THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 552 of 2016

BRUCE CHO **CLAIMANT**

AND

SALVIO PAQUIL **RESPONDENTS**
EMILIANO CHIAC

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2017
10th April
24th April

Decision
2017
16th May

Mr. Hubert Elrington, SC for the Claimant.
Mrs. Monica Coc Magnusson for the Respondents.

Keywords: Civil Procedure – Strike Out Application – Claimant's Statement of case – At Pre-trial Review – Failure to Comply with Case Management Order and Costs Order – No Relief from Sanctions – Trial on Admissions made in Statement of Case –No reasonable ground for bringing the Claim – Likely to obstructs the just disposal of the proceedings

DECISION

1. This decision concerns an application to strike out the Claimant's Statement of Case in circumstances where counsel for the Claimant bears the weighty consequences of his failure to comply with the Case Management Order for

filing witness statements. The Applicants ground their request on Rule 26.3(1) (a) (b) and (c) which provides:

> *"26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
> *(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;*
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim ..."*

2. Counsel submits in support, that the defence has failed to comply with Case Management Orders having made no standard disclosure, served no witness statements and filed no pre-trial memorandum. Additionally, he has failed to pay costs as previously ordered by the court. She contends that since counsel has been sanctioned and cannot rely on any witness statements at trial, his Statement of Case discloses no reasonable grounds for bringing the claim and in any event, to allow the matter to proceed to trial in its present condition would likely obstruct the just disposal of the proceedings.

The History:

3. There is no disputing that the defence has not complied with any of the Case Management Orders made at a conference in which he actively participated. The date for such filing and service of his witness statements having passed, counsel made no application for extension of time or relief from sanctions. The Defendants made no applications either. Instead, at Pre-trial Review counsel for the Claimant informed the court that he had never intended to file or serve any witness statements as he was of the opinion that all that was required to be proven, by the Claimant, had already been admitted by the defence in their Statement of Case. This was an entirely new stance taken

without notice. It was obviously intended to be a life raft for the claim and a blind side for the defence. He had made no application for summary judgment which would have failed in part, since summary judgment cannot be given in proceedings for false imprisonment (which this claim is) see Rule 15.3; nor had he applied for judgment on admission or for trial by way of legal submissions only.

4. He further informed that at trial he would rely on his own Statement of Case and the Defendants' witness statements. He sought time to put written submissions before the court to support his position. The court offered no relief from sanctions as they had not been sought and informed the parties that the sanctions would apply pursuant to Rule 29.11(1).

5. A short adjournment was granted during which period counsel for the defence filed a strike out application. On the adjourned date counsel for the Claimant came with one copy of a single case in hand (the specific nature of which remains a mystery) and made brief oral submissions in opposition to the strike out application. He again sought time in which to not only respond to this application but to support his original contention. The matter was adjourned for written submissions from both sides and the court gave directions for their filing. The parties were subsequently informed by the court to be prepared for trial on the date given for decision on the application.

6. The court received the written submissions as directed. Suffice it to say that the Claimant's were not very helpful to the issue at hand and the Defendants' were understandably, more in the vein of a no case submission. The findings are as follows:

Dealing with Admissions:

7. Where a party makes an admission in writing, example in the Statement of Case, Rule 14.4 (1) allows either party to apply to the court for judgment on admission. In the present case, if the Claimant felt the Defendants had made certain relevant and sufficient admissions, it was open to him to apply for judgment on those admissions, whereupon the court would have given such judgment as it appeared he was entitled to. No such application has been made.

8. However, as stated in Blackstone's Civil Practice 2013 at 26.7: *"If an allegation is admitted, the Claimant is absolved from any obligation to bring any further evidence in support of that allegation. This is apart from any other consequences that may flow from the admission made."* So too, any facts which are formally admitted, can no longer be in issue. Equally, where the facts are in the Defendant's possession the Claimant need not prove them. On the other hand, informal admissions need to be proved as they are only evidence which could be explained away by testimony.

