

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO. SLUHCV2008/0172

BETWEEN:

LEN ISHMAEL

Claimant

And

**TIMOTHY POLEON
RADIO CARIBBEAN 1982 LTD**

Defendants

Appearances:

Mr. Mark D. Maragh for Claimant

Ms. Samantha Charles for Defendants

2009: March 17;
May 21.

DECISION

- [1] **GEORGES, J (AG.):** At the outset I must confess that this case has thus far had a somewhat chequered history. It is an action in damages for defamation which was filed on 15th February 2008 and which allegedly arose out of a lunchtime talk show called "News Spin" hosted by the first defendant as the servant or agent of the second defendant and which was allegedly broadcast and published by Radio Caribbean the second defendant on 15th February 2007 and allegedly repeated in part over its airwaves the following day.

- [2] The Claim Form with the usual documents were duly served on the defendants on 15th February 2008 and acknowledgment of service filed by the first defendant on 17th March 2008 (i.e. 17 days late) and by the second defendant on 29 February 2008. Each defendant filed defences on 18th March 2008.
- [3] On that selfsame day the claimant's legal practitioner requested entry of judgment in default of defence as the time for filing and serving the same had expired (on 14th March 2008). This was however refused by the Registrar.
- [4] On the matter coming on for case management conference on 5th May 2008 Master Cheryl Mathurin ordered the defendants to provide a recording of the alleged publications on or before 16th May 2008 and the matter was adjourned for further case management on 9th June 2008.
- [5] On the adjourned hearing the production order was not yet complied with and the matter was further adjourned to 10th July 2008 and the defendants were then ordered to provide an edited copy of the show (sic) by 4th July 2008. On the adjourned hearing on 10th July 2008 the order to provide an edited copy of the show was still not complied with and the matter was simply adjourned to 24th September 2008. On 23rd September 2008 the defendants' solicitors were duly served with a copy of the order of 10th July 2008.
- [6] When the matter came on for further case management before Master Pearletta Lanns on 24th September 2008 it was ordered and directed inter alia that there be standard disclosure by the parties on or before 24th October 2008 and that the parties file and exchange witness statements on or before 12th December 2008.
- [7] Sight appears to have been altogether lost of the case management order made on 5th May 2008 for specific production of a recording of the publications which were allegedly aired by the defendants on 15th and 16th February 2007 on or before 16th May 2008 and subsequently renewed when the defendants repeatedly

failed to comply with the initial order as well as subsequent orders following a number of adjournments.

[8] Having regard to the nature of the case it is frankly baffling how such vital evidence was not forthcoming. It was not until late on the afternoon of 24th October 2008 that the defendants' legal practitioner eventually filed and served the claimant's legal practitioner with a CD recording of a talk show news spin dated 15th and 16th February 2007 production of which had been specifically ordered since 5th May 2008. No application for relief from sanctions for late filing was made.

[9] As Barrow J (Ag) (as he then was) aptly put it at paragraph [6] in **Kenton Collinson St. Bernard v The Attorney General of Grenada and others in Suit No. 84 of 1999**.

[6] Non-compliance has continued to be commonplace under the new rules, in the daily experience of these courts. Case management orders are often flouted. The breadth of this practice may have given acceptability to it. In truth, that very acceptability stands as a reproach. Casual accommodation of non-compliance with orders is a violation of clear rules. It is a subversion of a fundamental objective of the rules which was precisely to put a stop to habitual non-compliance. The rules need to be obeyed, they need to be enforced.

[10] The case was listed for Pre-trial review on 9th March 2009 but was adjourned to 17th March 2009 with the possibility of an out of court settlement. On 16th March 2009 a notice of application was filed by the claimant's legal practitioner seeking an Order that:

- (i) The Applicant be granted relief from sanctions for late filing of her witness summaries and that the same be deemed to be validly filed;
- (ii) such further or other order as to the Court seems fit.

