IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 661 OF 2012

BETWEEN:

STEVE FULLER	**Claimant**
AND	
FORT STREET TOURISM VILLAGE	**First Defendant**
HENRY YOUNG	**Second Defendant**
BELIZE MARINE & SAND CO. LTD.	**Third Defendant**

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

April 5 & 12, 2016.

Appearances: Ms. Darlene Vernon for the Claimant.
Mr. Godfrey Smith, SC for the First Defendant.
Mr. Michael Young, SC for the Second Defendant.
Mr. E. Andrew Marshalleck, SC for the Third Defendant.

JUDGMENT

[1] Before the Court is an application by the Claimant for relief from sanctions for failure to file certain witness statements in breach of the case management order and for permission to file the said witness statements out of time. The Claimant applied by way of Notice of Application dated January 14, 2015 supported by an affidavit sworn to by him on even date.

[2] The substantive claim was brought by Claim Form on November 29, 2012 and was amended to add the Third Defendant as a party. The Claim seeks damages for

nuisance of the Defendants or in the alternative for negligence by the Defendants. At case management conference held on October 29, 2013, orders were made for specific and standard disclosure to be made on or before November 22, 2013 and for witness statements to be filed and exchanged on or before December 6, 2013. The pith and substance of the application resides in the fact that there were filed on behalf of the Claimant on December 9, 2013, two affidavits sworn to by the Claimant himself and by an intended witness, Vallan Leonard Hendy, instead of witness statements as mandated by the case management order. It follows that the said Case Management Order was not complied with in two respects, namely, as to the time within which the documents were to be filed and as to the nature and format of the documents actually filed.

[3] The present application, which is opposed by the Defendants, seeks the following orders:

> "1. That the Applicant be relieved from sanctions pursuant to Rule 26.8 of the Civil Procedure Rules for failure to file its (sic) Witness Statement as per Case Management Orders.
>
> 2. That the Applicant be allowed to comply with the Case Management Orders and file his witness statements out of time."

The application for relief from sanctions is stated to be made pursuant to Rule 26.8 of the Supreme Court (Civil Procedure) Rules, 2005 ("the Rules") which states:-

> "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 interests of the administration of justice;

(b) whether the failure to comply was due to the party or his legal practitioner;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

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

(e) the effect which the granting of relief or not would have on each party."

[4] The evidence in support of the application was set out in the accompanying affidavit of the Claimant. He stated that he had previously retained and had been represented in the proceedings by the firm of learned Senior Counsel Mr. Hubert Elrington. It was recalled that at a sitting of the Court it was pointed out in his presence that certain orders of the Court had not been complied with and unless complied with certain consequential orders would be made. Being concerned about this state of affairs, he made inquiries of his Attorney-at-Law and paid several visits to his office to have the non-compliance addressed. He was unable to meet or receive any information from his Attorney-at-Law. Consequently, he retained fresh Counsel on or about November 20, 2014. Attempts to retrieve his case file from previous Counsel were to no avail and the court's file was eventually perused. His new Attorney-at-Law

thereupon discovered that two affidavits had been filed instead of witness statements as ordered by the Court.

[5] The affidavit contained the following averments:

> "9. That I have been informed by my new Attorneys that the Order made by the Court was for the filing of Witness Statements which will stand as my evidence in the matter and not affidavits. Further that the consequences flowing from this could be the striking out of my evidence before the Court.
>
> 10. That there are only two Affidavits that were filed instead of Witness Statements and these were for Vallan Leonard Hendy and myself. The others were filed properly as Witness Statements.
>
> 11. That the failure to file the witness statements were not intentional on my part but an error made by my then Attorney, Hubert Elrington.
>
> 12. That I have in every other respect to the best of my knowledge, complied with all other relevant rules, practice directions and orders of the Court made.
>
> 13. That I acted as promptly as possible to file this Application before the Courts in order to have the matter corrected and to file my Witness Statements.
>
> 14. That I verily believe that the relief, if granted, would not cause any prejudice to the Defendants herein as the Affidavits contain most of the substance of my case that I intend to rely on."

Plainly, the Claimant was seeking to address the requirements of an application for relief from sanctions.

[6] Learned Counsel for the Claimant urged that the lapse in filing Affidavits instead of witness statements was unintentional and appeared to be an error on the part of the

Claimant's previous Attorney-at-Law. It was pointed out that the two Affidavits were filed on the same date as the other witness statements in support of the Claimant's case. The date was erroneously stated to be December 6, 2013. The record reflects that the said affidavits and witness statements were filed on December 9, 2013. Accordingly, not only were the Affidavits incorrectly filed but also they were filed out of time.

[7] It was further contended that the application was made promptly after the Claimant had changed Attorneys-at-Law. Also, it was said that given the drastic consequence of the application not being granted, the overriding objection set out in Rule 1 of the Rules ought to be applied to grant the Claimant his day in Court.

[8] Learned Senior Counsel for all three Defendants concurred in their arguments in opposition to the granting of the application. It was firstly recognised that the process of substituting witness statements was a relatively facile matter against the background of the serious consequence of the claim being at an end if the application was unsuccessful. However, the mandatory conditions of Rule 26.8, it was argued, had to be met before the court's discretion could be exercised.

