EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0009

BETWEEN:

PRUDENCE ROBINSON

Appellant

and

SAGICOR GENERAL INSURANCE INC.
(Formerly Barbados Fire and Commercial Insurance Company Inc.)

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

On written submisissions:

Ms. Lydia B. Faisal for the Appellant
No appearance by the Respondent

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2014: September 29.

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Interlocutory appeal – Failure to comply with case management order – Relief from sanctions – Rule 26.8 of the Civil Procedure Rules 2000 – Bald assertions made in affidavit in support of application for relief from sanctions – Whether adequate for purpose of determining whether criteria satisfied for grant of relief – Whether learned judge erred in granting respondent relief from sanctions

The appellant filed a claim to recover damages which had been awarded to him in a previous claim, pursuant to section 9 of the Motor Vehicles Insurance (Third-Party Risks) Act.[1] At case management, an order was made directing the parties to file and exchange witness statements on or before 19th December 2008. The respondent filed a witness summary on 16th February 2009 and on 10th July 2009, applied to the court to be permitted

[1] Cap. 8.02, Revised Laws of Saint Lucia 2008.

to rely at trial on said witness summary, and for relief from sanctions for its late filing. The trial date was 27th July 2009.

The grounds of the respondent's application were that the witness summary was filed late due to the change in position of its claims manager and the unforeseen unavailability of the former claims manager to give evidence on its behalf. The new claims manager, in an affidavit sworn in support of the application, averred that the witness summary covered the two grounds on which the respondent's defence rested, that the appellant had not been prejudiced by the late filing and that the trial date had not been compromised. The judge accepted the explanation provided by the respondent and, after taking other factors into consideration, granted the application for relief from sanctions.

The appellant appealed the learned judge's decision, complaining that the affidavit in support merely contained bald assertions which were not sufficient to satisfy the criteria in rule 26.8 of the Civil Procedure Rules 2000, which deals with applications for relief from sanctions. As such, the judge erred in granting the respondent's application. There were no submissions filed by the respondent in the appeal.

Held: setting aside the judge's order granting relief from sanctions and awarding the appellant costs of $2,000.00, that:

1. The learned judge did not pay proper regard to the inadequacy of the affidavit evidence in satisfying himself that there was a good explanation for the delay in filing the witness summary. Having made the finding that the respondent had relied on bald assertions to support its application for relief from sanctions, the judge erred in granting the application.

2. The learned judge erred in granting the application for relief from sanctions when a corresponding application for an extension of time to file the witness summary had not been made along with it. The relief granted by the judge did not advance the matter on its own; the respondent still remained in breach of the case management order without being granted an extension of time to file the witness summary. In the circumstances, the relief granted by the learned judge lacked efficacy.

JUDGMENT

[1] BAPTISTE JA: This is an interlocutory appeal from a decision of a judge granting relief from sanctions for failing to file a witness summary on time. The appellant argues that the learned judge erred in law in granting relief from sanctions and seeks an order to set aside the grant of relief. The respondent filed no submissions in the appeal.

[2] The background facts are that following a motor vehicular accident, the appellant filed, and was successful in, a claim to recover damages in respect of bodily injury. The appellant then brought a claim seeking to recover the damages awarded to him pursuant to section 9 of the Motor Vehicles Insurance (Third-Party Risks) Act,[2] from the respondent insurance company ("Sagicor"). On 10th July 2009, Sagicor filed an application seeking an order that it be permitted to rely at trial on the witness summary filed on 16th February 2009 and that it be granted relief from sanctions for the late filing of the witness summary. The application was served on 30th July 2009.

[3] The grounds of the application were that Sagicor's sole witness summary was filed late due to the change in position of its claims manager and the unforeseen unavailability of the former claims manager to give evidence on its behalf. The witness summary was filed as soon as reasonably practicable on 16th February 2009, five months before the trial date – 27th July 2009. The late filing did not prejudice the appellant and would not compromise the trial date. The failure to file the witness summary was not intentional and Sagicor had generally complied with all other rules, orders and directions.

[4] Petrona King, the claims manager of Sagicor, swore an affidavit in support of the application. Ms. King averred that she became involved in the matter after the departure of Mr. Pitcairn, the previous claims manager, who handled the matter from its inception. After Mr. Pitcairn became unavailable as a witness, she had to fill the void and familiarise herself with the documents. The witness summary was served on the respondent on 16th February 2009, five months before the trial date of 27th July 2009. Ms. King further averred that the witness summary essentially covers the two grounds upon which the defence rests: (i) that the claim for breach of statutory duty is prescribed since it was not filed and served on Sagicor within the three year prescription period stipulated by law; (ii) in any event, the 30 day temporary cover issued by Sagicor had long expired prior to the date of the appellant's loss and as such Sagicor was not in risk or liable to any third party.

[2] Cap. 8.02, Revised Laws of Saint Lucia 2008.