[11] The grounds of the application are that:

- (i) The Application is being made as promptly as the circumstances permit;
- (ii) The default in filing in time was unintentional;
- (iii) There is a good explanation for the failure;
- (iv) The Applicant has generally complied with all other relevant orders and directions;
- (v) There would be no prejudice to the Defendant should relief be granted and time extended;
- (vi) The failure has been remedied within a reasonable time;
- (vii) The trial date will not be compromised by the grant of relief; and
- (viii) It is in the interest of the proper administration of justice that relief be granted.

The application which was opposed was set down for hearing the following day being the adjourned date for Pre-Trial review.

[12] In paragraph 5 of the Claimant/Applicant's supporting affidavit sworn by Patricia James a Legal Secretary with the law firm of Mc Namara and Company which had conduct of the matter on behalf of the Applicant Ms. James avers that all orders of the Case Management Order dated 24th September 2008 had been complied with save and except the filing of the Applicant's witness statements (including her own) which were filed late as witness summaries on 9th March 2009. In actual fact two witness summaries were filed on 6th March 2009 and the Claimant's own witness summary was filed on 9th March 2009.

[13] Paragraphs 6 and 7 of the said affidavit states:

6. That upon a review of the file just prior to the Pre-Trial Review scheduled for 9th March, 2009 Mr. Maragh then realized that the Witness Statements had not been finalized.
7. Whereas the drafts had been prepared for review and execution by the Applicant and her Witnesses, by inadvertent error the filing date slipped Mr. Maragh until the scheduled Pre-Trial review. This was apparently caused by an inadvertent omission to enter the Case Management dates into Amicus, the case management software at the firm.

[14] The applicant further declares that all other directions for trial had been complied with and the **default had been remedied by the late filing of the witness summaries.** (My Emphasis)

The trial date of 27th May 2009 would not be compromised it was pointed out by grant of relief to wit that the Applicant be permitted to call her witnesses and to adduce her evidence by way of her witness summaries at the trial. Alternative sanctions were open to the Court for the default it was further pointed out and in the interests of the proper administration of justice and fairness the trial ought to proceed on the merits it was stressed.

[15] That essentially is the gist of the Applicant's case.

[16] Learned Counsel for the respondents/defendants in opposing the application argued that the case management order dated 24th September 2008 had stipulated that the parties were required to file and exchange witness statements on or before 12th December 2008.

[17] The claimant had not complied with that deadline and because by that date defendants' counsel had not received witness statements from the claimant she

proceeded to comply with CPR 29.7 and serve the claimant's attorney with notice of the filing of the defendants' witness statements.

[18] CPR 29.7 states that:-

29.7(1) This rule applies where –

- (a) one party (the "first party") is able and prepared to comply with the order to serve witness statements; and
 - (b) the other party fails to make reasonable arrangements to exchange statements.
- (2) The first party may comply with the requirements of this Part by –
- (a) filing the witness statements in a sealed envelope at the court office by the date directed; and
 - (b) giving notice to all other parties that the witness statements have been filed.
- (3) Statements filed pursuant to paragraph (2) must not be disclosed to the other party until the other party certifies that the witness statements or summaries in respect of all witnesses upon whose evidence the other party intends to rely have been served.

[19] So that when the claimant's attorney alleges (at paragraph 7 of his supporting affidavit) that the witness statements were not filed by the stipulated deadline because the filing date had not through inadvertent error been entered into the firm's amicus system i.e. the case management software at the firm notice of filing of the defendants' witness statements on 12th December 2008 ought to have alerted him to at least check the case management order learned counsel for the defendants contended.

[20] Instead what had happened she submitted is that three months later and just about the time of the pre-trial review on 9th March 2009 the claimant's witness summaries were filed learned counsel pointed out.

[21] Referring to the mandatory requirements of CPR 26.8 learned counsel urged that in the circumstances which obtained the requirements of the rule had not been met referring to the judgment of Rawlins J.A (as he then was) in **Richard Frederick and Owen Joseph et al (St. Lucia Civil Appeal No. 32 of 2005)** an application for leave to amend a notice of appeal and for an extension of time to file and serve the record of appeal which was dismissed on the ground inter alia that there was an inordinate delay in bringing the application without a convincing explanation for the delay.

