IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 142 of 2018

MARK KING	**FIRST CLAIMANT**
BRINTS SECURITY LIMITED	**SECOND CLAIMANT**
AND	
MOSES SULPH	**DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2018
11th October

Written Submissions
Claimant – 14th September, 2018
Defendant – 3rd October, 2018

Decision
11th October, 2018

Mr. Estevan Perera along with Ms. Payal Gandwani for the Claimant.
Mr. Arthur Saldivar for the Defendant.

Keywords: Civil Procedure – Strike Out – Defence – Failure to Make Standard Disclosure as Ordered – Failure to Serve Witness Statements as Ordered – No Reasonable Grounds for Defending the Claim – Application for Relief from Sanctions

DECISION

1. The decision to strike out a Statement of Case is never to be made lightly. It deprives the party of a fair trial. The Claimants in this case have presented

two grounds on which they ask the Court to move. The first is divided into three parts and deals with the Defendant's non-compliance with orders of the court. The first two parts will be dealt with together as they are similar in nature. The others will be considered separately. For efficiency sake, this judgment will also deal with the Defendant's subsequent application for relief from sanctions which was served today on the Claimant who acceded to having it heard immediately.

Grounds 1a and 1b – Non-compliance with Case Management Orders for the service of standard disclosure and witness statements:

2. It is true that the Defendant has failed to make his standard disclosure as ordered. He did so some nine days late. It is also true that he failed to serve his witness statements on or before the 2nd July, 2018. He accomplished service on the 6th July, 2018, four days late. The Rules dictate a sanction for each of these defaults. For the disclosure it says the party may not produce or rely on any document not so disclosed – Rule 28.13(1). As it relates to the witness statement, where it has not been served within the time specified by the Court, the witness may not be called unless the Court permits it. Even at trial the Court may give permission if the applicant-party has a good reason for not previously seeking relief from sanctions under Rule 26.8.

3. The Claimants, however, did not seek to draw the Court's attention to those sanctions. Rather, they seek to strike out the Statement of Case for non-compliance with orders given by the Court pursuant to Rule 26.3(1)(a) and (c). It must be noted that striking out is a sanction which the Court is empowered to use *"in addition,"* not in the alternative to the other sanctioning powers given. The Claimants have not explained why the Court should ignore the specific sanctions provided for the Defendant's proven default

and to instead proceed to strike out the Statement of Case. It is the view of this Court that this is not the correct approach.

4. A proper reading of Rule 26.7.(2) makes this clear: *"where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the Rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and Rule 26.9 shall not apply"* Part 26.9 deals with the court's power to rectify procedural errors. Since the specific sanction takes automatic effect, making an order to strike out the Statement of Case would be tantamount to a double sanction which could not be right or fair under any circumstances. The court refuses to participate in any such exercise.

5. The Court is minded to believe that counsel in making his strike out application was aware that it was probably not the proper procedure since he attempts to meld both sanctions in his conclusion. Paragraphs 10 to 14 of his submissions read:

"10. ……….The Defendant served his list of documents …… 9 days after the date ordered.

11. The consequences of this failure has been predetermined by the CPR. Rule 29.11(1) which provides that a party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any documents so disclosed or made available for inspection.

12. The Defendant herein also failed to exchange witness statements …….. as ordered by the Court……

13. The consequences for the former non-compliance has also been predetermined by the CPR. Rule 29.11(1) (sic) *provides that if a witness statement or 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. However, the court may not give permission at trial unless the party asking for permission has a good reason for not previously seeking relief under Rule 26.8."*

"14. In the case at bar, the Defendant has not applied for relief from any of these sanctions. Therefore, the witness statements and documents purportedly disclosed

cannot be relied on during trial. For this reason, the Claimants respectfully submit that the Court should exercise its authority to strike out the Defendant's Defence for failure to comply with Her Ladyship's order."

Relief from Sanction:

6. The Defendant has, since the filing of the application to strike out, made an application for relief from sanctions. Let us consider that at this juncture being reminded that the burden of proof on this application lies with the applicant.

7. Mr. Sulph states in his affidavit that on the Case Management date his attorney was not present at the Case Management Conference. So he, as a lay person, was "*intent of* (sic) *complying with all the orders the Court made."* The absence of his attorney was practically habitual. The Court had ordered on the last Case Management date that on the adjourned date, orders would be made whether Mr. Sulph's counsel was present or not. Counsel chose to absent himself and the orders were made.

8. That Case Management Order was never filed. It is usual that the Claimant's attorney would prepare the draft for the Court's approval. The Court detects that there seems to be some reluctance to do this and often it is at the pre-trial review that an order has to be made for the Case Management Order to be filed. This is a most unacceptable state. In this case where the Defendant's attorney was absent, it became even more important for the order to be filed. This is not to say that the failure to file is determinative of anything or absolving of any default on the part of the defence.