Accordingly the appellant has not been prejudiced by the late filing and the trial date has not been compromised.

[5] Ms. Faisal, the appellant's counsel, complains that the affidavit in support contains no evidence or no sufficient evidence in respect of satisfying any aspect of rule 26.8 of the Civil Procedure Rules 2000. Ms. Faisal submits that being devoid of time frames, dates and factual details, the sole allegation in the notice of application was not substantiated in the deficient affidavit and as such was insufficient for the court to have granted the application for relief. Ms. Faisal argues that there is no evidence given for the absence of Mr. Pitcairn and challenges the judge's finding that Ms. King 'has signed the affidavit explaining the unavailability of Mr. Pitcairn who formerly held the position of Claims Manger but who is no longer available. It would be difficult to challenge this statement'.[3]

[6] Ms. Faisal also challenges the finding that: 'I am not of the view that the present circumstances require such detailed explanation unless there is some rebuttal of the evidence being given. In the circumstances I have no difficulty with the Applicant's explanation and I do not think that the delay was intentional'.[4] Ms. Faisal questions the evidential basis for that finding and states the affidavit in support gave no justification or explanation for the delay. Ms. Faisal also questions the basis for the judge's finding that there must be a rebuttal of (bald) assertions on an application for relief from sanctions in order for the party asserting to be required to produce evidence to support the assertions relied upon. Ms. Faisal also laments this finding in view of the judge's agreement with her argument that the applicant relies on bald assertions in its application for relief from sanctions. Ms. Faisal argues that as there was no evidence in support of the application, the judge could not be of the view that this was a case in which no detailed explanation was required.

[7] I now consider the grounds of appeal. The first ground alleges that the learned

[3] At para. 24 of the learned judge's judgment.
[4] At para. 26 of the learned judge's judgment.

judge was wrong and erred in law when, having found that the application for relief from sanctions was based on bald assertions, he held that those same facts could have sufficed for the grant of relief from sanctions in any event. At paragraph 23 of his ruling the judge agreed with Ms. Faisal that the Sagicor relies on bald assertions in relation to the application for relief from sanctions. The judge proceeded to state at paragraph 24 that the reason advanced for the delay was the change of personnel in the business place. The judge therefore concluded that it would not be possible to have the very person who is not available to make the witness statement swear to an affidavit explaining their unavailability. The explanation would more likely than not come from the person who has replaced the individual. The judge stated that Ms. King signed the affidavit explaining the unavailability of Mr. Pitcairn, the former claims manager, who is no longer available. The judge then concluded that it would be difficult to challenge this statement. In my judgment reliance on bald assertions must be inimical to the grant of relief. Having found that Sagicor relies on bald assertions in its application for relief, the judge was plainly wrong in granting relief. The judge's reasoning illustrates that he did not pay proper regard to the inadequacy of the affidavit evidence in respect of being satisfied that there was a good explanation for the delay.

[8] The second ground of appeal alleges that the judge erred by granting relief from sanctions when the application was not in accordance with CPR 26.8(1), (2) and (3). Rule 26.8 sets out the circumstances which the court will consider on an application to grant relief from a sanction. I begin by examining the text of the rule. Rule 26.8(1) states when the rule is engaged by providing that it applies on '[a]n application for relief from any sanction imposed for a failure to comply with any rule, order or direction'. The court's first task is to identify the 'failure to comply with any rule, order or direction' which initially triggers the operation of the rule. Secondly, the application must be made promptly; and supported by evidence on affidavit.[5] Thirdly, rule 26.8(2) confers on the court a discretion to grant relief. It

[5] CPR 26.8(1) (a) and (b).

states that the court may grant relief only if satisfied that (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) there has been general compliance by the defaulting party with all other relevant rules, practice directions, orders and directions. Fourthly, in the exercise of its discretion to grant relief, the Court must consider rule 26.8(3), which states:

> "In considering whether to grant relief, the court must have regard to –
> (a) the effect which the granting of relief or not would have on each party;
> (b) the interests of the administration of justice;
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
> (d) whether the failure to comply was due to the party or the party's legal practitioner; and
> (e) whether the trial date or any likely trial date can still be met if relief is granted."

[9] The witness summary in respect of which the application for relief from sanctions was made, should have been filed on 19th December 2008. The application was seven months late and therefore was not made promptly (in breach of rule 26.8(1)(a)). The judge however considered the reasons for the delay and essentially concluded that there was a good explanation for the delay. The judge also concluded that the delay was not intentional. In considering whether there was general compliance with rules and court orders, the judge noted that there had been some non-compliance which was largely in relation to the case management timetable.

