EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2015/0029

BETWEEN:

ISSA NICHOLAS (GRENADA) LIMITED

Appellant

and

TIME BOURKE HOLDINGS (GRENADA) LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Mitchell QC, with him, Mr. Ruggles Ferguson for the Appellant
Mr. James Guthrie QC, with him, Ms. Yurana Phillip and Ms. Afi Ventour de Vega for the Respondent

---

2016: December 5, 8.

Interlocutory appeal – Relief from sanctions – Rule 26.8 of the Civil Procedure Rules 2000 – Whether appellant failed to meet any of the 3 preconditions required under CPR 26.8(2) for relief from sanctions

Following a case management conference in the underlying claim commenced by the respondent against the appellant, the court below made an order, *inter alia*, allowing the appellant to, if need be, file and serve any further witness statements on or before 27th July 2015. On 27th July 2015, the appellant filed a supplementary statement to one of its witnesses, Mr. Daniel Nicholas ("the Supplementary Statement") in support of its case. The Supplementary Statement, at paragraph 36, made reference to statements in a letter to Mr. Nicholas from Mr. Roland Mouly, a senior executive in the parent company of the appellant's business and a copy of Mr. Mouly's letter was attached to the Supplementary Statement.

The next day, counsel for the respondent wrote to the appellant acknowledging receipt of the Supplementary Statement and pointed out to the appellant that paragraph 36 of the Supplementary Statement contained hearsay and suggested that if the hearsay evidence was to be relied upon, the appellant would have to comply with section 36E of the Evidence Act.[1] About a month later, the appellant sought to file a witness statement by Mr. Mouly ("the Mouly Statement") and applied for an extension of time to deem the Mouly Statement filed within time and for relief from sanctions pursuant to rule 26.8 of the Civil Procedure Rules 2000 ("CPR") as the sanction contained in CPR 29.11 for serving a witness statement out of time had already bitten.

The application for relief, amongst others, came before the learned judge in the court below at a further case management conference. The relevant evidence in the affidavit filed by the appellant in support of the application was in essence: that the evidence contained in the Mouly Statement is already in evidence before the court as admissible hearsay; the appellant seeks to file the Mouly Statement so as to facilitate Mr. Mouly being cross examined at the trial; that its failure to file the Mouly Statement was not intentional and that it has generally complied with all other relevant rules, practice directions and orders. While the other applications were unopposed, it turned out at the hearing that the application for relief was vigorously opposed as not meeting the threshold requirements under CPR 26.8(2). The learned judge, after hearing argument, in an ex tempore ruling, refused the appellant's application for relief from sanctions, having found that the appellant had not satisfied the conditions in CPR 26.8(2) and she accordingly disallowed the filing of the Mouly Statement.

The appellant, being dissatisfied with the learned judge's decision, appealed against her ruling.

Held: dismissing the appeal with costs to be assessed by the court below unless agreed within 21 days, that:

1. CPR 26.8(2) requires the court to embark upon a stepped approach when considering an application for relief from sanction. CPR 26.8(2) provides that the court may only grant relief if three conditions are met, namely: the defaulting party demonstrates that the failure to comply was not intentional; there is a good explanation for the failure; and the defaulting party has generally complied with all other relevant rules, practice directions, orders and directions. CPR 26.8(2) is uncompromising; it imposes a fetter on the exercise of the court's discretion and a failure to satisfy all three preconditions is fatal to the application.

   The Attorney General v Keron Matthews [2011] UKPC 38 applied; Ferdinand Frampton v Ian Pinard et al DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported) applied.

[1] Cap. 92, Revised Laws of Grenada 2011.

2. Evidence adduced in support of an application for relief from a sanction must be cogent in that it must be set out with sufficient particularity so as to satisfy the court that the three preconditions have been met. The burden to satisfy the court so as to enable the court to grant the relief sought falls squarely on the defaulting party and the defaulting party ought not to view this obligation as trifling or treat with it lightly or otherwise assume or expect that there will be an accommodation from the other party, nor must the applicant leave it up to the court where its application was deficient to fill the void in its favour.

   Robin Mark Darby v LIAT (1974) Limited applied; Prudence Robinson v Sagicor General Insurance Inc. SLUHCVAP2013/0009 (delivered 29th September 2014, unreported) applied.

3. In the present case, the appellant clearly took a position and must be taken to be aware of the risk it took based on the method it adopted for placing evidence before the court below, that is, filing the Supplementary Witness Statement and exhibiting Mr. Mouly's letter. The reasonable inference to draw from this is that the failure to timely file a witness statement of Mr. Mouly may be considered as intentional. Accordingly, it was open to the learned judge to conclude that precondition (a) in CPR 26.8(2) had not been met, and in as much as (b) was intertwined with (a), that precondition (b) had also not been met. Notwithstanding that the learned judge did not specify which of the preconditions of CPR 26.8(2) had not been met, there was no basis to interfere with her finding.

ORAL JUDGMENT

[1] PEREIRA CJ: This is the judgment of the Court. This is an interlocutory appeal and it concerns the admission of a witness statement of one Roland Mouly sought to be filed by the appellant (the defendant in the court below), after the time limited by the case management order for filing witness statements by the parties had passed.

[2] The underlying claim is by the respondent for the forfeiture of a 99 year lease, with an unexpired period of 81 years, of a property in Grenada upon which the appellant as a tenant operates a hotel business (Radisson Grenada). The respondent alleges breach of covenant contained in the lease.

[3] It is undisputed, as the number of the claim in the cause below reflects, that the proceedings have been running for a fairly long period (having been commenced in 2011) with no trial date as yet being fixed. This has been due to several factors not directly relevant to this appeal. Suffice it to say that Wallbank J on 21st January 2015 made a case management order: (i) allowing the respondent to amend its claim and similarly for the appellant to amend its case and (ii) for the appellant (if need be) to file (and presumably serve) any further witness statements on or before 27th July 2015.

[4] Both parties complied with this order and the appellant, on 27th July 2015, filed the supplementary witness statement of Daniel Nicholas ("the Supplementary Statement") in support of its case. Paragraph 36 of the Supplementary Statement made reference to statements contained in a letter dated March 9th 2015 from Mr. Roland Mouly (vice president of development for the Carlson Rezidor Hotel Group) to him and attached a copy of the said letter to the Supplementary Statement.

[5] At that time, the appellant did not seek to file a witness statement of Mr. Mouly, but counsel for the appellant made clear at the hearing of the appeal that the purpose of exhibiting the letter to the Supplementary Statement was to rely on it at the trial. The Supplementary Statement having been served on the respondent, counsel for the respondent wrote to counsel for the appellant the next day, 28th July 2015, acknowledging receipt of the Supplementary Statement. Counsel in that letter pointed out that paragraph 36 of the Supplementary Statement contained hearsay evidence and suggested, in effect, that if the said hearsay evidence was to be relied on the appellant should ensure compliance with section 36E of the Evidence Act.[2] The relevant provisions of section 36E are subsections (2) and (3) which state that:

> "(2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the

[2] Cap. 92, Revised Laws of Grenada 2011.

proceedings as to the statement to be tendered, and as to the person who made the statement.

(3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness."

Subsection (4) further requires the party intending to tender the statement to call the person who made the statement as a witness unless the person falls into any of the categories of persons excepted from being called listed in the subsection.

[6] Approximately a month later, on 26th August 2015, the appellant sought to file a witness statement by Mr. Mouly ("the Mouly Statement") presumably setting out the statements he had made in his letter to Mr. Nicholas and attached to the Supplementary Statement. The appellant also applied for an extension of time to deem the Mouly Statement timely filed and for relief from sanctions pursuant to rule 26.8 of the Civil Procedure Rules 2000 ("CPR") as the sanction contained in CPR 29.11 had already bitten. CPR 29.11 has two limbs. The first limb says in effect that if the witness statement or summary of an intended witness is not served in the time specified by the court, the witness may not be called unless the court permits. The second limb says that the court may not grant such permission at the trial unless the party asking for permission has a good reason for not previously applying for relief under CPR 26.8. The second limb of the sanction contained in CPR 29.11 is not here engaged as the appellant has applied to be relieved from the sanction prior to trial, and as stated earlier, no trial date has been fixed. The matter fell squarely within the provisions of CPR 26.8 which governs the grant of relief from sanctions, the deadline date fixed by the court having passed.

