IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE A.D. 2024

CLAIM No. CV 134 of 2024

BETWEEN:

CAROL SANDIFORD

Claimant/Respondent

and

ROSENDO REYES

Defendant/Applicant

Appearances:

Mr. Estevan Perera and Ms. Chelsea Sebastian for the Claimant/Respondent
Mrs. Andrea Mckoy for the Defendant/Applicant

2024: October 22;

November 07;

November 20.

RULING

Civil Practice and Procedure – Evidence – Witness Statements Filed Late – Relief From Sanctions – CPR 26.8 & CPR 26.9 – Additional Witness Statements Filed Without Permission.

[1] **ALEXANDER, J.**: The application before me was filed on 4th October 2024 by the defendant for relief from sanctions ("the application"). It was filed because the defendant failed to comply with the rule for filing of witness statements and also prepared and filed additional witness statements without seeking the permission of the court. By the application, the defendant also asked the court to put matters right.

[2] I refuse the application for the filing of additional witness statements. First, the case management order provided the contours of the evidence to be called at the trial, and the defendant has no authority to expand that order without the permission of the court. The court is the one vested with the responsibility to manage the evidence at the trial, and it is contrary to the overriding objective for the defendant to usurp that power in his own interest.

[3] Secondly, I find that the defendant intentionally flouted the court's order and then sought, by the application, to ask the court to exercise its discretion to put matters right. I refuse. While in cases of an error in procedure or failure to comply with orders and rules, the court could at any time exercise its discretion in the interest of justice to *put matters right*, this is not a proper case for the exercise of that power. The filing of three additional witness statements is not an error of procedure but a choice by the defendant to refuse to comply with an order of this court made in the exercise of its case management powers.

[4] Regarding the three witness statements that were allowed to be filed pursuant to the order of this court, I am satisfied that the defendant has met the threshold test to secure an order for relief from sanctions. I will grant the order in that limited context.

The Application

[5] The application is filed pursuant to Rules 11, 26.8 and 26.9 of the Civil Procedure Rules, 2005 ("CPR") and the inherent jurisdiction of the court. The application came after a case management conference ("CMC") was held on 10th July 2024 directing parties to file three witness statements *each* and only after the claimant took objections to the defendant's additional three witness statements being allowed to stand. The statements were due on 17th September 2024 but were uploaded late, and the application for relief was filed on 4th October 2024. Therefore, the application was filed about seventeen days after the defendant's non-compliance with the court's order.

[6] At the CMC, the court robustly inquired into every aspect of the matter before making its orders with the aim of putting parties on the path of trial preparedness. In making its orders, a major focus of the court was on the management of the evidence to be called at the trial. Hence, the parties were given permission to call three witnesses each, and to file and exchange witness statements by 9th September 2024. It was also ordered that the witnesses who provided statements are to attend the trial for cross-examination. A trial date was fixed for 5th November 2024 at 9:00 a.m. It is self-evident that that trial date was lost.

[7] Subsequently, the parties consented on two occasions to an extension of time for filing of witness statements,[1] initially to 16th September 2024 and then to 17th September 2024. Pursuant to their agreement for an enlargement of time, the claimant filed her witness statements on 17th September 2024 and served same by email on the same day at 4:20 p.m. That was before the 5:00 p.m. end of the workday. The defendant also filed his witness statements (i.e. uploaded them) on 17th September 2024 but around 8:27 p.m. and served same on the claimant at 9:11 p.m. on that same day. The Rules provide that documents that are filed after the closure of the court office are deemed filed on the next day on which the court office is open: see CPR 3.7(2). As such, the application for relief was filed.

[8] The grounds for the application are that the defendant had difficulties in locating certain witnesses and in obtaining their requisite consents for their statements. The application was supported by the affidavit of Ms. Laura Diaz, the legal assistant in the office of the defendant's attorney, Mrs. Andrea Mckoy. However, the affiant provided completely different reasons in her affidavit for the delayed filing of the witness statements. Ms. Diaz stated that most of the witness statements were prepared by 16th September 2024, but Mrs. Mckoy was involved in trial preparation for an upcoming matter, a mediation session in another matter and had an unexpected matter to attend to in Belize City. There was complete silence in the affidavit about the difficulties in locating witnesses or getting their consent. In fact, the Diaz affiant stated at paragraph 4 of her affidavit that she was

[1] A Notice of Consent to the Extension of time was filed on 5th September 2024.

