THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2017

CLAIM NO. SKBHCV2012/0181

BETWEEN:

MURTLAND WATTERTON

1st Respondent/Claimant

and

NIGEL LANDRETH SMITH

2nd Respondent/1st Defendant

WYN AGGREGATE LTD

3rd Respondent/2nd Defendant

HALCROW TRINIDAD & TOBAGO

4th Respondent/3rd Defendant

PROFESSIONAL TECHNOLOGIES (Anguilla) Ltd

5th Respondent/4th Defendant

THE CHIEF ENGINEER OF PUBLIC WORKS

1st Applicant/5th Defendant

THE ATTORNEY GENERAL OF ST. CHRISTOPHER & NEVIS

2nd Applicant/6th Defendant

Appearances:-

Ms. Marsha Henderson for the Claimant
Ms. Angelina Sookoo with Ms. Rénal Edwards for the 3rd Defendant
Mr. Delano Bart Q.C. with Ms. Miselle O'Brien for the 4th Defendant
Mrs. Simone Bullen Thompson for the 5th & 6th Defendant

2017: April 26

REASONS FOR DECISION

Background

[1] **CARTER J.:** This court has previously given oral decisions on both the applications dealt with herein and now sets out its written reasons for those decisions. The claim arises out of conditions involving the 1st respondent/claimant receiving personal injuries from the construction of a bridge that collapsed on 14th May, 2008. According to the statement of claim filed 10th May, 2012, these injuries were a result of the negligence of the defendant's construction design, inter alia, of the said bridge.

[2] Subsequently, at case management, the parties were ordered to file and exchange their witness statements on or before 23rd October, 2013. Next, by an agreement filed on 23rd October 2013, the parties agreed to extend the time for filing and exchanging of witness statements to 20thNovember, 2013.

[3] That the parties further agreed to extend the time for filing and exchanging witness statements to 22nd November, 2013 after Counsel for the claimant requested additional time. The claimant however filed his witness statements out of time on 25th November and 26th November, 2013. Later on 28th November, 2013, the claimant filed an application to deem the statements properly filed and for relief from sanctions.

[4] On this application the court also received Submissions from both the applicant and from the respondents who oppose the claimant's application.

1. Application For Relief From Sanctions and To File Witness Statements Out Of Time

[5] The **Civil Procedure Rules 2000** (CPR) 26:8(1) states that *:*

> *"An application for relief from any sanction imposed for a failure to comply with any rule, order or directions must be –*

(a) made promptly; and
(b) supported by evidence on affidavit."

[6] The application was filed on the 28th day of November 2013, some three (3) days after the deadline for the filing of witness statements. The application was supported by the affidavit of Tazula Markman. Neither of the respondents take issue with these preconditions. The court has no difficulty in finding that the preconditions as set out by **CPR** 26.8(1) have been satisfied.

[7] Apart from the above, an applicant wishing to be granted relief from sanctions for noncompliance must also satisfy **CPR** 26:8(2). This Rule states that:

"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."

[8] The section is conjunctive and therefore the failure of an applicant to satisfy even one of these will result in the court being unable to grant the relief sought.

[9] The affidavit of Tazula Markman, in support of the application deposes to the fact that failure to comply was not intentional. The deponent states:

"On the 20th day of November, 2013 the Applicant/Claimant had not yet received the copies of the statements from the Medical Practitioners in this matter, namely Dr. Persad Chode, Dr. Mervyn Laws and Dr. Cameron Wilkinson who were still adding their credentials to the said Witness Statements. That reminders were sent to the said Medical Practitioner reminding them of the agreed deadline but we were not successful in obtaining them within the time."

[10] The applicant seems from the above to have been well aware of the deadline for filing of the witness statements. The court notes that the applicant had sought and obtained the consent of the respondent for an extension of the time for filing witness statements, from October 23rd to November 20th. A further extension was also agreed with the **1st named** respondent, albeit informally, to the 22nd day

of November. However, witness statements were not filed until the 25th and 26th November, 2013.

[11] In **Bilzerian v Weiner et al** [1], the applicant sought relief from sanctions and leave to file witness statements out of time. The Learned Chief Justice gave a very detailed explanation of what was required before a court could find that an applicant had demonstrated that the failure to file witness statements was not intentional:

> *"The onus was on the appellant to show by credible and particularized evidence that he had met the threshold warranting consideration for the grant of relief. He was required to clearly demonstrate to the court that his failure to file his witness statements was not intentional – in essence that he had taken all reasonable steps to meet the timeline and then to show why notwithstanding taking such reasonable steps, that he was unable to meet it.*

Further the learned chief Justice continued:

> *A litigant would do well to appreciate that making a bald statement that the failure to comply 'was not intentional' does not advance their case in persuading a court on this question. Rather, sufficient and cogent evidence must be placed before it from which it can conclude that the failure was not intentional*."[2]

[12] Having considered the evidence advanced by the applicant, the court finds that there has been advanced sufficient information for the court to find that the failure was not intentional.