9. Formal admissions aid in narrowing the issues and could greatly assist summary judgment applications as well. A summary judgment application is suitable where the case does not turn on the evidence of witnesses so there is no need for a full trial. It is only in very exceptional cases that summary judgment will be granted at trial. But as stated earlier no summary judgment application has been made. The matter is now ready for trial.

10. There is certainly nothing which precludes a matter proceeding to trial even where admissions have been made. Details of those admissions ought to appear in the pre-trial memorandum in accordance to Rule 38.5 (3) (b) . However, there should also be issues to be determined which would warrant

a trial. Had the Claimant sought in any way to comply with the Case Management Order, that the pre-trial memorandum, which could have been agreed between the parties, would have contained all of the pertinent information and would have made matters far easier.

11. I have considered the pre-trial memorandum filed by the defence. Their only stated factual admission is: *"The Respondent Paquil admits to issuing the impugned warrant and imprisoning the Claimant for five and a half hours after he refused to pay a fine imposed by Mr. Paquil."* I have also considered the Statement of Case on both sides and find that there are issues to be determined. And though I do not believe counsel for the Claimant has conducted this matter properly, or shown serious regard for the court's orders or the Rules of court, it is trial ready.

The Strike Out Application:

12. The sanction, for not serving a witness statement for an intended witness within the specified time is automatic. The offending party is not allowed to call that witness unless the court permits –Rule 29.11(1). It remains open to the court to grant such permission even at trial in accordance with Rule 29.11(2). However, that party must have a good reason for not previously seeking relief The test for a good reason here is the same as it is for the setting aside of a default judgment or a judgment made where one party is absent. Therefore, it must be compelling. And although I do not believe that default occasioned by deliberate decision of counsel would constitute a good reason, that door must remain open in the interest of justice.

13. To my mind striking out the claim at this stage of the proceedings (pre-trial) is pre-emptive, premature and plainly wrong. It denies the possibility of an

application, pre-determines its failure and goes against the overriding objective of dealing justly with a case. Additionally, I agree with counsel for the Claimant when in his first oral submission he proposed that in the circumstances striking out his claim pursuant to Rule 26.3 (1) (a) would be tantamount to a double sanction. Through his own devices he has already been sanctioned, he ought not to be penalized twice.

14. There were also applications which the defence could have made to enforce compliance with the other terms of the Case management Order and the costs order. For example it was open to her to seek an unless order pursuant to Rule 26.4 (1). This would have been a more efficient way of dealing with the Defendant's breach rather than pursuing a strike out order just before trial is scheduled to begin.

15. This court notes the case of ***Carmelita Aldana v John Sansone Claim 479 of 2008*** relied upon by counsel for the defence. Here the court dismissed the claim where the sole defence witness was inexplicable absent on the date of trial. It is to be noted that the decision to dismiss the claim was made at trial. Moreover, the Acting Chief Justice, made it clear at paragraph 12 that the important matter was not just the witness statements but more so, the witness in person.

16. I do not think it prudent either to entertain an application, for striking out a Statement of Case at this stage, on the basis that it discloses no reasonable grounds for bringing the case. This is an attack on the Statement of Case. The fact is the Defendants have filed a defence and have joined issue with the Claimant. They have proceeded through Case Management and have readied themselves for trial. The Claimant's failure to file and serve witness

statements cannot affect the sustainability of his Statement of Case. It may affect his ability to prove the allegations made therein but it does not affect its content. One must be reminded that in a strike out application it is to be assumed (not proved) that the facts alleged by the Respondent are true. I also note the voluminous submissions made by counsel for the Defendants and the many issues of fact and law outlined therein. This entirely contradicts her position on this particular strike out ground.

17. Finally, striking out the claim at this stage will restore the parties to their pre-claim stage where the Claimant would be at liberty to bring a similar claim. This matter is currently ready for trial. To accede to this application in fact militates against the overriding objective, as it cannot be an appropriate use of time or resources and would most certainly obstruct the just disposal of these proceedings.

Conclusion:

18. The parties have been previously notified of the court's intention should the application fail.

IT IS ORDERED:

1. The application to strike out is dismissed.
2. Costs on the application shall be in the cause.
3. Trial shall commence forthwith.

SONYA YOUNG
JUDGE OF THE SUPREME COURT