EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV 2008/0254

BETWEEN:

GARY SMITH

Claimant

and

[1] EDWARD HENRY
[2] KENDAL HANLEY

Defendants

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Ms. Natasha S. Grey for the Applicant/Claimant
Ms. Keisha Spence for the Respondent

2014: June 17;
July 1

JUDGMENT

[1] ACTIE, M. [AG.]: Before me is an application for an extension of time and relief from sanctions.

Background

[2] This matter is of chequered history with many applications. The background facts giving rise to this application are as follows: On 8th April 2004, the claimant was a passenger on a motor vehicle owned by the first named defendant and driven by the second named defendant, the said vehicle having collided with a motor vehicle owned by Calvin Edwards. The claimant filed a claim against the defendants

seeking compensation for damages suffered as a result of the accident. The defendants in a joint defence stated that the accident was caused by the negligence of Calvin Edwards. On 6th April 2009, the defendants filed a notice of application to be removed as defendants and for the substitution of Calvin Edwards and NEMWIL insurance company as defendants on the grounds that the parties had taken full responsibility for the accident by their actions. The application was opposed by the claimant. Master Lanns in a decision delivered on 13th November 2009 directed the claimant to file and serve an amended claim and statement of claim on or before 30th November 2009, adding Calvin Edwards as a defendant. The claimant failed to comply with the said order.

[3] The claimant, by application filed on 28th March 2014, applies for relief from sanctions pursuant to CPR 26.8 and an extension of time to comply with the order of master Lanns made on 30th November 2009. The grounds of the application are:

(i.) The claimant's non-compliance was no fault of the applicant and was not intentional.

(ii.) The considerable delay is justifiable.

(iii.) The respondent will not be prejudiced by the extension of time.

[4] The evidence indicates that the claimant made several attempts to pursue his matter through, Ms. Angella Innis, his previous counsel on record who failed to pursue his claim. The claimant eventually lodged a complaint with the Disciplinary Committee of the Bar Association on 22nd March 2013. On 7th March 2014, the Disciplinary Committee found Ms. Angella Innis guilty of professional misconduct and ordered that she repay the claimant the sum of $5,000.00 representing the retainer paid by the claimant and the costs of the application.

[5] The application for the extension of time to comply with the master's order is vehemently opposed by the intended respondent, Mr. Calvin Edwards.

The Application for Extension of Time and Relief from Sanctions

[6] CPR 26(1)(k) empowers the court generally to extend the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

[7] The provisions for relief from sanction are found in CPR 26.8 (1). An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

(1) (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 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.

Whether application was made promptly

[8] Both parties concede that the application having been made some 4 years and 4 months after the order was not made promptly. The claimant states that the word promptly should have some degree of flexibility and should depend on the

circumstances. The claimant states that he became aware of the default in October 2012 and made efforts to try to remedy the default after his file was eventually released to him in February 2013 by his then attorney. The claimant asks the court to take into consideration the time when he became aware of the default rather than the time of the default.

[9] Counsel for the respondent states that the evidence indicates that the claimant's application was made some 18 months after the claimant became aware of the breach and some 8 weeks after the decision of the disciplinary committee. The respondent contends that the failure to make the application promptly is fatal and having so failed, there should be no further consideration of the application. The respondent relies on the decision in Dominica Agricultural and Industrial Development Bank v Mavis Williams[1].

[10] Counsel for the claimant states that the applicant should not be penalized for the professional negligence of his previous counsel and urges the court to consider the provisions of CPR 26.8 (2).

Was the failure to comply intentional?

[11] The claimant contends that the failure to comply was due to his attorney's negligence and as such there was no breach of CPR 26.8 (2) (a). The claimant states that the failure to comply with the order of the master was not deliberate or intentional. The claimant said that he made regular enquires about the status of his matter but was not given an accurate picture by his attorney on record at the time.

[12] The respondent rejects the claimant's reasons for his non-compliance and relies on the decision of Sir Dennis Byron, CJ in John Cecile Rose v Ann Marie Rose[2] where he observed that "the lack of diligence of an attorney is not a good reason

[1] Commonwealth of Dominica Civil Appeal No. 20 of 2005.Delivered: 29/01/2007

[2] St Lucia Civil Appeal HCVAP 2003/19 delivered on 22nd September 2003.

for delay, whether it is explained in terms of volume of work the attorney is maintaining, or as in this case the difficulties experienced in communication".

