IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 10 of 2018

NADIA BEATRICE CLARKE **CLAIMANT**
Executor of the Will of EROLITA RANCHARAN

AND

NAIROBI RANCHARAN **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young
Hearings
2019
2nd April
Oral Submissions
2nd April
Decision
2nd April

Mr. Kevin Arthurs for the Claimant.
Ms. Audrey Matura Shepherd for the Defendant.

Keywords: Civil Procedure – Relief from Sanctions – Application to file Witness Statements Out of Time – Difficulty Finding Witnesses – Attorney Ill – One Month Delay – Supreme Court (Civil Procedure) Rules 2005 (Rules 11.3, 11.4, 11.11, 26.7, 26.8, 29.5, 29.11)

DECISION

1. By a case management order dated 17th January, 2019, Witness statements were to be filed and exchanged on the 21st February, 2019, pretrial review was to be held on the 21st March and trial was scheduled for the 2nd and 3rd

April, 2019. The Defendant purported to file his witness statements on the 25th and 28th February and 8th March.

2. There was no application for relief from sanctions or leave to file out of time and the Court raised this at pretrial review on the 21st March, 2019. An application in this regard and an affidavit in support were filed on the 22nd March and arrived on the Court's desk for the first time when trial was about to start on the 2nd April, 2019. The Court was informed by counsel for the Applicant that an advanced copy had been sent to Counsel for the Respondent but the application and affidavit had not been served as they had not yet been returned by the Court office.

3. The general rule is that the notice of application must be served as soon as practicable after the day on which it is issued. The application had not been given a hearing date and so could not be issued. If however, notice of the application had been given but notice was shorter than the seven days required, the court in considering all of the circumstances could still direct that sufficient notice had been given and deal with the application (see rule 11.11). When asked, Counsel for the Respondent said if given 21/2 hours he would be prepared to defend the application. The court adjourned the hearing accordingly.

Preliminary issue:

4. According to the filing stamp on the document the application had been filed on the 22nd March, one day after pretrial. It reached the court this morning seemingly having been delayed in the Court Office. Rule 11.4 guides that an application is made on the date it is received by the court office or made orally to the court. That is the date which this Court accepts as the date the

application was made. It therefore finds no need to consider the requirements of rule 29.11(2) since relief was not being sought at trial. It had in fact been sought on the 22nd March.

The Law:

5. Rule 29.11 prescribes the consequences of not filing witness statements on time. The witness may not be called unless the Court permits it and the Court may only give permission, if the applicant has a good reason for not previously seeking relief from sanction.

6. Since this Applicant has applied for relief from sanctions after the dates for complying had passed Rules 26.7(2) and 26.8 become relevant:

> *26.7 (2) 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.*
> *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 court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."*

The Evidence:

7. In his affidavit in support of the application, Mr. Rancharan explained that he had difficulty locating his witnesses. One was ill and Counsel had to travel to Corozal to prepare the witness statement in her presence. This took serious coordination as she would sometimes be away from her home sojourning with relatives. One had moved and it proved difficult to find him, another was busy and somewhat reluctant. It must be understood that Mr Rancharan had no control over these witnesses. They were not employees whom he could perhaps direct to attend at a certain place, for a certain time. His attorney also fell ill and was inaccessible for some time so he was unable to communicate with her. He does not state the period during which she was ill.

8. However, legal secretary for Ms. Matura in an affidavit filed on the instant date, deposed that counsel had broken her hand and had been on sick leave from the 29th January to 6th February and the 15th February to the 22nd February, 2019. She supported this with medical documents. She also testified to the efforts made by the defendant in having the witnesses present to prepare their witness statements, the difficulties encountered in coordinating the arrangements and in having the witnesses agree to testify as well as his own difficulty in having his own witness statement prepared because of counsel's unavailability. She also explained that the delay was not intentional as counsel had been ill for a significant part of the period in which to comply and the Claimant had done all he could to assist in meeting the deadline.

Consideration:

9. Having heard oral submissions on the application, the Court considered the mandatory requirements of Rule 26.8 (1) and (2) understanding that the factors are cumulative. The Court must be satisfied that each threshold has been met before considering to grant relief and before having any regard to the provisions of Rule 26.8 (3).

