

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0162

IN THE MATTER OF THE COMPANIES ACT CAP. 143 OF THE REVISED LAWS OF SAINT VINCENT AND
THE GRENADINES 2009

AND

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT CAP. 136 OF THE REVISED LAWS OF
SAINT VINCENT AND THE GRENADINES 2009

AND

IN THE MATTER OF THE RECEIVERSHIP OF ST. CLAIR INVESTMENTS LIMITED, KFC (ST. VINCENT)
LIMITED, BOYEA HOLDINGS LIMITED, AND W.J. ABBOTT AND SONS LIMITED

BETWEEN

ST. CLAIR INVESTMENTS LIMITED

FIRST CLAIMANT

and

KFC (ST. VINCENT) LIMITED

SECOND CLAIMANT

and

BOYEA HOLDINGS LIMITED

THIRD CLAIMANT

and

W.J. ABBOTT AND SONS LIMITED

FOURTH CLAIMANT

and
ORMISTON ARNOLD BOYEA

FIFTH CLAIMANT

and
DAVID HOLUKOFF

and
MARCUS WIDE

both of Grant Thornton, 171 Main Street,
Road Town, Tortola, British Virgin Islands
Receiver-Manager of the Claimants

DEFENDANTS

Appearances:

Mr. Parnel R. Campbell Q.C., Ms. Mandela Campbell with him for the claimants.
Mr. Grahame Bollers for the defendants.

2016: Nov. 2

Nov. 15

DECISION

- [1] Henry, J.: This is a joint application by St. Clair Investments Limited, KFC (St. Vincent) Limited, Boyea Holdings Limited, W.J. Abbott and Sons Limited and Ormiston Arnold Boyea ('the claimants') and Mr. David Holukoff and Mr. Marcus Wide (**'the defendants'**) for an order granting them respectively relief from sanctions for failure to file their skeleton arguments, list of authorities and witness statements within the timeline stipulated by the court. They also seek an order that they be deemed properly filed and that the trial date of November 3rd, 2016 be vacated.
- [2] The grounds of the **defendants'** application is that their legal practitioner was ill and ordered to rest by his medical practitioner thereby making it impossible for them to meet the deadlines. The parties

allege that they were unable to file their skeleton arguments and list of authorities within the time ordered because they met and agreed a statement of facts and it was no longer necessary for them to call 6 witnesses each as originally intended.

ISSUES

[3] The issues are:

1. Whether the trial date of 3rd November, 2016 should be vacated?
2. Whether the defendants should be granted:
 - (1) an extension of time to file their witness statements; and
 - (2) relief from sanctions for non-compliance with the deadline for doing so?
3. Whether claimants and defendants should be granted:
 - (1) an extension of time to file their skeleton arguments and list of authorities; and
 - (2) relief from sanctions for their failure to meet the deadline for doing so?

ANALYSIS

Issue 1 – Should the trial date be vacated?

[4] On 2nd November, 2016 during a pre-trial status hearing, the court signaled to the parties that it would not consider vacating the November 3rd 2016. This was because it was necessary to guard against the possibility that unforeseen circumstances could derail a trial on 8th November, 2016. In such an eventuality the court would lose two full days of sitting. The parties arranged for the witnesses to be tendered for cross-examination later that day and the trial was concluded without cross-examination. This issue was therefore rendered moot. No order vacating the trial date is necessary and none is made.

Issue 2 – Should the defendants be granted an extension of time to file their witness statements and relief from sanctions for their non-compliance with the court order?

[5] The court is vested with discretionary power to extend time for complying with a court order.¹ It may

¹ See Rule 26.1 (2) (k) of the Civil Procedure Rules 2000, (“CPR”).

do so on application from a defaulting party.² As a general rule, such an application should be made before the filing deadline. A later application must include both an application for extension of time and an application for relief from any sanction to which the party is subject.³ Messieurs **Holukoff's and Wide's** application was made after the deadline and specifically prayed for an order for relief **from sanctions and that the first defendant's witness statement filed** on 28th October, 2016 be treated as properly filed. While it did not expressly seek extension of time, this is implied. In any event, the court is also authorized to make an order to put things right where there has been an error of procedure or a failure to comply with a rule, practice direction or court order which does not attract a sanction.⁴ Pursuant to that authority, it is hereby declared that the defendants' application is deemed to contain an application for extension of time.

- [6] The court must act judicially⁵ in the exercise of its discretion and give effect to the overriding objective of the CPR to act justly.⁶ It must consider all material factors including the period of and reasons for the delayed filing and the degree of prejudice to each party if the application is denied or granted.⁷ Those factors will be taken into account in respect of **the defendants' and claimants'** applications.