"assisting steadily with the interviewing of witnesses and preparation of their statements since early September, and most were finalized by the 16th September." According to the affiant, it was Mrs. Mckoy's busyness that delayed the filing of the defendant's witness statements.

[9] The affiant further stated, as a justification for getting the relief from sanctions order, that since the delay was not excessive or prejudicial, and the defendant had filed additional witness statements, the court should grant the order. She posited that the additional witnesses were from persons who assisted the defendant with the development of the property, so they provided necessary evidence for the resolution of the dispute. The court ought to grant permission for the six witness statements to be relied upon by the defendant, by putting matters right if there was "any breach" of its orders. There seemed to be a total disconnect from or disregard for the fact that the court had already settled the number of witnesses to be called by each party as three and/or that it had fixed a one-day trial window.

Issues

[10] I have identified the main issues for determination by this court as follows:

1. Whether the correct or proper application was made to the court?
2. Whether the application for relief from sanctions satisfies the requirements of CPR 26.8?

The Law

[11] The relevant rules governing the application are CPR 26.8, 26.9, 29.11(1) and 3.7.

"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 -
(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; and
(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.

26.9 (1) This Rule applies only where the consequence of failure to comply with a Rule, practice direction or court order has not been specified by any Rule, practice direction or court order.

(2) An error of procedure or failure to comply with a Rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a Rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.

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, then the witness may not be called unless the court permits.

3.7 (2) The document is filed on the day when it is received at the court office or, **where it is received at a time when the court office is closed**, on the next day on which the court office is open. [My Emphasis]."

Discussion

A. Whether the Correct or Proper Application was Made to the Court?

[12] Counsel for the claimant, Mr. Perera, submitted that the defendant made the wrong application to the court. The proper application to make, in the circumstances of this case, was an application to vary the CMC order and not for relief from sanctions.

[13] Mr. Perera argued that there are two live objections before the court: (i) the defendant did not file and/or serve his witness statements within the specified time and (ii) the defendant filed more witness statements than he was permitted to do. Having filed more witness statements than he was directed to file, the present application for relief from sanctions was wrong. The defendant needed a variation of the previous CMC order, not relief from sanctions, as there was no sanction for a refusal to comply with the CMC order.

[14] In response, Mrs. Mckoy advanced that there was nothing wrong with filing the additional witness statements since it was understood that the court would "give some latitude to the number of Witnesses required". Mrs. Mckoy submitted also that the defendant was "forced to, in the interest of justice and to properly advance the Defendant's Defence, file additional statements." The position as advanced by Mrs. Mckoy is not reflective of the position of this court, which seeks always to encourage parties to come armed with all requisite information inclusive of the evidence to enable a full CMC order to be made.

[15] Mrs. Mckoy also argued that the additional three witness statements are concise and so would not unduly prolong the trial. Moreover, there is no prejudice to the claimant if the order for relief were to be granted. Mrs. Mckoy relies on the case of **Mark King et al v Moses Sulph**[2] to support her argument that a party can, in the absence of a court order, increase the number of witness statements it wants to file, and the court will make an order to put things right under CPR 26.9. She relies on the statement in **Mark King** that "a party ought not without very good reason, to be denied the opportunity to put his whole

[2] Claim No. 142 of 2018.

case to the court". Resting on this argument, Mrs. Mckoy asked this court to put matters right. I fully disagree with this argument as aligning with the overriding objective of the rules. The defendant was afforded the opportunity to settle his evidence at the CMC where the relevant directions were given for the evidence at the trial. Wilfully filing additional witness statements is not a procedural error or a failure to comply with an order such that a court would step in and put matters right. It is a choice to disregard the court's order, and a step that I deem invalid and not to be encouraged.

