

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0004  
(Interlocutory Appeal Pursuant to CPR 62.10)

BETWEEN:

KYLE DAVID

Appellant

and

[1] ATTORNEY GENERAL OF THE COMMONWEALTH OF  
DOMINICA  
[2] OSCAR GEORGE  
[3] JOSIAH CORNELIUS  
[4] EGBERT CHARLES

Respondents

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

On written submissions:

Ms. Gina Dyer Munro or Dyer & Dyer for the Appellant

Ms. Tameka Hyacinth for the Respondents

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2014: January 21.

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*Interlocutory appeal – Case management order for filing and serving witness statements – CPR 29.11(1) – Witness statements not filed and served in time - Application for extension of time – No application for relief from sanctions - Consequence of failure to apply for relief from sanctions*

## JUDGMENT

- [1] **MITCHELL, JA [AG.]:** The Master case managed this case in the High Court. She gave directions for the filing and serving of witness statements by the parties by 7<sup>th</sup> September 2012. She fixed the trial date for 21<sup>st</sup> January 2013. The appellant was the claimant in the court below, and the respondents the defendants. The appellant did not file and serve any witness statements in the prescribed time, but only did so on 10<sup>th</sup> January 2013, a few days before the trial date. The respondents filed their witness statement in a sealed envelope within the prescribed time but did not serve them. On 10<sup>th</sup> January 2013, the respondents applied to strike out the statement of claim. The appellant filed an application for an extension of time and for the witness statements to be deemed properly filed and served. There were numerous affidavits in support and in opposition.
- [2] The applications to strike out and for an extension of time came before the learned trial judge on the morning of the day fixed for the commencement of the trial. The judge heard argument and considered the applications and the evidence in support and in opposition, and ruled that the claim would be struck out for failure to serve the witness statements in time and for failure to make an application for relief from sanctions. The appellant obtained leave to appeal the strike out order and on 16<sup>th</sup> May 2013 filed his notice of appeal. The appellant has additionally sought to add a further ground of appeal, which I grant. This ground is to the effect that at the pre-trial review counsel for the defendants indicated that her instructions were to proceed to trial with the matter, and that by implication she would not apply to strike out the claim. Counsel did eventually, however, apply to strike out the claim, and the judge ruled on that application. The appeal has come before me for determination as a single judge of the Court of Appeal pursuant to CPR 62.10.

- [3] The striking out of a statement of claim has been described as a draconian step.<sup>1</sup> No judge engages lightly in taking such a step which will deprive a claimant of his day in court. That is especially so where, as in this case, there was a tight timetable for filing a claim under the **Public Authorities Protection Act**,<sup>2</sup> and there is now no possibility of re-filing the claim.
- [4] It is important for litigants filing appeals to remind themselves of the Rules and the Practice Directions governing appeals to the Court of Appeal. In particular, the Notice of Appeal in this case does not comply with the requirements of **CPR 62.10** in that it does not in its heading state that the appeal is an interlocutory one. This is an important requirement because it guides the staff at the Court of Appeal office in their further treatment of the appeal, avoiding delay. Nor were there any submissions in support of the appeal filed and served with the Notice of Appeal on 16<sup>th</sup> May 2013 as the rule requires. They were not filed until 28<sup>th</sup> October 2013.
- [5] In any event, the law, the rules and the principles governing an appeal of this nature are not susceptible to any doubt. They have been exhaustively set out by Ola Mae Edwards JA in her judgment in the case from St Kitts and Nevis of **David Goldgar and others v Wycliffe H Baird**.<sup>3</sup> This Court will not interfere with the learned trial judge's case management order, unless he is clearly wrong, has misdirected himself in law, has failed to take into account some material matter which he ought to have taken into account, or has taken into account a matter which he ought to have excluded, thereby exceeding the generous ambit within which reasonable disagreement is possible.<sup>4</sup> There is no suggestion that the judge was wrong in the order he made in the instant case.

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<sup>1</sup> Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22<sup>nd</sup> December 2009 per Creque,JA.).

<sup>2</sup> Cap 7.60 of the Laws of Dominica.

<sup>3</sup> SKBHCVAP2007/0013.

<sup>4</sup> At paragraph [11] of her judgment.

[6] The words of CPR 29.11(1) on the consequences of a failure to file witness statements in the prescribed time are clear, precise and unambiguous.<sup>5</sup> The result is that the witnesses may not be called unless the court permits it. The court did not permit it here. CPR 29.11(1) provides that the sanction of not being able to call the witness at the trial comes into effect immediately upon the expiration of the time limit, and continues until it is either lifted pursuant to CPR 26.8 which deals with relief from sanctions,<sup>6</sup> or is revoked at the trial where the Court gives permission. The time limit in this case expired on 8<sup>th</sup> September 2012. The appellant made no application for relief from sanctions. An application for an extension of time simpliciter is not an application for relief from sanctions. Extensions of time are dealt with by CPR 27.8 which deals with the variation of the case management timetable<sup>7</sup>.

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<sup>5</sup> **Consequence of failure to file witness statement**

29.11(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.

<sup>6</sup> **Relief from sanctions**

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) . . .
- (4) . . .

<sup>7</sup> **Variation of case management timetable**

27.8 (1) A party must apply to the court if that party wishes to vary a date which the court has fixed for –

- (a) a case management conference;
  - (b) a party to do something where the order specifies the consequences of failure to comply;
  - (c) a pre-trial review;
  - (d) the return of a listing questionnaire; or
  - (e) the trial date or trial period.
- (2) Any date set by the court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).
- (3) 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.
- (4) A party who applies after that date must apply for –

[7] CPR 29.11, as Justice Edwards puts it,<sup>8</sup> is in very clear and imperative terms. It does not permit a tortuous construction in order to accommodate a non-compliant claimant or defendant. Indeed, the court is not able to give effect to what it may otherwise consider to be the just way of dealing with the case. It is to be remembered that the principal mischief which the **Civil Procedure Rules** were intended to counter were excessive costs and delays.

[8] For all these reasons, the appeal is dismissed. In the circumstances, I shall not make any order as to costs.

**Don Mitchell**  
Justice of Appeal [Ag.]

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- (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.
- (5) The parties may agree to vary a date in the timetable other than one mentioned in paragraph (1) or (2).
- (6) . . .

<sup>8</sup> At paragraph [25].