[7] CPR 26.8 states as follows:

"Relief from sanctions
26.8 (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 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.

(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." (My emphasis).

[8] CPR 26.8 may be contextually understood to comprise three components. Firstly, CPR 26.8(1) requires that the application for relief be made promptly and must be supported by evidence on affidavit. Secondly, CPR 26.8(2) says that the court may only grant relief if three conditions are satisfied, namely: by demonstrating that the failure to comply was not intentional; there is a good explanation for the failure; and that the defaulting party has generally complied with all other relevant rules, practice directions, orders and directions. These conditions have been termed preconditions by the Privy Council in The Attorney General v Keron Matthews.[3] There, the Board, in opining on CPR 26.7(3) of Trinidad and Tobago which is a mirror of our Eastern Caribbean Supreme Court ("ECSC") CPR 26.8(2) said at paragraph 17 that 'an application for relief from a sanction must fail unless all three of the conditions precedent specified in r. 26.7(3) [ECSC CPR 26.8(2)] are satisfied.' This Court in the decision of Robin Mark Darby v LIAT (1974) Limited[4] termed the CPR 26.8(2) conditions as 'the compendious conditions circumscribing or the prerequisites for the exercise of the discretion' and that once

[3] [2011] UKPC 38.
[4] ANUHCVAP2012/0002 (delivered 5th June 2012, unreported).

these are satisfied then the court is exhorted to then have regard to the considerations contained CPR 26.8(3) in exercising its discretion.

[9] As to whether these preconditions have been satisfied falls to be determined in large measure from the evidence provided by the affidavit in support of the application or from evidence on affidavit even if put in by another party bearing on the application. We have in numerous decisions of this Court been consistent in expressing the view that the evidence adduced in support of an application for relief from a sanction must be cogent in the sense that it must be set out with sufficient particularity so as to satisfy the court that these three preconditions have been met. In this regard, the decision of this Court in Prudence Robinson v Sagicor General Insurance Inc.[5] as to the need for cogency and particularity, as referenced in paragraph 10 of that judgment, is also instructive. This Court quite recently returned to this issue and made similar observations in the case of Adam Bilzeraian v Gerald Lou Wiener et al.[6] In Ferdinand Frampton v Ian Pinard et al,[7] Barrow JA, delivering the judgment of the Court, although there dealing with an application for extension of time to appeal, had this to say at paragraph 19 in speaking of CPR 26.8 (2):

> "The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied…The failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position. The court is not permitted to guess and to supply the omissions in the application …It is not permissible for the applicants to violate clear rules and escape sanctions by leaving it to the court, impressed with the importance of the matter, to find a way out for the applicants…The rules are not draconian; where a party has made a slip the rules provide a procedure and criteria for avoiding the consequence. It cannot be too much to ask that the party in default satisfy the reasonable conditions that the rules lay down for obtaining relief."

[10] The overriding objective set out in CPR 1.1, in interpreting and applying the rules, is to enable the court to deal with cases justly. This encompasses, when interpreting the meaning of any rule, elements of proportionality as well as

[5] SLUHCVAP2013/0009 (delivered 29th September 2014, unreported).
[6] SKBHCVAP2015/0015 (delivered 27th January 2016, unreported).
[7] DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

expedition. It must be understood then that the provisions of CPR 28.6(1) and (2) expressed in the terms as crafted, must in themselves be interpreted as reflective of the overriding objective.

The Evidence in Support

[11] This brings us to a consideration of the evidence placed before the trial judge in support of the application. The relevant portion of the evidence on affidavit filed on behalf of the appellant for the purposes of satisfying the preconditions contained in CPR 26.8(2) is contained in the affidavit of Danielle Sylvester dated 26th August 2015 at paragraph 6 and is in these terms:

> "6b. The evidence contained in the Mouly statement is already before the court as admissible hearsay evidence and the Respondent has already intimated that it may wish to cross-examine the witness, Roland Mouly pursuant to section 36E of the Evidence Act.
>
> 6c. The Applicant now seeks to file a witness statement from Roland Mouly so as to facilitate the process of the trial if the Claimant decides to call that witness to be cross examined.
>
> 6d.The failure to file the witness statement by the deadline date of 27th July was not intentional.
>
> 6e. The Applicant has generally complied with all other relevant rules, practice directions and orders."