[16] In my view, an application for relief of sanctions is incapable of curing the breach of the CMC order as to the ***number*** of witnesses permitted by the court. The defendant was well aware that the court had limited the evidence of parties to three witnesses each who are to be available for cross-examination and had proceeded to organise the trial around those directions. In the affidavit in support of the application at paragraph 8, Ms. Diaz stated that while the court's order permitted each party to file three witness statements each, the defendant had filed six witness statements "from witnesses who assisted him in critical ways in the development of the Property." This evidence is of no significance and is no justification for the present breach. Based on this evidence, however, the court is asked to put matters right and allow the defendant to have his way. In my judgment, the defendant, or any defendant for that matter, cannot wilfully choose to ignore the requisite number of witnesses for which permission was granted at a CMC, and then approach the court by means of an application for relief to cure its non-compliance. It is a flouting of the rules governing the court's processes and, in particular, it fails to assist the court with realising the overriding objective of the rules to deal with matters justly.

[17] The purpose of a CMC is to allow the court to manage the case by controlling the evidence to be called. In so doing, the court adopts a balanced approach in assessing the case of each party that is being advanced before it. Therefore, the court's orders seek to do justice between both parties in preparing the case for trial. The filing of additional witness statements, outwith the contours of the CMC directions, does not give the claimant the same opportunity as the defendant. After directions are given for the evidence at the trial, a defendant is not entitled to disturb the court's order because he discovered additional

witnesses who might help his case. No court will facilitate a litigant's non-compliance with its CMC orders in the present circumstances.

[18] In the present case, the defendant failed to apply to vary the order for the number of witness statements, which remains as fixed in the CMC directions. Further, and in any event, I am not convinced that the evidence advanced in the application provides any sufficient reasons or justification for the court to exercise its jurisdiction to belatedly vary its CMC order. In fact, the affidavit evidence conflicts with the grounds given for the application.

[19] Given the above, I find the relief for sanctions application is inapplicable to the additional witness statements that were filed. It was wrong to seek a variation of the CMC order by way of an application for relief from sanctions. The filing of the additional witness statements was done without permission, and these are struck out.

[20] Relatedly, there is the issue of the late filing of the permitted number of witness statements, which I will discuss below in the context of the relief from sanctions application.

B. Whether the Application for Relief from Sanctions Satisfies the Requirements of the CPR 26.8?

[21] The application for relief from sanctions does not give as a ground the busyness of Mrs. Mckoy or her preoccupation with other matters. It stated that the statements were filed late "due to issues [with] locating certain witnesses and obtaining the requisite consent". These challenges caused the documents to be uploaded late on 17th September 2024 at 9:11 p.m. and also emailed late to the claimant at 9:11 p.m. The affidavit in support then advanced totally different reasons for the late filing. The affidavit makes no mention of being unable to locate witnesses or of challenges with getting their consent for witness statements. In fact, contrary to the grounds given in the application, the affiant stated that since early in September the witnesses were interviewed and their statements prepared,

and that most of their statements were finalised by 16th September. She did not specify how many statements were not finalised, who were supposed to finalise them and why they were not finalised. Ms. Diaz never referred to the inability to locate witnesses as being an issue affecting the finalising of the statements. She simply advanced that it was the unavailability of Mrs. Mckoy, who was otherwise engaged with other matters, that caused the late filing.

[22] I considered whether to grant relief in the context of this case. To do so I would have to be satisfied that the requirements for getting a relief from sanctions order were met by the defendant. All requirements set out in the rule are to be met or I will be precluded from granting the application for relief. I turn to the rules.

(a) Promptitude

[23] CPR 26.8(1) is set out at my paragraph 11 above. Promptness in the filing of an application for relief is a prerequisite and critical factor. Once the application is made promptly, the court will consider certain requirements in determining if to grant or refuse the application. The application at bar was filed on 4th October 2024, a full seventeen days after the late filing of the witness statements.

[24] The jurisprudence as to what constitutes acting promptly is well developed. Promptitude is contextual and, as such, the circumstances of each case will influence the conclusion on the issue. A defendant must demonstrate alacrity in approaching the court for relief if he is to satisfy this limb of the test. Promptness, however, is not defined nor is a measuring standard or event provided against which it can be decisively gauged. It all depends on the facts of the particular case.

