file was unaware: (a) of the scheduled appointment with the witnesses for 9th February 2016

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and; (b) that the deadline for filing witness statements was 19th February 2016. I therefore proceed on the premise that counsel was aware. Being so aware, there is no evidence that counsel followed up with the witnesses following their non attendance on 9th February 2016. The evidence is that counsel waited until 16th March 2016 *after the deadline had expired for filing witness statements*, to follow up with the Commissioner of Police about the witnesses.

(6) The evidence of Mr. Williams is that "*Counsel* ***upon getting around to this file*** *send an urgent follow up to the Commissioner of Police on or around March 16."* It is not expressly stated why counsel only "got around" to the matter around March 16 but I infer that it is being asserted that counsel only *got around* to the file when he or she did because of the volume of work. As stated I do not accept that the volume of work is a good explanation for failure to comply with an order of court. Even if counsel recognised that due to the volume of work there would be difficulty in complying with the order there is no evidence of any barrier preventing an application being made for an extension of time to file witness statements prior to the deadline for filing the statements.

(7) Further, being aware of the deadline for filing witness statements it is not acceptable that counsel would delay until March- after the time for filing witness statements had passed - to *"get around to the file".* This does not suggest that the matter was prioritised in view of the deadline or that the order of the court was attributed the level of seriousness warranted. I note that within 2 days of counsel following up on the matter the witnesses attended.

[27] The reasons provided disclose real and substantial fault on the part of the defendant. In all the circumstances I am not satisfied that the claimant has provided a good explanation for its failure to file its witness statements within the time required.

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Has the Claimant generally complied with all other relevant rules, practice directions, orders and directions.

[28] Counsel for the claimant submits that the defendant has not generally complied with all other relevant rules, orders and directions and notes that the defendant failed to file a defence within the time fixed by the Rules.

[29] The defendant did fail to file a defence within the time fixed by the Rules. The claimant obtained judgment in default. The judgment in default was set aside under CPR 13.3 upon an application by the defendant. I note that one of the grounds of the application was that "*The Defendant however through inadvertence and inability did not file a Defence due to the fact that all requisite documents had not and still have not been obtained for the defendant to prepare its Defence. Further, the Defendant was encumbered due to difficulties in the scheduling of interviews with the officers involved due to the exigencies of their profession. The Defendant considers this a good reason for failure to file a Defence.*"

[30] While the defendant failed to file a defence within the time fixed by the rules I find that the defendant has *generally* complied with the other rules and directions.

[31] Applying the approach to **CPR** 26.8 outlined in **Robin Darby v Liat (1974) Limited** and **Prudence Robinson** my finding that the claimant has not provided a good explanation for failing to comply with the order of the court means that the defendant has failed to satisfy one of mandatory preconditions set out in **CPR** 26.8 (2) and consequently the defendant's application for relief from sanctions must fail.

[32] **CPR** 1.1 and 1.2 provide that the court must give effect to the overriding objective when it exercises any discretion given to it by the rules so as to enable the court to deal with cases justly. However, it has been held that the overriding objective cannot be used to widen or enlarge any power, allow the court to bend the rules or come to the rescue of an applicant.[6] In **Ferdinand Frampton v Ian Pickard** [7] the court noted:

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[6] Justice Dean Amore in Winston Padmore v James Morgan, Civil Appeal No. 277 of 2006; D' Auvergne JA

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"it is appropriate, at the juncture to state the fundamental premise that there are rules that govern the grant of an extension of time. The Court cannot grant an extension of time as a matter of discretion. The Court can only do so in accordance with the rules that are laid down. Not even in a case of the utmost public importance can the Court overrule the rules because in a particular case the Court thinks it fair or reasonable or appropriate or just to do so ... The due application of the rules, therefore, is itself of the utmost public importance because those rules and their due application are the basis upon which opposing parties to litigation are entitled to and must expect their dispute to be determined."

[33] The claimant's application for an extension of time to file witness statements and relief from sanctions is therefore refused.

Costs

[34] This application was filed after case management conference had ended with the issuing of trial directions. The application is therefore not an application being determined at a case management conference. Consequently costs to the defendants will be calculated on an assessed costs basis pursuant to **CPR** 65.11.

[35] **CPR** 65.11 (7) states that the costs should not exceed 1/10 of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount.

[36] I do not find that there are any special circumstances justifying a higher amount. Having regard to the factors set out in **CPR** 64.6 (6) costs to the claimant are assessed in the sum of $450.00.[8] The defendant shall pay the costs within 21 days.

Fidela Corbin Lincoln
Master

(Ag.) in Ormiston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd. SVGHCVAP2004/0003.

[7] DOMHCVAP2005/0015

[8] Applying the default value of $50,000.

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