[12] This evidence gave no indication as to when the appellant received counsel's letter but merely indicated that having received this intimation of the 'wish to cross examine Mr. Mouly' that it was now seeking to file the witness statement of Mr. Mouly to facilitate the process of the trial if it was that the respondent wished to call Mr. Mouly to be cross examined.

[13] Matters lied there until October 2015 when the case was coming up for further case management scheduled for 8th October 2015. By that time three applications were pending: one by the respondent seeking to further amend its case; one by the appellant seeking to amend its statement of case to reinsert its counterclaim which had been inadvertently deleted due to a word processing error, and additionally its application for relief from sanction in respect of the Mouly witness

statement. The amendment applications by either side were not being opposed and there was no indication that the application for relief from sanction was being opposed. Indeed, the affidavit filed by the respondent on 6th October 2015, a mere two days before the further case management conference, exhibited counsel's letter of 28th July 2015. In this affidavit the respondent pointed out that it had not indicated any desire to cross examine Mr. Mouly but that it merely pointed out the need for the appellant to comply with section 36E of the Evidence Act in respect of the hearsay evidence. It only became apparent on the day of the hearing of the applications at the further case management hearing that counsel for the appellant learned that the application for relief against sanction was being opposed as not meeting the threshold required under CPR 26.8(2). The appellant having not had wind of any opposition prior to this hearing and seemingly laboring under the mistaken belief that all three pending applications were being put forward and would be on the basis of mutual consent was, understandably, surprised to learn that the application for relief from sanction was being vigorously opposed together with full 'speaking notes' and authorities which had prior thereto not been shared with counsel for the appellant. The Court wishes to observe that this practice is not one which the Court encourages. That said, it does not relieve a defaulting party of its requirement to place sufficient evidence before the court so as to enable the court to grant it the indulgence sought. The burden to so satisfy the court remains squarely on the shoulders of the defaulting party and it behooves a defaulting party not to view this obligation as trifling or treat it lightly or otherwise to assume or expect that any accommodation will be forthcoming from the other party.

[14] The learned judge, after hearing argument, eventually ruled ex tempore by refusing relief from the sanction and accordingly disallowed the filing of the Mouly witness statement. She concluded that the appellant had not satisfied the conditions in CPR 26.8(2). No further reasons were given nor, it seems, were any requested. It is not clear whether she found all three preconditions as not having been met or whether it was that one or more than one of them had not been met. Either way, the failure to satisfy any one of them is fatal.

[15] The appellant says that the learned judge arrived at a conclusion which was clearly wrong in that she was required to have regard to all the circumstances including those factors set out in sub rule 26.8(3) in the overall exercise of her discretion in giving effect to the overriding objective including the steps taken by the parties up to the stage reached in the proceedings. It has not been suggested that the appellant had not complied with precondition (c) of the compendious requirements of CPR 26.8(2). Queen's Counsel, Mr. Mitchell, on behalf of the appellant, also urged that there was no basis on which the learned judge could have concluded that the appellant's failure was contumacious or contumelious in the sense that intentionality as required under CPR 26.8(2)(a) was of the character of conduct evidencing some form of contumacious behavior. Counsel placed reliance on Re Jokai Tea Holdings Limited[8] a decision of the English Court of Appeal pre-dating CPR 2000, which considered the notion of intentionality in the context of an 'unless order' and viewed 'intentionality' as requiring an element of contumaciousness. The appellant says that it did not become aware of the need for a witness statement from Mr. Mouly until receipt of the respondent's letter which came after the deadline for filing witness statements had passed and that this was explained in paragraphs 6(b) and (c) of the appellant's supporting affidavit. These referenced paragraphs, it says, clearly demonstrated that the failure was not intentional. Counsel for the appellant also says, given that sequence of events, that this also provided a good explanation for the failure to comply, so that, the evidence filed on behalf of the appellant coupled with the evidence filed by the respondent taken together, satisfied preconditions (a) and (b) of CPR 26.8(2); and thus enabled the learned judge to exercise her discretion having regard to the factors contained in sub rule 26.8(3) which were clearly in favour of the grant of relief to the applicant.