[25] I find instructive and will reproduce here the discussion on "promptly" in **Deputy Superintendent John Morris et al** v **Desmond Blair et al** at paragraph 66.[3]

[3] (2023) JMCA Civ. 45.

"[66] In **Ray Dawkins**, this court considered the question of what the word "promptly" meant and stated as follows:

> "[60] It is to be noted that the rule does not give any definition of the word 'promptly' neither is this requirement of promptness referable to any other event. There are rules where a party is required to make an application to avoid the consequence of its matter being determined due to failure to comply with a rule or a direction. For example, in an application to set aside or vary a judgment made in default 'the court must consider whether the defendant has applied to the court as soon as is reasonably practicable after finding out the that [sic] judgment has been entered' (see rule 13.3(2) of the CPR.
> [61] In **National Irrigation Commission Ltd v Conrad Gray and Marcia Gray** [[2010] JMCA Civ 18] Harrison JA stated that:
>
> > '[14] […] Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon, L.J. said:
> >
> > > 'I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances.'
>
> And at paragraph [16] he had this to say:
>
> > '[…] Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.'" [Emphasis Original].

[26] I have considered the facts of the instant case and the evidence that points to the statements being filed on the enlarged date consented to by the parties, albeit several hours late and after the court office was closed. I have also considered that the application for relief was filed on 4th October 2024, some seventeen days after the late filing of the statements. Mr. Perera argued that the application was filed late and pointed to the fact that the application for relief was filed *eighty-seven days after the CMC orders were made*. Mr. Perera contended that this timeframe was excessive, so the court need not consider

the merits of the application. I did not accept this argument, which I consider as misconceived. It is not the date of the CMC order that determines the promptitude of the relief from sanctions application. There was no delay or non-compliance by the defendant when the CMC order was made. Moreover, no sanction for a failure to comply with the court's order arose at that time.

[27] I also do not accept Mrs. Mckoy's submissions on "promptly". She argued that the application was prompt because it was filed three days from the date of the discovery of the breach. According to her, she only realised that the claimant was taking issue with the statements being filed late, when she received notice of objections from the claimant. She, therefore, acted promptly in filing the application three days thereafter. In my view, Mrs. Mckoy did not need a notice of objections from counsel on the other side to realise that the statements were uploaded late. In any event, Mrs. Mckoy's position does not accord with the rules on applications for reliefs. It is ignored.

[28] I have considered all the circumstances of the present case and note that the rules do not provide a definition or timeline of what should constitute "promptly". However, I do not find that the application was filed with a lack of alacrity. I find it was made promptly in the circumstances of this case.

(b) Intentionality

[29] CPR 26.8(2)(a) provides that the grant of relief would only be made if the court is satisfied that the failure to comply was not intentional.

[30] The evidence does not point to the late filing of the statements being done intentionally or in a bid to not comply with the court's order. In fact, the affiant, Ms. Diaz, stated that the attorney's office was steadily and intentionally taking steps to prepare and had finalised most of the witness statements when a series of unfortunate events in the office and with Mrs. Mckoy overtook and delayed the filing. The application for relief was then filed late. I do not find the explanation unconvincing, and I am minded to accept it. I,

therefore, rejected Mr. Perera's characterisation of what occurred in the context of this case as intentional or that the timelines were excessive and created a presumption of a clear intention by the defendant and his counsel not to comply with the court's orders. I do not find that the delay was intentional.

(c) Good Explanation

[31] I am mandated by CPR 26.8(2)(b) to consider if there is a good explanation for the failure to comply with the CMC order for witness statements. As stated above, my consideration here is not related to the additional witness statements that were filed and which I have already struck out as not properly filed. The issue of good explanation is considered only in the context of the permitted number of witness statements under the CMC order.

[32] Mr. Perera has advanced that the explanation that Mrs. Mckoy was engaged in trial preparation for an upcoming matter and was involved in extended mediation on the 17th September (the date on which the statements in the instant case were due to be filed) were not good reasons. Mr. Perera then pointed to a comment in **Deputy Superintendent John Morris** supra as providing guidance for this court. The pertinent comment was that since that court's orders "gave the respondents a period of some six months, from 10 July 2020 to 8 January 2021, to file the witness' statements. They were obliged to provide a good explanation for the failure to comply within that time." I do not find this particular comment in **John Morris** helpful or instructive. The Rules require that a good explanation is provided.

