

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0278

BETWEEN

RALPH SCOTT

CLAIMANT

AND

THE CENTRAL WATER AND SEWERAGE AUTHORITY

DEFENDANT

Appearances:

Mr. Jaundy Martin for the claimant.

Mr. Samuel E. Commissiong for the defendant.

2017: Feb. 2

DECISION

BACKGROUND

[1] **Henry, J.:** This is an application by the Central Water and Sewerage Authority ('the Authority') for an extension of time to comply with an order to file its witness statements; for an order that the witness statement of Ray Victory filed on 1st February, 2017 be deemed properly filed and for relief from sanctions. The Authority alleged that it encountered difficulty finding eye witnesses or informed persons who witnessed the accident which is the subject matter of the claim. The claimant Ralph Scott opposed the application. It is dismissed for the reasons provided.

ISSUES

- [2] The issues are whether the Authority should be granted:
1. an extension of time to file its witness statements?
 2. relief from sanctions?

ANALYSIS

Issue 1 – Should the Authority be granted extension of time to file its witness statements?

[3] The court is authorized to enlarge time for complying with a court order even if the application for additional time is made after the deadline for compliance.¹ If the application is made after the date specified for compliance, the applicant must apply for relief from sanctions.² The present application was made on 1st February 2017, over two years from the 2014 deadline for compliance. The Authority has applied for relief from sanctions in accordance with the CPR. Its application was supported by affidavit³ of Eveta Davis.

[4] In deciding whether to grant an extension of time, the court must act judicially⁴, exercise its discretion in accordance with well-established principles and give effect to the overriding objective of the CPR to act justly.⁵ It must consider all factors relevant to the breach, such as reasons for and the period of the delay, and the degree of prejudice caused to the respective parties from the decision.⁶ The court has the option of making an order to put things right where there has been a failure to comply with a court order.⁷ Those principles are applied in arriving at the decision in the case at bar.

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

² CPR 27.8 (4).

³ Filed on 1st February, 2017.

⁴ Fok Hei Yu and John Howard Batchelor v Basab Inc. et al BVIHCMAP2014/0010.

⁵ CPR Part 1.2 (a).

⁶ John Cecil Rose v Anne Marie Uralis Rose SLUHC VAP2003/0019.

⁷ CPR 26.9 (3).

[5] Ralph Scott initiated this claim on 4th October, 2012. The following month the Authority filed its defence⁸. In 2013 the learned Master ordered the parties to file witness statements by 21st June 2013. The parties filed none. Just over a year later⁹ the deadline for filing witness statements was changed to 28th May 2014. Mr. Scott complied but once again the Authority filed no witness statement. It applied for more time to file its witness statement and the application was heard on 10th October 2014. The Authority sought then and was granted an order that Mr. Monte Ponton of Alas Consultants (Barbados) Limited be appointed an expert witness in the case. The Authority alleged then that it had been and was experiencing difficulties in tracing eye witnesses. It was granted an extension until 17th October 2014 to file its witness statements. None were filed.

[6] On 18th January 2017 when the matter next came up for hearing the Authority was represented by its customer service representative Lesley Peters. A trial date was set for 30th January, 2017. The Authority failed to attend court on that date. Its legal counsel informed the court that he had not notified the Authority of the trial date. The trial was re-scheduled for 2nd February 2017 and notice of hearing was served on the Authority at its business place.

[7] In the affidavit supporting the instant application, the deponent Eveta Davis averred that she is the senior clerk in the law office of Samuel E. Commissiong & Co. and that she made the affidavit on instructions from her principal Mr. Samuel E. Commissiong. Mr. Commissiong is the Authority's legal practitioner. Ms. Davis referred to the case management order made on 7th May, 2014 which directed that witness statements be filed and served by 28th May 2014. She attested further:

'I am informed by counsel for the applicant/defendant in these proceedings and verily believe that it was necessary for the Applicant to get credible evidence from witnesses to the incident. I am further informed by counsel for the applicant and verily believe that the applicant experienced difficulty in finding eye witnesses to the accident or informed persons who witnessed the said accident.

... the defendant/applicant is therefore seeking a further order for relief from

⁸ On 9th November, 2012.

⁹ On 7th May, 2014.

sanctions and the court's consent to further extend time to file witness statements in this case.'

[8] The quoted portions of Ms. Davis' testimony outline the reasons for the delay in filing witness statements and rehearse the grounds on which the application was made. Those assertions mirror in material respects the explanation provided for non-compliance with the previous order. It should be noted that the averments violate respectively, the provisions of the Evidence Act¹⁰ and the CPR 30.3 in that they contain hearsay material and do not detail facts of which she asserted she was personally aware. Furthermore, they indirectly constitute evidence of counsel from the bar table, contrary to accepted principles of law¹¹. Those statements are therefore inadmissible. No other factual basis was advanced to ground the application for extension of time or relief from sanctions. Be that as it may, I propose for the sake of completeness to consider those allegations on their merits.