[9] On behalf of the first Defendant, and adopted on behalf of the other two Defendants, Learned Senior Counsel highlighted that the Claimant had allowed an entire year to elapse before retaining new Counsel and as such, he could not be heard to say that he was unable to obtain the case file from his original Attorney-at-Law. As a matter of conjecture as to whether the error was intentional, it was said that in preparing both witness statements and affidavits to support the Claimant's case, there must have been the averting of the mind to this course of action.

[10] With reference to Rule 26.8(2)(c), learned Senior Counsel said that there were several adjournments of the matter at the instance of the Claimant and that the Claim was partially struck out precluding the Claimant from seeking special damages. In addition, learned Senior Counsel for the second Defendant pointed out that the said order striking out the claim for special damages, though initialled by Counsel, was never

perfected and entered. These matters were put forward to show that the Claimant has not generally complied with all other relevant rules and orders of the court.

[11] The Court is empowered by Rule 26.1(2)(c) to extend the time for compliance with an order of the Court whether before or after the time for compliance has passed. However, before exercising the discretion so to do it is circumscribed by the mandatory requirement of Rule 26.8(1) and (2) visited upon any application for failure to comply with any Rule, order or direction of the Court. In this case, the application was properly supported by evidence on affidavit but such evidence must be analysed to determine whether the application for relief was made promptly and the conditions in sub-rule (2) of Rule 26.8 were satisfied.

[12] The Affidavits were filed on December 9, 2013 after the deadline of December 6, 2013 fixed by the case management order. Faced with the non-responsiveness of his then Attorney-at-Law, the Claimant, being admittedly fully aware that there was an outstanding issue affecting his case, did not seek to retain new Counsel until November 20, 2013, nearly one year later. Even after doing so, it took from then until January 14, 2015, a period just shy of two months, for an application to be made for relief from sanctions and an extension of time to file the witness statements replacing the two Affidavits. This is evidence of the antithesis of promptitude, but rather demonstrates a dilatory approach to the making of an application to rectify a potentially fatal procedural faux pas. The application is required to be made promptly and this was certainly not done in this matter.

[13] Inasmuch as the lack of promptitude renders the application doomed to failure, in deference to Counsel the remaining arguments deserve attention. Before doing so, it is salutary to be reminded that the Court must examine the evidence to determine whether it is satisfied that the failure to comply with the order of court was not intentional, that there is good explanation for the failure and that the defaulting party has generally complied with all other relevant rules, practice directions, orders and directions. Only after being so satisfied as to these conditions, can the Court embark upon an evaluation of the case in the light of the matters listed in sub-rule (3). The matter was put in this

way by Barrow, JA in **Dominica Agricultural and Industrial Development Bank v Mavis Williams** – Civil Appeal No. 20 of 2005 (Dominica) (at para 19):

> "... the provisions that are contained in rule 26.8 were crafted, in striking contrast to the provisions contained in the English Rules (Rule 52), in specifically non-discretionary terms: "the court may grant relief ONLY IF it is satisfied ..." Apart, therefore, from providing the criteria by which to determine the present application, Rule 26.8 has a wider importance. Rule 26.8 demonstrates the paradigm shift in the culture of litigation that CPR 2000 is intended to accomplish by, along with other things, its emphasis on compliance with the rules. Rules 26.8 ordains that the sanctions imposed for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise, as it did in the past, and "unfettered discretion" and relief against sanctions whether the defaulter fails to satisfy a particular criterion. The court has no power to overlook inordinate delay or intentional non-compliance."

[14] It was deposed that an error was made by the previous Counsel and that the failure to file witness statements were not intentional. Learned Counsel for the first Defendant posited that since other witness statements were simultaneously filed, Counsel must have addressed his mind to the distinction. Having not heard from the previous Attorney-at-Law or any member of his firm, the Court is forced to agree that some conscious effort had to be made, for a reason that would remain unknown (as conceded by learned Counsel for the Claimant), to adopt two separate formats of documents. The case management order made no mention of affidavits being filed, hence it is difficult to accept that an error was truly made.

[15] It was represented that there were several adjournment dates to accommodate learned Senior Counsel for the Claimant. Upon a perusal of the record this was not substantiated. The only matter of an adjournment at the behest of the Claimant's

Attorney-at-Law was on first date when the matter came up for case management and service had not yet been effected on the second Defendant. On that occasion, the Claimant was mulcted in costs in the cause.

[16] On January 21, 2014, the Court heard an application to strike the Claim in whole or in part. It was ordered that the Claim for special damages be struck out for failure to provide specific disclosure as ordered. Costs in the cause were awarded in favour of the second Defendant. As earlier iterated, it was brought to the attention of the Court that the said order was never perfected and filed with the Court. These matters were urged as evidence of failure on the part of the Claimant to generally comply with Rules of Court and orders and directions made by the Court in the course of the proceedings.

[17] In my view, the foregoing matters fall short of presenting a case for absence of general compliance with the Rules and/or order of Court. The Claimant did not fulfil the request for specific disclosure and paid the price of having his claim for special damages struck out from the claim leaving only a claim for general damages for nuisance or in the alternative, negligence. I can hardly discern a pattern of general non-compliance. I am satisfied that there was general compliance with the Rules and orders of the Court.

[18] In the premises, the Claimant has failed to meet the threshold requirements of Rule 26.8 and accordingly the application must fail. It is therefore ordered that the application for relief from sanctions and for an extension of time to file witness statements be dismissed. The defendants are entitled to their costs on the application.

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KENNETH A. BENJAMIN
Chief Justice