Length of delay and reasons for delay

- [7] Case management directions were given in this matter on 4th May, 2016. The claimants were present, the defendants were absent. The parties were directed to file and exchange witness statements on or before 30th June, 2016. The defendants filed none. The matter was set down for further case management on 13th July, 2016. On that date, the parties were present. The claimants represented

² See CPR 27.8(3).

³ See CPR 27.8 (4).

⁴ CPR 26.9 (3).

⁵ *Fok Hei Yu and John Howard Batchelor v Basab Inc. et al BVIHCMAP2014/0010* per Dame Janice M. Pereira C.J. at para. [11].

⁶ CPR Part 1.2 (a)

⁷ *John Cecil Rose v Anne Marie Uralis Rose SLUHCVAP2003/0019* per Sir Dennis Byron C.J. at para. [2].

at that time that the parties were considering filing a joint application for revision of the case management timetable. The parties made verbal representations that they would be able to finalize filing of witness statements sufficiently in advance of a November 3rd, 2016 trial date. The trial was set down for commencement on that date. The defendants filed two witness statements on 26th October, 2016, one by the first defendant and the other by Mrs. Sharda Sinanan Bollers. It is in respect of these that the extension of time is being sought.

[8] The defendants' application is supported by affidavit⁸ of Kimron Morgan, legal clerk to learned counsel Mr. Grahame Bollers. She deposed that she is authorized to swear the affidavit on the **defendants' behalf primarily because they are out of state**. She averred further that she was informed by Mr. Bollers that through his negligence he forgot to inform the defendants that witness statements were due because he forgot to enter the date in his electronic calendar, with a reminder. She attested that the failure to file was not intentional. I make the observation that she is not competent to say so.

[9] Ms. Morgan deposed further that at the end of the law term in July, 2016, she was informed by Mr. Bollers and from her personal knowledge is aware that he received medical advice that his blood pressure was elevated due to stress and that he should take a break from work. She averred that as a result of this advice, he has been working half days since the beginning of the new law term and is taking steps to employ a junior to assist him with his work. She attested that Mr. Bollers informed her that as soon as he became aware that:

'witness statements had passed at the last court sitting he contacted
the Mr. Holukoff by telephone. Mr Holukoff flew to Saint Vincent on
the weekend of 23rd October, 2016 ...'

compiled all relevant exhibits and prepared his witness statement which was subsequently filed.

[10] **The defendants' application was filed 4 months after the deadline for filing.** This is excessive. Their reasons for the delay all relate to the conduct of their counsel who they allege initially forgot to notify them of the timeline for filing. Even though they were not present when the May 2016 order was made, the defendants had an ongoing duty to apprise themselves of progress with the case in an active fashion by making such inquiries as necessary on a regular basis. Their failure to do so would

⁸ Filed on 31st October, 2016.

not afford them a justifiable excuse for tardy filing of their witness statements. They would have had constructive notice of that order. The case management conference on 13th July which they attended, would have alerted or reminded them of their default. By then they had actual notice that witness statements were outstanding. They took no corrective measures.

[11] **Based on Ms. Morgan's testimony**, learned counsel Mr. Bollers was advised of his medical condition within 2 weeks of that hearing, (i.e. some 4 weeks after the filing deadline and 2 months after the order was made). By that time, the defendants had ample time within which to file and serve their witness statements or at the very least make a timely application for extension of time and relief from sanctions. There is no explanation why they did not use that 2 week period for this purpose. Their **legal practitioner's forgetfulness** and subsequent illness does not assist them as they would have been aware by then that they were out of time.

[12] The defendants have supplied no explanation as to why they did not file their witness statement and an application for an extension of time between 13th July and 31st October 2016. There is no evidence that their legal practitioner was incapacitated or not working regular hours during that time. No medical certificate was exhibited and no information was supplied as to whether learned counsel Mr. **Bollers stopped working on doctor's orders or otherwise and if so**, for what period. I make no such finding.

[13] A litigant seeking an extension of time must give:

'a clear, detailed and accurate picture of what occasioned the failure and what was done in seeking to remedy it'.⁹

Mr. Holukoff and Mr. Wide have not done so. They have not provided any good reason why their witness statement was not filed in accordance with the order. It strikes me that their delay was deliberate and in total disregard for the court order and any consequences which might flow from such default. I conclude that it is.

⁹ Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner SKBHC VAP2015/0015 at para. [15] per Pereira CJ.

Effect of delay and degree of prejudice to the parties

[14] The defendants claim that they have complied with all other directions of the court. This is not factual. The defendants also failed to file their skeleton arguments and list of authorities, and they did not file a notice indicating whether November 8, 2016 was a convenient date for their prospective witnesses from the Dominion of Canada. **The claimants support the defendants' application and submitted that they will suffer no prejudice by the delayed filing of the witness statement as the facts are largely undisputed and the parties have filed a joint agreed statement of facts.**

Effect on the administration of justice

[15] It is a matter of record that on representation by the parties that each side intended to call 6 witnesses and wished to cross-examine the other **side's witnesses**, two trial days were reserved for the trial. As it turned out, the claimants tendered one witness and the defendants relied on two, none of whom were cross-examined. The trial dates were both vacated on concurrence and submission by the parties that the issue to be determined turned largely on the legal principles. It proved impossible for the court to schedule other matters for those vacated dates because it would not have afforded adequate notice to other litigants. In this regard, the administration of justice interests were adversely affected. While the trial proceeded, the court was deprived effectively of two full days to dispose of other matters.

[16] The defendants have failed to demonstrate that they had good reason for their delay. I find that their conduct and that of their legal practitioner was less than acceptable in all the circumstances. They are equally to blame for waiting until the last possible moment to seek relief. Litigants are expected to respect time limits. Their compliance is indispensable to the proper functioning of the administration of justice system. Willful flouting of orders and negligent or careless behavior must not be countenanced.¹⁰

¹⁰ Jurkowska v Himad Limited [2008] EWCA Civ 231 at para. 19 per Lord Justice Rimer, cited approvingly by Edwards JA in C. O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. SLUHCVAP2011/017.

[17] Mindful that the court is interested in facilitating resolution of disputes and not in depriving parties of an opportunity to be heard, the justice of this case can best be served by granting extension of time to the defendants to file their witness statements and imposing wasted costs sanctions for their non-compliance with the timelines. It is therefore ordered that the defendants be granted an extension of time to file their witness statements. The witness statements of Sharda Sinanan Bollers and David Holukoff filed on 26th October, 2016 are deemed properly filed. The defendants David Holukoff and Marcus Wide are to each pay wasted costs of \$500.00 into the court office on or before 22nd November, 2016.

Issue 3 - Should the claimants and defendants be granted an extension of time to file their skeleton arguments and list of authorities and relief from sanctions for their failure to meet the deadline for doing so?

[18] By order dated 13th July, 2016, the parties were directed to file skeleton arguments and list of authorities on or before 21st October, 2016. The claimants filed theirs on 31st October, 2016. The defendants filed theirs on 8th November, 2016. The claimants and defendants rely on the statements **contained in Ms. Morgan's affidavit to support their application for extension of time to do so and for relief from sanctions for the late filing. Ms. Morgan did not indicate on what basis she purported to testify on the claimants' behalf. She** deposed that she was informed by learned counsel Mr. Bollers that he and learned Queens Counsel Mr. Campbell agreed to meet and settle an agreed statement of facts in order to reduce the duration of the trial and that it was prepared and approved in final form on 31st October. She averred further that the parties now intend to call only one witness each instead of 6 and consequently the trial should take only one day. It lasted for roughly 15 minutes.

[19] The application was made 10 days after the deadline and was therefore late. Ms. Morgan's **affidavit** presented no coherent or reasonable explanation for the delayed filing of the said skeleton arguments and list of authorities. It is not clear whether it is attributable solely to the parties or their **legal practitioners. Ms. Morgan's assertions level the blame squarely at the feet of the legal practitioners.** In the premises, I find that the non-compliance was inexcusable and intentional.

[20] The parties **mutually support each other's application and submit that they are not thereby prejudiced.** They have complied with the other directions except as indicated previously. The non-compliance would not and has not affected the completion of the trial. In all the circumstances, it is desirable to extend the time for filing to enable each party to make full representations to the court. In light of the referenced principles, this is also an appropriate case in which sanctions ought to be imposed particularly since the parties had no good reason for their default.

[21] It is accordingly ordered that the claimants and defendants be granted an extension of time to the file **their skeleton arguments and list of authorities. The claimants' and defendants'** submissions filed respectively on 31st October, and 8th November, 2016, are deemed properly filed. The claimants' and defendants' **legal practitioners** shall each pay wasted costs of \$500.00 into the court office on or before 22nd November, 2016 for their default.

ORDER

[22] It is accordingly ordered:

1. The defendants' application for extension of time to file their witness statements is granted and the witness statements of David Holukoff and Sharda Sinanan Bollers filed on 26th October, 2016 are deemed properly filed.
2. **The defendants'** application for relief from sanctions is dismissed.
3. **The defendants' shall each pay wasted costs of \$500.00 into the court office on or before 22nd November, 2016 for non-compliance with the timelines for filing the witness statements.**
4. **The claimants' and defendants':**
 - (1) application for extension of time to file their skeleton arguments and list of authorities is granted;
 - (2) respective applications for relief from sanctions are dismissed; and

5. **The claimants' and defendants' legal practitioners** shall each pay wasted costs of \$500.00 into the court office on or before 22nd November, 2016 in respect of their non-compliance with the timeline for filing skeleton arguments and list of authorities.
6. Penal notices are to be endorsed on this order in accordance with CPR 53.3.

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Esco L. Henry
HIGH COURT JUDGE