[10] I agree with the judge that the failure to comply was not intentional. To my mind, however, the explanation offered by Ms. King in the affidavit is substantially deficient and did not meet the threshold of a good explanation for the delay. The affidavit evidence does not condescend to particulars. It is not enough merely to say that: 'I became involved in this matter after the departure of the previous Claims Manager, Mr. Dylan Pitcairn, who handled this matter from inception'.[6] It begs the following questions: when did the previous claims manager depart the

[6] See para. 2 of the affidavit of Ms. Petrona King (dated 10th July 2009) in support of the application to be permitted to rely at trial upon the witness summary (filed on 16th February 2009) and to be granted relief from sanctions for the late filing of said witness summary.

business? How soon after his departure did Ms. King become involved in the matter? Other relevant questions are: was any attempt made to contact Mr. Pitcairn? Were these efforts successful? Likewise, it is insufficient merely to state that: 'After Mr. Pitcairn became unavailable as a witness ... I had to fill that void and familiarize myself with the documents in this case'.[7] When did he become unavailable as a witness? How long did it take for Ms. King to familiarise herself with the documents? These are critical questions which had to be addressed in the affidavit evidence. In the circumstances it cannot be said that there was a good explanation for the failure. The pre-condition stated in rule 26.8(2)(b) was therefore not met. That is fatal to the case in relation to rule 26.8.

[11] The judge stated that the other considerations raised in rule 26.8 now depend largely on the court's ability to deal with the outstanding applications and set the matter down for trial. In speaking of the other considerations, the judge was clearly referencing rule 26.8(3). In treating with the rule that way, the judge erred in principle and was plainly wrong. The judge's statement does not reflect the true importance of or the role of rule 26.8(3) in an application for relief from sanctions. It also evinces a misapprehension of the rule. Rule 26.8 is an important provision. It lists a number of factors a judge must have regard to in considering whether to grant relief. It does not depend upon the courts ability to deal with outstanding applications and to set a matter down for trial. Rule 26.8(3) has to be considered at the time of the application for relief from sanctions. It does not operate in futuro.

[12] In relation to rule 26.8(3), the only factor the judge specifically considered was whether the trial date or any likely trial date can still be met if relief is granted. The judge pointed out that the previous trial date had to be vacated because an appeal was granted; and as such it was the new trial date which had to be protected. The judge observed that the trial had been delayed by more than three years but noted that the application did not impair any new trial date. The judge did not consider the effect which the granting of relief would have on each party; the interests of the administration of justice; whether the failure to comply has been or can be

[7] See para. 3 of the affidavit of Ms. Petrona King dated 10th July 2009.

remedied within a reasonable time and whether the failure to comply was due to the party or the party's legal practitioner. All of these were relevant considerations the court was enjoined to have regard to in considering whether to grant relief. I note however from the evidence that the failure to comply would not be attributable to the party's legal practitioner. With that exception, the affidavit evidence did not seek to address the factors raised in rule 26.8(3). Quite apart from the error in principle referred to earlier, the judge was not in a position to properly exercise his discretion in so far as relevant considerations necessary for the exercise of that discretion were not taken into account.

[13] The third ground of appeal alleges that the judge erred by taking a piecemeal approach to CPR 27.8(4) and granting relief from sanction when a corresponding application for extension of time had never been made despite the passage of over four years.

[14] It appears to me that there is much force in this ground. As pointed out by Ms. Faisal, an application for extension of time should have been made alongside the application for relief from sanctions. This is so as the respondent was seeking to vary the dates given for complying with certain case management orders after the date given for compliance had expired. I agree. It is noteworthy that the judge himself recognised in his ruling that the Sagicor must now file an extension of time to file the witness summary.

[15] Rule 27.8 deals with variation of case management timetable. Rule 27.8(3) provides that a party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date. Rule 27.8(4) states that a party who applies after that date must apply for (a) an extension of time; and (b) relief from any sanction to which the party has become subject under these Rules or any court order.

[16] Ms. Faisal submits, quite correctly, that CPR 27.8(3) and 27.8(4) do not envisage piecemeal applications for relief from sanctions and extensions of time regarding

the same document. The relief from sanction granted does not advance the matter as from the very moment made, the respondent still remains in breach of the case management order without an extension of time. In the circumstances, the relief granted by the judge lacked efficacy. The judge erred in treating the matter in a piecemeal manner. This ground of appeal accordingly succeeds.

[17] The last ground of appeal states that the judge erred by setting down the matter for case management despite there not being any outstanding applications or matters, thereby delaying the trial date. In light of my conclusion reached with respect to the other grounds, it is not necessary to consider this ground.

[18] The decision whether or not to grant relief against sanction is a discretionary one to be exercised by the judge at first instance. That exercise of discretion attracts appellate interference if the judge errs in principle or is plainly wrong. For the reasons given in this judgment, this is an appropriate case for appellate intervention. It is accordingly ordered that the judge's order granting relief from sanctions for failing to file the witness summary on time is set aside. The costs order is also set aside. The appellant is awarded costs of $2,000.00.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal