[2018] JMSC Civ 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 00494

BETWEEN	**EVAL WALCOTT**	**CLAIMANT**
AND	**SHAWN WALTERS**	**1ST DEFENDANT**
AND	**LLOYD M'CBEAN**	**2nd DEFENDANT**

CONSOLIDATED WITH
CLAIM NO. 2011 HCV 01093

BETWEEN	**DWAYNE CHIN**	**CLAIMANT**
AND	**SHAWN WALTERS**	**1ST DEFENDANT**
AND	**LLOYD M'CBEAN**	**2nd DEFENDANT**

CONSOLIDATED WITH
CLAIM NO. 2016 HCV 000956

BETWEEN	**RYAN O'HARA**	**CLAIMANT**
AND	**SHAWN WALTERS**	**1ST DEFENDANT**
AND	**LLOYD M'CBEAN**	**2nd DEFENDANT**

IN OPEN COURT

Messrs. Stephen Jackson and Paul Edwards for the Claimant instructed by Bignall Law
Miss Nicosie Dummett for 1st & 2nd Defendants/1st & 2nd Ancillary Claimants
Miss Racquel Dunbar for Ancillary Defendant, Eval Walcott, instructed by Dunbar & Co.

PRACTICE AND PROCEDURE – Application for Claimants' Witness Statements not to be used at trial – CPR, rules 26.18 and 29.11

Heard: 23rd April 2018

CORAM: DUNBAR GREEN J

[1] This is a preliminary oral application for the claimants to be precluded from giving evidence at trial. The application is made pursuant to rule 29.11 of the Civil Procedure Rules (CPR), and as a consequence of the claimant's failure to file and serve witness statements in compliance with an order of the court made on 24th January 2018, extending time within which to file witness statement.

[2] In relation to Claim 2011 HCV01093, case management orders were made on 26th May 2016. One of the orders was that witness statements were to be filed and exchanged by 31st October 2017. It is not clear from the records when case management orders were made in relation to the other claims. However, the records show that the claims were consolidated on 27th February 2017.

[3] On 24th January 2018, the court granted an extension to 2nd February 2018 for the parties to comply with the case management orders.

[4] There is no issue that the witness statements for the 1st and 2nd defendants were filed and sealed in October 2017.

[5] CPR rule 29.11 states:

> (a) *Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
>
> (b) *The court may not give permission at the trial unless the party asking for the permission has a good reason for not previously seeking relief under rule 26.8.*

[6] Counsel for the defendants relied on ***Jamaica Public Service Company Limited v Charles Vernon Francis Anor*** SCCA No. 126/2015, in particular

paragraphs 14-17. In that case, the application was for relief from sanctions and for extension of time to file witness statement. The application was supported by an affidavit in which it was deponed that the failure to file witness statements was due to the intended witnesses being "currently travelling outside the parish as well as the island for an extended period of time due to work related commitments."

[7] The learned judge refused the application. One of the bases was that the appellant had not given a good explanation for failure to file its witness statements within the time limited in the case management orders.

[8] The Court of Appeal, in explaining the effect of rule 29.11, said:

However, under rule 29.11, the appellant's failure to file and exchange witness statements as ordered rendered it unable to call any witnesses unless it was granted relief from sanctions…[Rule 29.11] in and of itself is a sanction and the appellant was therefore obliged to apply for relief from this sanction. (Paras. 15-16).

[9] In the matter before me, there was no application for relief from sanction. The claimants' failure to file witness statements within the time allowed was brought to the court's attention by counsel for the defendants who sought leave to make an application after counsel for the claimants announced that he was ready for trial.

[10] At the conclusion of submissions by counsel for the defendants, the court afforded the claimants time to consider the application and to put their submissions in writing.

[11] On resumption, counsel for the claimants informed the court that a written application and affidavit were being filed to seek relief from sanctions. In the course of making his submissions, the court was told that an affidavit had been filed but there was no success in serving it on the defendants.

[12] The court declined to consider the affidavit for reasons that:

I. counsel for the defendants had already concluded her submissions; and

II. no permission had been sought or given for an application and/ or affidavit to be filed.

[13] The court proceeded to consider oral and written submissions by counsel for the claimants as to the failure to seek relief. The first purported reason (numbered 2 in the submissions), was background information and not a reason. The claimants' reasons are stated as follows:

"…3. By Affidavit, Counsel gave instructions for Witness Statements which were settled in January 2018 to be filed no later than January 31, 2018.

4. Through inadvertence of the paralegal this was not done. The error was not noticed until time for preparing the Bundle of documents needed for the Court which is required three days prior to a hearing.