9. Mr. Sulph said that he filed the disclosure and the witness statements on the dates ordered, but he neglected to serve as well. For the witness statements, he said he went out of the district to work on the date he filed and he did not

return until the morning of the 6th July, 2018, the date of service. He adds that he left the filed disclosure at his lawyer's office on the 11th June, 2018, and expected that they would have been served. They were not, due to a mis-communication, the nature of which he neglects to explain. He says he only became aware that the disclosure was not served timeously when he was served with the strike out application

10. In considering whether to grant relief from sanctions the Court is guided by Rule 26.8. The Court must ensure that the application is made promptly and is supported by an affidavit. The application in this matter is supported by an affidavit. While it cannot be said to have been made very promptly, there was no inordinate delay. Mr. Sulph knew the witness statements had been served late since the 6th July (paragraph 11 of his affidavit). He knew that his disclosure had been served late since, at the very latest the 20th September, 2018. His attorney must have known since the date of service 20th June, 2018 or before. Neither of them did anything. Mr. Sulph was always represented. After the strike out application had been served it took counsel ten days before the application for relief from sanctions was made.

11. It must be explained here that trial was originally listed for the 26th and 27th September, 2018. It had to be vacated as counsel for the Defendant was in a criminal trial and had difficulty attending the pre-trial review on the 18th September, 2018. The strike out application had by then already been filed (since August). It was only served on the 20th September due to a Registry error which resulted in its late return to counsel. It was scheduled to be heard on the trial date instead.

12. Now, it could be argued that the failure to serve the witness statements was not intentional, however the failure to serve the disclosure certainly was. Mr. Sulph's need to leave the district did not preclude him from having someone else serve the document on his behalf. It is also noteworthy that he left the district at night. He offers no explanation as to why did he not serve before he left. Honestly, there really was no good excuse for not serving the disclosure. The Court could not determine whether the reason for not serving the witness statements was good since it was not fully explained in the affidavit.

13. The Court must also consider whether the defaulting party generally complied with all other relevant rules, practice directions orders and directions. It is here that all non-compliance gains relevance (not for striking out as the Claimants submit). The late service of both the disclosure and the witness statements as well as his filing of eight witness statements when he was given leave to file only five indicates a pattern of non-compliance.

14. Be that as it may, the Court must still have regard to the interests of justice, whether the non-compliance has been remedied within a reasonable time and the effects relief would have on the trial date and on all the parties.

15. This is a defamation claim. It deals with issues which touch and concerns a person's reputation – a priceless, non-tangible, the loss of which could ruin lives. It also equally touches and concerns the fundamental right of freedom of expression. For this reason, perhaps, summary judgment is not allowed.

16. The failure to comply in this matter seems to be the fault of both the applicant and his legal practitioner. In his oral submissions counsel accepted

all the blame. The failure was remedied very soon after it occurred which was certainly within a reasonable time. The trial date has already been vacated so granting relief at this stage has no effect on it. Both parties have exerted effort to make the matter trial ready. The Claimant is not excessively prejudiced by the late service as there was sufficient time to prepare for trial and the lateness was a mere days. The documents were all filed as ordered. There was partial compliance with the order.

17. The overriding objective demands that the Court deals with cases justly. Having considered the short periods of default and its limited effect, I do not feel the defaulting party ought to be deprived of access to the Court. This court does not intend in any way to minimize the need for strict adherence to court orders but to impose the specified sanctions here seems disproportionate to the default. For this reason, I would grant relief but the Claimant would have his full costs on the application.

Ground 1c - Filing more witness statements than he was given leave to do:

18. At Case Management the Court is empowered to give any directions or make any orders it deems necessary for the purpose of managing the case and furthering the overriding objective. It may also direct that any evidence be given in written form (see Rule 26.1(2)(1) and (P) respectively).

19. In the case at Bar the Court permitted the Defendant to file five witness statements, as he had requested. He obviously later determined that he required three additional witnesses and proceeded to file witness statements accordingly. He neither sought nor received the Court's permission to increase the number. This not only impacts the allotted trial time and other

trial resources but it takes the other party by surprise. The days of trial by ambush are long behind us.

20. However, filing additional witness statements without leave is not specifically sanctioned by the rules. Therefore, the step taken is not invalid unless the Court so orders. The Court is also allowed to exercise its general power to rectify such a failure to comply. The Court may make matters right even where there has been no application by a party.