[22] CPR 26.8 (1) and (2) mandates that:

- (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.

[23] In reply Mr. Maragh referring to the grounds of his application which are set out at paragraph 11 and reiterated and reflected in CPR 26.8 urged that the claimant's witness summaries were filed on 9th March 2009 just before the pre-trial review on that date which was adjourned. The Court notes that two witness summaries had already in fact been filed on 6th March and only the claimant's witness summary was filed on the 9th March 2009. I would add in parenthesis that the said witness summaries could not be traced in the Court Office until 18th May 2009 when they were put in the suit file.

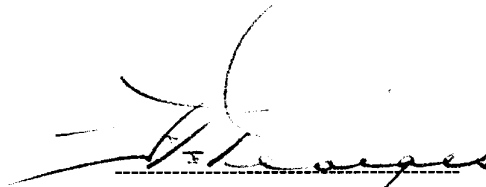
- [24] Be that as it may learned counsel went on to submit that this application in reality hinged on the interpretation of Parts 29 and 26 of the Civil Procedure Rules. In that regard he submitted that it was made reasonably promptly having regard to all the circumstances adumbrated in paragraphs 6 and 7 of the supporting affidavit. All other directions and orders for trial had been complied with he reminded and the default had been remedied by the prompt filing of the witness summaries.
- [25] The attention of the Court was drawn to the fact that three case management conferences had been adjourned for the purpose of ensuring compliance by the defendants with an order for specific disclosure. There were defaults on both sides in respect of court orders Mr. Maragh declared. That surely can be of no avail to him although the defendants' own non-compliance has not gone unnoticed and he himself appears to have condoned them as he did nothing. He cannot now complain. The onus at this point in time is on him to satisfy the mandatory requirements of CPR 26.8.
- [26] Although inadvertent omission to enter the case management dates into the firm's case management software (Amicus) may well have caused the dates for filing of witness statements to have been oversighted there can be no gainsaying the fact that when the defendants' attorney in compliance with CPR 29.7 served the claimant's attorney with notice of filing of their witness statements on 12th December 2008 that fact ought to have alerted him to check the case management order and that alas was not done.
- [27] The Court is nevertheless satisfied that at the first opportunity that the default actually came to the claimant's attention in early March 2009 in preparation for pre-trial review he acted with promptitude by filing his witness summaries at once and applying for relief from sanctions.
- [28] I entertain little doubt having regard to all the circumstances that the failure to comply was not in these circumstances intentional and that a good explanation for

it has been proffered. There has been in my view no evidence of deliberate flouting of or flagrant disregard for the case management order. I am equally satisfied that all other directions had by then been complied with by the claimant's attorney and that the default has been promptly remedied by the late filing of the witness summaries well nigh three months prior to the trial date which would not be compromised thereby. No injustice would be caused to the defendants and the interests of the administration of justice would be served. If the claimant is not granted relief from sanctions she will be unable to prove her case through no fault of hers. She would have no prospect of succeeding on the claim which in all likelihood would be dismissed with costs. The consequences could be grave. She would be shut off from the judgment seat. This case should be tried on its merits.

[29] The facts in *St. Bernard v The Attorney General of Grenada* (Grenada Civil Suit No. 84 of 1999) to which reference was made in the course of argument are in my view far removed from the circumstances here. I would rely rather on the learning expounded by Saunders J.A (as he then was) in ***The Treasure Island Company and anor and Audubon Holdings Limited & ors BVI*** (Civil Appeal No. 22 of 2003).

[30] In the result I would in the circumstances grant the applicant relief from sanctions for the late filing of her witness summaries and deem that they be validly filed.

[31] There will be no order as to costs.



EPHRAIM GEORGES
HIGH COURT JUDGE (AG.)