Length of and reasons for delay

[9] The application was made 2 ¼ years after the court deadline for filing witness statements. The delay is inordinate and without reasonable explanation. Interestingly, the Authority has presented the same reason (i.e. difficulties in identifying witnesses). The court observes that the proposed witness Ray Victory is an employee of the Authority and was an employee at the time of the incident around which this case revolves. Conceivably, although there is no indication in the supporting affidavit to this effect, Mr. Victory was always accessible to the Authority prior to February 1, 2017 and would have been able to provide a witness statement in a timely manner. I infer that this is so in the face of inexplicable silence to the contrary, by the Authority. The court observed that in 2014 the Authority identified an expert as a prospective witness. He has not materialized.

[10] These developments taken as a whole coupled with the recent application in wake of an imminent trial, suggest that the Authority's failure to comply with the order or to make a more timely application for extension of time was deliberate and intentional. I so infer. The apparent nonchalance is brought

¹⁰ Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

¹¹ Casimir v Shillingford (1967) 10 W. I. R. 269.

into sharper focus by the absence of any explanations as to steps taken by the Authority to locate or contact witnesses. It has been established that an applicant seeking further time to comply with an order must provide:

‘a clear, detailed and accurate picture of what occasioned the failure
and what was done in seeking to remedy it¹².

The vague, general and largely non-existent excuse supplied by Authority demonstrated forcefully that it had no good reason for non-compliance and I so find.

Effect of delay and degree of prejudice to the parties

[11] If the application is granted, Mr. Scott might need additional time to instruct his lawyer and the Authority would have succeeded in flouting clear rules of court and no less than three orders of court stipulating timelines. Granting of the application would send an unmistakable message to litigants that court orders can be ignored at will. This is contrary to the customs, conventions and nature of the administration of justice system and is not to be encouraged particularly where the default is repeated and so glaring.

[12] In addition, the trial date might need to be re-scheduled for several months to accommodate consultation between Mr. Scott and his legal counsel. This would be manifestly unfair to Mr. Scott who has waited for these past years to have his matter go to trial. He should not be penalized in that way for the Authority’s default.

Likelihood of success

[13] This case involves a claim for damages for loss allegedly by Mr. Scott when his vehicle was reportedly damaged by a metal cover belonging to the Authority. The Authority has denied liability and alleged that Mr. Scott caused or contributed to the accident by his negligence. By making those assertions the Authority has effectively represented that it intended to offer certain evidence or at least refute Mr. Scott’s assertions at the trial. Both parties have had just over 4 years to prepare themselves for trial. The Authority has not filed a counterclaim. On the face of the pleadings it has a fair chance of prevailing at trial.

¹² Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner SKBHC VAP2015/0015.

[14] Having heard from Mr. Martin that the application was served only yesterday; that the trial bundle contained the claimant's witness statements and thirdly that the claimant had already consented to a previous application by the defendant for an extension of time in October 2014 and it would be unfair to the claimant to have to grapple with this application at such a late stage and on the very date of the trial, I am sympathetic to the claimant's position. However, Mr. Martin has urged some compelling grounds and additional reasons why the court should not grant the application.

[15] Learned counsel Mr. Commissiong on the defendant's behalf has conceded that the case is an extreme one in that the application was made 'yesterday for today', and that witness statements are usually filed in advance. This concession acknowledges and properly so, that the overriding objective of the CPR requires parties to operate on a level playing field if they are to obtain justice from the court. Where one party is permitted to essentially conduct an ambush over the other, the overriding objective is violated flagrantly and the court can not countenance that.

[16] The circumstances of this case points to a complete disregard by the Authority of its need to comply with court orders. It can only be characterized as willful disobedience which provides a firm basis to deny its application. I remain mindful that the court does not exercise its discretion in a 'vacuum or on a whim'. I am satisfied that the Authority's conduct and omissions have manifested as deliberate and egregious default which justifies dismissal of the application for extension of time. I accordingly dismiss the application for extension of time.

Issue 2 – Should the Authority be granted relief from sanctions?

[17] A party who without justification, fails to comply with an order becomes subject to any sanctions which apply for such default¹³. If the party failed to serve a witness statement, it would not be permitted to tender that witness without the court's permission¹⁴. In view of the decision on the application for extension of time, there is no witness statement which would attract such sanction. While it is not necessary to assess this application it is worth noting the general principles.

¹³ CPR 26.7(2).

¹⁴ CPR 29.11(2).

[18] The court may grant relief from sanctions if it is satisfied that the failure was unintentional, for good reason and the defaulting party has generally complied with court rules, practice directions and orders.¹⁵ The Authority has treated the orders in this case with scant regard through its repeated non-compliance and excessive delay in seeking relief. Taking into account all of the relevant circumstances, the justice of this case demands that the application for relief from sanctions be dismissed with costs to Ralph Scott.

ORDER

[19] It is accordingly ordered:

1. The Central Water and Sewerage Authority's application for extension of time to file its witness statement is dismissed.
2. The Central Water and Sewerage Authority's application for relief from sanctions for failure to file its witness statements is dismissed.
3. The Central Water and Sewerage Authority shall pay agreed costs of \$750.00 to Ralph Scott.

.....
Esco L. Henry
HIGH COURT JUDGE

¹⁵ CPR 26.8 (2); C.O. Williams Construction (St. Lucia) Co. Ltd. v. Inter-Island Dredging Co. Ltd. SLUHC VAP 2011/017.