5. When the error was noticed (at the time for filing the Bundle), insufficient time would be present (sic) for an application to be made, and their (sic) was no further Pre-trial review dates for compliance to be ensured.

6. The Appellant was did not (sic) anticipate that their (sic) would be a need for an application in light of the fact that to he (sic) was not in possession of a witness statement from the Defendant.

[14] In oral submissions, counsel stated that the period between the discovery of the failure to file witness statements and the date for trial was not sufficient to guarantee him a hearing of an application for relief and so none was made. He also said there would not have been enough time to give notice of the application.

[15] I take note that the court had ordered that the core bundle be filed on or before 16th April 2018. That was to have been five days prior to the hearing. Yet, at explanation 4, counsel claims that the bundle should have been filed three days prior to trial. Clearly, there was no diligence in complying with the court orders.

This explanation as well as number 3 are reasons for not filing and serving the witness statements and not reasons for failure to seek relief from sanctions.

[16] Reason number 5 is particularly astounding. Counsel claims that although it was discovered (purportedly on the date the bundle was to have been filed) that there had not been compliance with the court order, the decision was taken to proceed to trial rather than comply with rule 26.8 and make an application for relief from sanctions. The non-compliance was intentional, a blatant contempt for the rules of the court and an abuse of process. Counsel ought to have promptly put in an application for relief on discovering that there was failure to comply with, not the first but, the second date granted by the court for filing of the witness statements.

[17] Reason number 6 is unacceptable because the claimants had been served with notice that the defendants had filed their witness statements from October 2017. The defendants had therefore complied with the court orders and their action could not provide an excuse for the claimants' failure to seek relief from sanctions.

[18] I did not find any good reason for the claimant's failure to have previously sought relief from sanctions. If anything, the excuses proffered made it clear that an application for relief should have been sought. The non-compliance was not trivial. It pertains to the heart of the action.

[19] I am duty bound to ensure that the overriding objective of the CPR is met. This requires that trials are conducted in a disciplined manner, which includes efficient use of the court's time and the need for compliance with the rules of procedure. In this case, the claimants intentionally flouted rule 26.8. Their conduct was contemptuous of the procedural rules.

[20] Accordingly, I will not give permission for the claimants' witnesses to be called.

[21] I should also say that counsel for the claimants was not on sound footing when he sought relief by way of an oral application, relying on the Court of Appeal decision in ***Prime Sports Jamaica Limited (Coral Cliff Entertainment) v Lori***

Morgan SCCA No 68/2016 which referenced ***Dale Austin v The Public Service Commission and the AG*** [2016] JMCA Civ 48, at para. 101 wherein it stated, inter-alia :

"v. There need not be a formal application, and the court may act on its own motion or initiative even though it is under no duty to do so (Rule 26.1 (2) (v); 26.2 (1) and rule 26.1 (7)…"

[22] The Court of Appeal was dealing with the court's general powers of management and the court's power to make orders on its own initiative. However, there are specific rules which govern how applications for relief from sanctions should be made, one of which states that the application "must be –(a) made promptly; and (b) supported by evidence on affidavit" (rule 26.8 (1). Counsel's say so, in oral submissions in response to a preliminary point, would not be sufficient.

[23] I have also considered whether the claimants would have met the requirements for relief. They have relied on paragraphs 7-11 of the written submissions, viz:

7. The application was made as soon as the error was discovered. The Applicant has act (sic) as promptly as they (sic) could in the circumstances. The Applicant has a good reason for non compliance. He believes that the witness statements were filed and it was through inadvertence why this was not done.

8. The delay was caused by the Applicant's Attorneys and is no fault of the Applicant.

9. The Applicant has complied with all the Orders as at the date for Trial.

10. The Applicant has a real prospect of success and arguably should not be driven from the court by virtue of a technicality.

11. All witness (sic) can be accounted for and the prejudice to the defendant can be addressed by an appropriate award for courts (sic) or the Trial dates being vacated and awarding costs to the Defendants.

[24] I find no merit in those submissions. Counsel would have had to cross the hurdles set out in rules 26.8(1) and (2) before the court could consider those set out in 26.8(3).

[25] I have already stated that the failure to comply was intentional and contumelious and no good explanation for the failure was provided. This was also the second breach in relation to the filing of witness statements, hence the court order extending time. Therefore, the claimants would also not satisfy the requirements for relief under rule 26.8 (2) which states, inter-alia:

The court may grant relief only if it is satisfied that –

(i) *the failure to comply was not intentional;*

(ii) *there is a good explanation for the failure; and*

(iii) *the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*

[26] Accordingly, I will not give permission for the claimants' witnesses to be called.