10. Counsel for the Respondent presented **Steve Fuller v Fort Street Tourism Village et al Claim No. 661 of 2012** where Chief Justice Benjamin referred to the wisdom of Barrow JA when he discussed Rule 26.8 of the Rules of the Eastern Caribbean Supreme Court (which is identical to our own) in **Dominica Agriculture and Industrial Development Bank v Mavis Williams Civil Appeal No 20 of 2005 (Dominica) at parag 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, an "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."*

Promptitude:

11. In an earlier oral decision **Franz Weiler v Belize Minerals Ltd Claim No. 214 of 2018,** this Court stated:

> *"As explained by Sykes J (as he then was) in* ***Quintin Sullivan v Ricks Café Holdings Inc T/A Ricks Café (No. 2) unreported. Supreme Court Jamaican Claim No. 2007 HC03502:***
>
> *"Promptly is not defined for the rules, however, it is obvious that the context in which this adverb is used in the rules conveys the sense of 'without delay', 'quickly' or 'at once'."*
>
> *In assessing promptitude the Court must consider all the circumstances of the particular case. What may be prompt in certain situations may not be so in others and vice versa. This gives the word a level of flexibility which demands a close scrutiny of all the circumstances.*

12. In **Steve Fuller (ibid)** Chief Justice Benjamin refused relief from sanction for lack of promptitude. In that case, the Claimant had filed affidavits rather than the witness statements ordered. One year passed before he retained new counsel. Another two months passed before an application was made for relief from sanctions and extension of time in which to file witness statements. He found this to be *"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. The inordinate delay of **Steve Fuller** is easily distinguishable from the case at bar. In the present case time expired for filing on the 21st February, 2019 but counsel made no application until the 22nd March, 2019, a day after the pretrial review when it seems that she was prompted to act. The compliance period was admitted already short and counsel should have appreciated the need to act with more haste, however, I cannot find that a month's delay was less than prompt in all of the circumstances.

Whether or not the failure to comply was intentional and was there a good explanation for the failure:

14. It is difficult to extricate the failure to comply issue from that of a good explanation for non-compliance, so the Court finds it a more efficient use of time to deal with them together. The Court is guided by the Jamaican Court of Appeal decision in **Jamaica Public Service Company Limited v Charles Vernon Francis Civil Appeal No 126/2015** where President Morrison found that difficulty finding witnesses was a good explanation. He advised at **paragraph 42** that *"the paramount issue was not whether the explanation covered all the period limited for compliance. Certainly it would have been better for the appellant if it did, but the fact that it did not, by itself, should not have prevented the learned trial judge from considering it. What mattered was whether he considered it to be a good explanation for failing to comply in the time limit. Rule 26.8(2) of the CPR requires the learned judge to be satisfied that there is a good explanation for the failure to comply in order to exercise his discretion to grant relief from sanctions. Being currently off island or traveling out of the parish simply means they are not available."*

15. He continued at **parag 45** *"In my view, the essence of the explanation, in the instant case, was that the appellant's witnesses were not available to give witness statements before the period expired. The learned judge ought to have understood and accepted it to mean just that. His restrictive approach sought to punish the appellant for not complying at the earlier stage of the period limited for doing so. This approach fails to take into account the fact that the appellant could have complied on the last day of the period specified and there would be no need for an explanation as to why there was no earlier compliance. Certainly, a litigant who acts in this way does so at his own peril, if for some reason he misses that deadline. There may be a good explanation for missing that deadline but there may be an even better explanation for not being able to meet it earlier in the period. However, in my view, the fact that the explanation for missing the deadline did not cover the earlier period, important though it may be, by itself should not*

automatically result in the explanation which was in fact proferred, being dismissed out of hand."

16. This Court having considered the explanation presented finds it to be good. When coupled with the duration of counsel's illness, there is no difficulty in holding that the delay was not intentional.

General compliance will all rules, orders etc:

17. The applicant has complied in a general way. The outstanding pretrial memo was filed today albeit late. Counsel for the respondent also raised that he had been served with three witness statements which were not dated contrary to the mandatory requirements of Rule 29.5 (e). The filed copies were dated. This was clearly an error and not an intention to flout the rules. General compliance as explained in **Fuller** (ibid) is not the same as full compliance.

18. **Granting Relief:**

The court must now determine whether to grant relief. It seems clear that the failure to comply was due in part to both the applicant and his counsel. To penalize one for the other in these circumstances seems patently wrong. The failure can be remedied immediately with an order of the court because the witness statements were purportedly filed and have already been served. Today is the trial date and some part of it could still be salvaged if the Claimant is open to proceeding. The witnesses, I have been informed, are all present. Neither party stands to be prejudiced by a grant of this relief. The matter will be tried on its merits, the Claimant has already seen the witness statements. If he does not wish to proceed to trial today, the Court will grant an adjournment. In the interest of the administration of justice it is best that relief be granted and it will be ordered accordingly.

Costs:

19. Where an application is made which could have been dealt with at pretrial review, the court must order the applicant to pay the cost of the application unless there are special circumstances (Rule 11.3). There are no special circumstances existent here. Costs will be awarded to the respondent in the sum of $4,000.00 and not in the cause as requested by the applicant.

Disposition:

. It is ordered that:

1. The Claimant is hereby granted relief from sanctions for failure to comply with an Order of the Court dated 17th January, 2019.

2. The witness statements purported to be filed by the Claimant herein are deemed to have been properly filed and do stand as evidence-in-chief.

3. Costs to the Respondent in the sum of $4,000.00 to be paid before the next adjourned hearing date of this matter.

SONYA YOUNG
SUPREME COURT JUDGE