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[1] SKBHCVAP2015/0015 delivered on 24th May 2013
[2] Paragraphs 15 and 16

[13] In seeking to ascertain whether relief should be granted the court must also consider whether there has been advanced a Good Explanation For Failure to comply with the order, here to file within the time stipulated.[3]

[14] Just as the requirement to provide *"sufficient and cogent evidence"* to satisfy the court in the exercise of its discretion is necessary with regard to the need to show that the failure was not intentional the same applies to the good explanation that an applicant must show in order for the court to find that there was a good explanation for the failure to comply.

[15] In **Prudence Robinson and Sagicor General Insurance Inc. (Formerly Barbados Fire and Commercial Insurance Company Inc.)**[4] while the court accepted that the affidavit evidence of the change of the claims manager at the applicant's company and its effect as being sufficient to satisfy 26:8(1) he went on to state that with regard to 26:8(2) that:

> *"The affidavit evidence does not condescend to particulars. It is not enough merely to say that: 'I became involved in this matter after the departure of the previous Claims Manager, Mr. Dylan Pitcairn, who handled this matter from inception'. It begs the following questions: when did the previous claims manager depart the business? How soon after his departure did Ms. King become involved in the matter? Other relevant questions are: was any attempt made to contact Mr. Pitcairn? Were these efforts successful? Likewise, it is insufficient merely to state that: 'After Mr. Pitcairn became unavailable as a witness ... I had to fill that void and familiarize myself with the documents in this case'. When did he become unavailable as a witness? How long did it take for Ms. King to familiarise herself with the documents? These are critical questions which had to be addressed in the affidavit evidence. In the circumstances it cannot be said that there was a good explanation for the failure. The pre-condition stated*

[3] See BVIHCMAP2013/0003 - Sylmord Trade Inc v Inteco Beteiligungs AG and SKBHCVAP2007/0013- Goldgar et v Baird
[4] SLUHCVAP2013/0009

in rule 26.8(2)(b) was therefore not met. That is fatal to the case in relation to rule 26.8."

[16] The court must examine the adequacy of the affidavit evidence in support of this limb of the application.

[17] The evidence of Tazula Markman on this limb was essentially the same as set out at paragraph 9. The court notes however the matters set out in the grounds of the application for relief from sanctions. Ground 5 of the application states that:

"That on the 22nd of November 2013 Counsel for the Applicant was detained at Court for the entire duration of the day, and was unable to meet with the Witnesses who had attended her Chambers for execution of the Statement but who also wanted to discuss changes to be made to the documents."

[18] A number of matters arise for consideration:

(i) Clearly Counsel was in a position on the 22nd to seek additional time as had been sought from the 3rd, 4th and 5th defendants previously. Also, Counsel requested that the deadline for filing of the witness statements be moved to the 22nd. She should have been aware that her commitments at court and taken these into account when seeking that accommodation for the 22nd from her colleagues. There is no indication in the evidence presented in support of the application that these were considered, as being a factor that could have presented her from finalizing the witness statements as needed.

(ii) Interestingly, the witness statements of Doctor Laws and of Dr. Wilkinson do not bear the date. The court cannot verify that in fact these were not ready for filing on the required date, the 22nd of November. Even if the witness statements did not bear the certification, could witness summaries of the witness' evidence as allowed for by Rule 29.6 of the CPR not have been filed in their stead? There is no indication in the affidavit in support of the application that these matters were given any

consideration. Also the witness statement of at least one doctor, Dr. Prasad Chode, was faxed to the claimant on the 22nd of November at 10:27 am. The Doctor's credentials do appear on the statement yet this statement too was not filed until the 25th of November 2015. There is no explanation advanced for the failure to file same on the 22nd of November.

(iii) The witness statements of both of the claimants, Murtland Watterton and Carol Watterton are both dated the 22nd of November 2015 but these were not filed within the stipulated timeline. The claimants do not offer any explanation for this lack.

[19] After having carefully considered these matters and being cognizant of the need for the applicant to provide a full and cogent explanation this court finds that the applicants have not provided a good explanation for their failure file the witness statements within the time frame stipulated. The pre-condition stated in rule 26.8(2)(b) has not been met. This is fatal in relation to an application under rule 26.8.