21. The Court has considered the witness statements filed and find them all relevant to the issues at hand. A party ought not, without very good reason, to be denied the opportunity to put his whole case to the Court. An order will be made to make matters right by increasing the number of witness statements to eight and directing that the filing of the eight witness statements is deemed valid. To my mind striking out a party's Statement of Case would again be a disproportionate sanction, for filing three additional witness statements without leave. The Court will not exercise its discretion as requested. Rather, the Defendant would be condemned in costs.

22. To my mind striking out a party's Statement of Case would again be a disproportionate sanction, for filing three additional witness statements without leave. Rather the defendant would be condemned in costs. The Court will not exercise its discretion as requested.

2. No reasonable grounds for defending the claim, Rule 26.3 (1) (c):

23. Th Court became somewhat confused by the Claimant's submissions relating to this ground. They seemed to deal predominantly with the evidence provided in witness statements which had not yet been admitted as evidence or tested under cross-examination. They in fact have nothing

whatsoever to do with the state of the defence filed which is where the attack under this Rule is made.

24. As explained in **Blackstone's Civil Practice 2013 at paragraph 33.7** under the heading "**No Reasonable Grounds for Bringing or Defending the Claim":** "*A defence may be struck out if it consists of a bare denial or otherwise fails to set out a coherent statement of facts, or if the facts it sets out, even if true, do not amount in law to a defence to the claim."* Counsel for the Claimant quoted from **The Caribbean Civil Court Practice 2011** which provides the two situations the provision addresses:

"(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

(2) where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

25. Such a strike out application does not entail the examination of witness statements. It is concerned only with the Statement of Case and all the facts stated therein are assumed to be true. Whether or not the pleaded facts can be proven is the subject of some other procedure. It appears that perhaps counsel was really trying to secure a summary judgment but, was well aware that that avenue was not available to him on a defamation claim (see Rule 15.3(C)(iii)). The claim before the court is for defamation concerning two Facebook posts made on two separate dates. We shall refer to them as the first post and second post.

26. As a matter of law, truth, is a defence to defamation. Proof of the truth of the words used comes through a consideration of the evidence at trial which could certainly be enhanced through cross-examination. This was the defence raised to the first post.

27. I will not burden you with the precise words complained of in this decision. Suffice it to say that Counsel for the Claimant in his submission painstakingly assessed each individual sentence in the first post to determine what could and could not be proven according to the witness statements filed. Be that as it may, in one instance he claimed that the Defendant's Statement of Case never addressed a particular sentence in the post. It is trite law that a Defendant may defend only part of what is alleged to be defamatory. Moreover, if there is nothing in the statement of case relating to a particular allegation in a claim what exactly is the court being called upon to strike out. Again I am of the view that this was not the application Counsel really wished to make.

28. In another instance Counsel submitted that certain evidence was hearsay and must be excluded. No determination has yet been made by the court in this regard. This submission may be somewhat premature to say the least.

29. Fair comment on a matter of public interest is also a recognized defence to defamation whether or not the truth of the underlying facts is capable of proof, is again a matter for trial. In relation to the second post this defence was raised. Counsel for the Claimant launched a sound attach in part. He referred to **Gatley on Libel and Slander, 11th ed. at Note 12.2** which explains that, to succeed in the defence of fair comment a defendant must show that the words are a comment and not a statement of fact. It is on this basis that the defence of justification and fair comment is distinguished.

30. The first sentence of that second post reads *"Also you will have workers who after a year still have not gotten any Holiday pay."* This is clearly a pure statement of fact so that the fair comment defence will not be applicable. The defendant

did not plead justification in relation to the second post nor did he make any submissions in relation to this issue. Paragraph 15 (1) is therefore, struck from the defence as this defence will fail as a matter of law.

31. The second sentence, however, contains commentary and proof of the truth of the facts on which they are based is a matter for trial. Equally so is a determination of whether the facts stated are themselves defamatory. A order to strike out is not appropriate here.

32. The Court will make no order as to costs on the strike out application because the Defendant was only prompted to seek relief from sanctions after it had been made and even that application though filed, was served today.

Determination:

IT IS HEREBY ORDERED:

On the Claimant's application to strike out the Defence:

1. The application to strike out the Defendant's Statement of Case is dismissed save that paragraph 15(1) of the Defence is struck out as the defence of fair comment raised will fail as a matter of law.
2. No order as to costs.

On the Defendant's application for relief from sanctions:

The application is granted.

1. The Defendant is permitted to produce or rely on any documents disclosed out of time.
2. The Defendant is permitted to call all witnesses for whom he has served/filed witness statements out of time.
3. Costs to the Respondent/Claimant in the sum of $3,000.

The Court of its own volition:

1. The Defendant's filing of three additional witness statements without the leave of the Court is hereby validated.
2. Trial of the matter herein is adjourned to the 30th October, 2018.

SONYA YOUNG
JUDGE OF THE SUPREME COURT