

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0159; 2016/160

BETWEEN:

HILTON LAKE

Claimant

and

PIRATE'S NEST LIMITED

Defendant

Appearances:

Ms. Sharina Laws for the Claimant
Mr. Jonel Powell for the Defendant

2019: October 17
(Written Closing Submissions filed on 24 October)
October 28

JUDGMENT

[1] **VENTOSE, J.:** The Claimant filed an amended fixed date claim on 18 May 2018. At the first hearing on 17 December 2018, the Defendant had failed to file a defence and the matter was adjourned to 14 January 2019 at which date the matter was further adjourned for an investigation into the current officers of the Defendant company. The court gave trial directions on 25 February 2019. The parties were to file and serve witness statements on or before 31 July 2019 and

the parties were given permission to apply for further directions and orders, such application to be made on or before 30 August 2019. The pre-trial review was to be held on 17 October 2019 and the trial to take place on 21 November 2019. On 1 August 2019, the parties filed a document entitled "Agreement to Extend Time" purportedly made pursuant to CPR 42.7(3) agreeing to extend time for the filing and exchanging of witness statements to 9 August 2019. The Claimant filed his witness statements on 8 August 2019. The Defendant has, to date, not filed any witness statements.

- [2] At the pre-trial review, the court noted that both parties had failed to file their witness statements by 31 July 2019, the date ordered by the court in the case management order. The Defendant did not file any witness statements. None of the parties had by then filed an application for an extension of time to file witness statements and relief from sanctions. The court therefore gave the parties directions to file submissions and authorities on the question of: (1) whether an agreement to extend time to file witness statements is permitted by the CPR in light of CPR 29.11; and (2) what are the consequences of non-compliance with the case management order to file and serve witness statements as a result of such agreement.

The Relevant Civil Procedure Rules

- [3] The applicable CPR rules that must be considered in this matter are as follows:

Consequence of failure to serve witness statement or summary

29.11 (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.

Variation of case management timetable

27.8 (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.

(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.

(5) The parties may agree to vary a date in the timetable other than one mentioned in paragraph (1) or (2).

(6) Where the parties so agree, they must –

- (a) file a consent application for an order to that effect; and
- (b) certify on that application that the variation agreed will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence;

and the timetable is accordingly varied unless the court directs otherwise.

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.

Failure to File and Serve Witness Statements

[4] It is arguable that CPR 27.8(1)(b) does not apply to the deadline in the case management timetable relating to witness statements because it provides that a party must apply to the court if that party wishes to vary a date which the court has fixed for a party to do something where the order specifies the consequences of failure to comply. This is because the order in the case management timetable simply provides a deadline by which the parties are to file and serve witness statements. It does not specify the consequences of a failure to comply. CPR 27.8(3) states that a party seeking to vary any other date in the case management 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. In relation to witness statements, this rule suggests two things. First, that a party can apply before the date for filing witness statements to vary the date by which the witness statements are to be filed and served. Second, the parties can vary the case management timetable without the need to make an application to the court, but they must comply with CPR 42.7

[5] More importantly, CPR 27.8(5) expressly states that the parties may agree to vary a date in the timetable other than one mentioned in CPR 27.8(1) or (2). There is no question that the variation by agreement is permitted of the case management timetable. However, critically, CPR 27.8(6) states that where the parties so agree, they must: (a) file a consent application for an order to that effect; and (b) certify on that application that the variation agreed will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence; and the timetable is accordingly varied unless the court directs otherwise. CPR 27.8(6) compels parties wishing to vary the case management timetable to, first, file a consent application for an order reflecting their agreement, and, second, certify on that application that the agreed variation will not affect the trial date or trial window. Once this is done, the variation comes into effect immediately unless the court directs otherwise. The application must be filed ahead of the deadline to be effective and it must be noted that the court still retains a residual discretion to not approve any such consent application. Parties should not assume that their agreement has the effect of varying the case management timetable until their consent application is approved by the court.

[6] An important consideration in the exercise of the right granted to parties to agree to vary the case management timetable pursuant to CPR 27.8(3) and (5) is that it must be done under CPR 42.7 which deals with consent orders. CPR 42.7(1) provides that subject to paragraphs (2) to (5), a consent order or judgment must be – (a) drawn in the terms agreed; (b) expressed as being “By Consent”; (c) signed by the legal practitioner acting for each party to whom the order relates; and (d) filed at the court office for sealing. The consent order will then be approved by the court. The parties in the instant case merely filed their agreement but did not file a consent order drawn in terms agreed and expressed as being by consent. It was signed by both parties and was not in the usual form of orders filed at the court office for sealing. More importantly, the court did not sanction or approve any consent application for an order reflecting the agreement of the parties because no such consent order or application was filed by the parties. Consequently, the attempt by the parties to comply with CPR 27.8(6) fails to

achieve its intended purpose of varying the case management timetable relating to witness statements by agreement between the parties.

- [7] This means that none of the parties have complied with the order of the court to file and serve witness statements by 31 July 2019. The parties now have two options. Since the time period had passed, the parties, pursuant to CPR 27.8(4), may apply for an extension of time and relief from sanctions. CPR 26.8 provides the criteria that is to be applied in respect of applications for relief from sanctions. If the parties fail to avail themselves of this option, the witnesses may not be called unless the court permits (CPR 29.11(1)). However, 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 CPR 26.8 (CPR 29.11(2)).
- [8] The requirement that the court must sanction or approve any agreement by the parties as a consent order fits neatly with CPR 29.11(1) which provides that 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. Any extension of time within which to file and serve a witness statement pursuant to any agreement between the parties that is not approved by the court and subsequently sealed would never amount to a time “specified by the court” for the purposes of CPR 29.11(1). In such a case, as here, the time specified by the court remains the time specified in the case management order.
- [9] Agreements made by parties pursuant to CPR 27.8(3) and (5) have no life of their own. Life is breathed into them once they are sanctioned or approved by the court, pursuant to a consent application filed by the parties to reflect their agreement to vary the case management timetable. The practice of simply filing any such agreements which do not come to the attention of the court until the deadline has passed is unacceptable and must cease immediately. Parties must file, pursuant to CPR 27.8(6), a consent application and consent order to reflect their agreement. This also applies also to deadlines given by the court to file submissions and authorities on applications or closing submissions after trial. The

parties may file their agreement and consent order in advance for approval by the court. The court, of course, retains the discretion to approve or disapprove any such consent application or consent order.

Disposition

[10] For the reasons explained above, I make the following orders:

- (1) The parties are to jointly file an agreed statement of issues, facts or applicable law no later than 10 clear days before the trial. If such statement cannot be agreed, then each party is required to file their own statement.
- (2) The Claimant shall file trial bundles pursuant to CPR 39(5)(a)-(c) no later than 10 clear days before trial.
- (3) Counsel for the parties shall be prepared to make closing submissions at the trial unless the court indicates otherwise at the end of the trial.

Eddy D. Ventose
High Court Judge

By the Court

Registrar