[13] It is accepted and the evidence reflects that the claimant persistently made enquiries about his case through his counsel on record at the time. The applicant upon discovering that he had been misled by his counsel, filed a complaint with the Disciplinary Committee of the Bar Association. However, other than lodging the complaint with the Disciplinary Committee, there is no other evidence of an attempt to immediately comply with the order upon discovery of the omission.

[14] In Anthony Clyne v The Guyana and Trinidad Mutual Insurance Company Limited[3], Justice Edwards JA states:

> "[16] This court has before and since the operation of the rules in CPR 2000 made pronouncements from time to time as to what explanations proffered by a party will not be regarded as providing a good explanation for excusing noncompliance with a rule or order. In Richard Frederick and Owen Joseph and others3 (at paragraph 15) and Pendragon International Limited and others v Bacardi International Limited4 (at paragraph 15) it was recognized that misapprehension of the law is unavailing as an excuse for such failure. In Donald F. Conway and Queensway Trustees Limited5 (at paragraph 22) one of the reasons for the court's refusal to exercise its judicial discretion in favour of the appellant included that the appellant's reason for the delay in making a timely application for leave to appeal an interlocutory order [mistake of law by the appellant's counsel] is legally unacceptable in this jurisdiction as a good reason. Sir Dennis Byron, CJ in John Cecil Rose and Anne Marie Rose 6 also observed that "the lack of diligence of an attorney is not a good reason for delay, whether it is explained in terms of volume of work the attorney is maintaining, or as in this case the difficulties experienced in communications… In my judgment therefore there was no acceptable reason for the inordinate delay."
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> [17] In Vena McDougal and Reno Romain7 Thomas JA while considering the reason for delay advanced by the defendant/intended appellant: that her attorney was preparing for an appeal before this court, reviewed the principles relied on by this court in determining whether an explanation was a good reason for granting an extension of time. At paragraphs 36 to 38 of his judgment Thomas JA [Ag.] observed:

[3] Grenada Court of Appeal HCVAP 2010/011

> "[36] Even under the former rules the fact that a litigant's attorney was otherwise engaged was never accepted by this court or the Grenada Court of Appeal as a good reason for granting an extension of time. The leading case is Mills v John. In this case, Liverpool JA made an extensive analysis of the Caribbean cases on the point "for the guidance of the profession. {37} At page 601 His Lordship said this: "In Casimir v Shillingford and Pinard9, Lewis CJ delivering the judgment of the Court of Appeal of the West Indies Associated States held that 'pressure of work' was not a good and substantial reason to grant an application to extend the time within which to appeal and in answer to a plea [by] counsel for the applicant that the court should grant the application as a matter of indulgence the learned Chief Justice stated that: 'If the court did that, then it would be tantamount to doing away with the rule and it would open the way to a flood of applications by solicitors who might not be diligent in the conduct of their client's business, to apply for such indulgence of the court'.

[15] It is settled law that the lack of diligence on the part of counsel is not a good reason for the delay in compliance with any rule or order of the court. I sympathize with the applicant for the conduct of his recalcitrant counsel. However, litigation belongs to parties and not counsel. The claimant was under an obligation to ensure compliance with the order of the court and to have acted immediately upon discovery of the non-compliance by his counsel.

[16] The criteria set out in rule 26.8(2) of CPR 2000 are compendious when considering an application for relief from sanctions. The court may only grant relief from sanctions if all three limbs are satisfied. The claimant having failed to make the application promptly and satisfying the combined criteria required, cannot succeed in his application for relief from sanctions and for an extension of time to file the amended claim as was directed by the court.

[17] Even if I am wrong in refusing the extension of time, I am of the view that to grant the extension of time at this time would be tantamount to granting permission to file the claim outside of the limitation period. The cause of action accrued on the 8th April 2004; the order of the master directing the filing of the amended claim

adding the respondent was made in November 2009 within the limitation period. The Limitation Act of Saint Christopher & Nevis provides for the filing of actions of such nature within six (6) years. The Act does not empower the court to enlarge the time for bringing a claim in excess of the six (6) years. Accordingly the application for an extension of time to file and serve an amended claim to add the respondent as a party is statute barred and therefore fails.

ORDER

[18] Upon reviewing the evidence and the authorities it is hereby ordered as follows:

(1) The application for an extension of time to file and serve an amended claim and for relief from sanctions is refused.

(2) There shall be no order as to costs in keeping with CPR 26.8 (4).

(3) The matter is referred back to the master for further case management.

Agnes Actie
Master [Ag.]