[16] Queen's Counsel, Mr. Guthrie, on behalf of the respondent, says that the appellant's application fails at the pre-requisite stage. He contends that the

[8] 1993] I ALL ER 630.

learned judge could come to no other conclusion based on the material placed before her. Additionally, he says that the appellant could not rely on its letter of 28th July 2015 coming after they ought to have complied with the deadline expressed in the case management order as a basis for its failure to comply; that the fact that it exhibited Mr. Mouly's letter intending to rely on it rather than providing a witness statement for being called as a witness was a decision it took in choosing the method by which it intended to place his evidence before the court. In essence, the respondent says that it was up to the appellant to put in a witness statement in respect of Mr. Mouly before the deadline in the order expired and it was the appellant's decision to use the letter instead, and in this sense, its decision not to file a witness statement in the time required was intentional and for the same reason does not provide a good explanation for the failure to comply. The respondent further says it was not open to the appellant to seek to circumvent the case management order setting a deadline for filing of witness statements by resort to section 36E of the Evidence Act and in effect avoid the deadline fixed by the case management conference order for filing evidence in support of one's case.

[17] The question then for this Court is whether it was open to the learned judge, based on the material before her, to conclude as she did. The case law referred to previously clearly show that the text of CPR 26.8 (2) requires the court to embark on a stepped approach when considering an application for relief from sanction. As Barrow JA said in Frampton, CPR 26.8(2) is uncompromising. It imposes a fetter on the exercise of the court's discretion. A failure to satisfy all three preconditions, as said by the Privy Council in Matthew, is fatal. "The court is not permitted to guess and supply the omissions in the application."[9] An applicant who must be taken to be seized of the importance of its case and thus the evidence it requires to make good its case, must never leave it up to the court where an opportunity given to address it was not utilized, to find a way to fill the void in its favour.

[9] Ferdinand Frampton v Ian Pinard et al DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

[18] At its highest, the material before the judge showed that the appellant was satisfied that the Supplemental Statement referencing the statements made by Mr. Mouly and exhibiting his letter to that effect was sufficient. In essence, it could only be reasonably inferred that the appellant took the position that they need not file a witness statement by Mr. Mouly in that Mr. Mouly's letter had already been placed before the court through the Supplemental Statement of Mr. Nicholas. The most that can be said of the respondent's 28th July 2015 letter is that it alerted the appellant that the method it adopted for placing Mr. Mouly's evidence before the court was likely to be challenged. In that sense the respondent's letter provided the trigger for the appellant's attempt at changing course in terms of the method by which Mr. Mouly's evidence would be placed before the court by now seeking to file the Mouly witness statement out of time.

[19] It seems to us that at the time of filing the Supplemental Statement exhibiting Mr. Mouly's letter on which it intended to rely, the appellant would have been aware that a witness statement by Mr. Mouly would be required unless the appellant intended to rely on section 36E of the Evidence Act notwithstanding the case management conference deadline or, it took the view that the hearsay evidence would be admitted without challenge. That was the risk taken by the appellant. Accordingly, even though the appellant's conduct may not have reached the bar of being considered 'contumacious', the appellant clearly took a position and must be taken to be aware of the risk it took based on the method it adopted for placing this evidence before the court. The reasonable inference to draw from this is that the failure to timely file a witness statement of Mr. Mouly may be considered as being intentional. It was accordingly open to the learned judge to conclude that precondition (a) in CPR 26.8(2) had not been met, and in as much as (b) was intertwined with (a), that precondition (b) had also not been met. Notwithstanding that the learned judge did not specify which of the preconditions of CPR 26.8(2) had not been met, there is no basis, for the reasons given, to interfere with her finding. The failure to meet any of the three preconditions

required under CPR 26.8(2) was fatal to the success of the application for relief from the sanction and we are constrained so to hold.

Conclusion

[20] The appeal is accordingly dismissed with costs to be assessed by the court below unless agreed within 21 days.

By the Court

Chief Registrar