[33] Similarly, Mr. Perera pointed to the case of **Claudette Waldman** v **Kenroy Staine**[4] for guidance on what constituted a good reason for failure to file a defence on time. Counsel then stated that an attorney's preoccupation with other issues was not a good reason for non-compliance with the timelines set out in the Rules. **Waldman** is distinguishable from the present case, which involves a totally different application. Although neither counsel has referred me to it, I found instructive the guidance in the case of **The Attorney General**

[4] Claim No. 82 of 2019.

(Appellant) v **Keron Matthews**[5] where the Privy Council clarified the concepts of implied and express sanctions and when a relief from sanctions application will arise under the Rules.

[34] In my view, the Rules require that a good explanation be provided for the failure to comply with the court's order in the instant case. The evidence was clear that these statements were prepared and awaiting counsel for the defendant to settle them and to give the go-ahead for filing, which occurred late on the filing date. It is not unreasonable that an attorney will encounter circumstances that will arise unexpectedly in the daily course of the running of a civil practice in Belize. This might not be the best explanation, but I do not see why, in the circumstances of this case, that relief should be refused. The three statements were filed "late" on the parties' agreed date for filing because of administrative and other issues in counsel's office. I do not agree that I ought to penalise the defendant by refusing to allow him to use the permitted number of witness statements, as stipulated in the CMC order. A good explanation does not mean an unimpeachable or faultless explanation. I find that an explanation for the delay was provided and that it constituted a good explanation within the confines of this case.

(d) Compliance

[35] The next requirement to be satisfied by the party in default is to show that he has been in general compliance with all other relevant rules, practice directions, orders and directions. There is no evidence before me that shows a pattern of non-compliance by the defendant. I find that this requirement has been satisfied.

(e) Other Factors

[36] Having found that the defendant has satisfied all the requirements to get an order for relief from sanctions, I am to consider whether making the order will be in the interest of the administration of justice. I have considered the entirety of the circumstances of this case,

[5] [2011] UKPC 38.

and I find that it accords with the good administration of justice to grant the relief. A lot of resources have been invested in preparing and managing this matter towards trial readiness, and the defendant has engaged in the process and demonstrated an avid interest in securing a just outcome. The claimant was served with the witness statements on the same day that they were uploaded. Parties have also attended mediation but were unable to settle the matter and there has been general compliance with the rules and orders of the court. I consider it only fair that parties have their day in court.

[37] I note that it was Mrs. Mckoy who was responsible for the lag in meeting the filing timeline. I find that the delay in filing the witness statements was not excessive nor, to my mind, prejudicial to the claimant. Moreover, I do not consider it fair to deprive the defendant of calling any evidence at the trial. In any event, the failure to comply has been remedied within what I consider to be a reasonable timeframe. Relatedly, I accept that the trial date was lost, and a new trial date has to be found but I do not find the granting of relief to be prejudicial to the claimant. I will grant the application and limit my order as discussed above.

Costs

[38] The general rule on costs is that it follows the event. CPR 26.8 (4) provides that "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**." [My Emphasis]. There is no evidence advanced by either party of exceptional circumstances that will influence a cost order outwith the general rule.

[39] The application only became necessary because of the default of the defendant, first in refusing to comply with the clear order of this court by filing twice the number of witness statements than he was given permission to file, and secondly by filing the permitted statements late. The claimant is entitled to her costs, having successfully defended the application against the filing of additional witness statements. I will award the claimant her cost in the sum of BZ$2,500.00.

Disposition

[40] It is ordered as follows that:

1. The defendant's application for relief from sanctions for filing additional witness statements is not a proper application and is refused with costs to be paid to the claimant.
2. The defendant's three additional witness statements filed on 18th September 2024 are struck out.
3. The defendant is granted relief from sanctions, which is limited to only the permitted number of witness statements, as prescribed by the CMC order made on 10th July 2024.
4. The defendant is to pay the claimant costs in the sum of BZ$2,500.00.

Martha Lynette Alexander
High Court Judge