[20] The court notes that the applicants have failed to comply with the rules and directions of this court, including a failure to file and serve a List of Documents in accordance with an Order of the Master of July 17, 2013. This court however does not consider these to be relevant considerations in light of the applicant's failure to satisfy the court as to CPR 26.8 (2) (b) as outlined above.

[21] The application for relief from sanctions and to deem the witness statements filed on the 25th and 26th November 2013 to have been properly filed is refused. Costs of the application to be costs in the cause.

2. Application to Amend Defence:

[22] On the 2nd of October 2013, an application for an order pursuant to **CPR** 10.7 and 20.1 to grant leave to the applicants to amend the defence filed on 16th July, 2013

was filed. The applicants, the 5th and 6th Respondents state as the grounds for the application that they 'inadvertently omitted to include in their Defence that the Claim is statute barred by virtue of Section 2 of the Public Authorities Protection Act, Cap 5:13; that the granting of the amendment will allow for the just disposal of the issues between the Parties and that the Respondents to the applications will not be prejudiced in the granting of the amendment being sought.

[23] Rule 10.7 of **CPR 2000** states *"The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree."*

[24] Where, as in this case, the application to amend the defence is being made after the first case management conference, Rule 20.1(3) of the **CPR** sets out the factors to which the court must have regard when considering a party's application to amend a statement of case. These are:

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

[25] In their written submissions the 1st and 2nd applicants/5th and 6th defendants relied on the case of **Brantley v Cozier**[5] wherein the Court of Appeal dealt extensively with the provisions of Rule 20(1)(3). In its headnote the court stated:

[5] SKBHCVAP2014/0027

"In exercising its discretion with regard to the appellant's application to amend his defence, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs. The amendment should be allowed regardless of how negligent or careless the omission from the statement of case may have been, and no matter how late the proposed amendment is."[6]

[26] The court has carefully considered the written submissions of counsel or the applicants and the respondent and notes that:

(i) The application is being made some 4 months after the case management conference and 15 months after the defence was filed Some 15 months after the defence filed.

(ii) The prejudice to the applicant – the applicant will be prejudiced if the amendment is not allowed as it may amount to a complete answer to the Respondent's claim. The applicants rightly pray in aid the overriding objective that every point which a party reasonably wants to put forward in the proceeding is aired.

(iii) The prejudice to the respondent – would the granting of the amendment place the Respondent in a worse position than he would have been if the amendment had been pleaded from the time that the Defence was filed. The prejudice to the respondent if the amendment is granted is that he may not be able to proceed with the case on its merits as it has proceeded up to this point. He would have been entitled to believe that the applicants were aware of the limitation defence but did not plead such as they were content for the issues between the parties to be ventilated at trial.

[6] The applicants also referred to the cases of Charlesworth v Relay Roads Ltd.(In liquidation) and others [1994] 4 ALL E.R. 397 and Gale v Superdrug Stores plc [1996] 3 All E.R. 468

However the court notes here that the prejudice with which Rule 20.1 (3)(d) is concerned is not prejudice relating to the nature of the defence, for example, as in this case, if it is a complete defence to the claim, if proved. In **Ketteman and others v Hansel Properties Ltd**[7], **Lord Keith of Kinkel in delivering the majority judgment of the House of Lords** referred to the authority in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263 where Brett MR stated that: *"The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made."*

Lord Keith of Kinsel went further to explain that: *"The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed. In my opinion, no sensible distinction is to be drawn for this purpose between an amendment seeking to plead limitation and any other sort of amendment."*

The real issue is whether the respondent has been precluded from making a particular response by the late amendment. In this case, the respondent

[7] [1988] 1 All ER 38

would not have been in a position to give some other response to the proposed defence even if it had pleaded before this time. This court finds that it cannot say that the respondent would be placed in a worse position in this regard.

(iv) Whether any prejudice to any other party can be compensated by the payment of costs and of interest. Only one of the factors to be considered. The prejudice to him would be the cost of having proceeded on this basis. This cost is quantifiable and can be compensated by the payment of costs and/or interest.

(v) Stage at which the matter has reached. A trial date has not been set in this matter and the matter has not yet reached the stage of pretrial review. The court notes here that it is the respondent who inaction that has led to some delay in moving this matter forward before this time. It is quite true that "to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence."[8] The time at which this application is being made is highly relevant.

[27] The court has carefully considered the application to amend and the relevant submissions. The application to amend the defence is allowed. Costs of the application to be costs in the cause.

Marlene I. Carter
Resident Judge

[8]Ketteman, Ibid, note 7, at page 62