IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 660 of 2021

BETWEEN

Glen Brayshaw	**DEFENDANT/RESPONDENT**
AND	
Thomas Jackson	**COUNTERCLAIMANT/APPLICANT**

ORDER OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE

HEARING DATE: 23rd March 2023

APPEARANCES:

Mr. John Nembhard, Counsel for the Claimant.

Mr. Darrell Bradley, Counsel for the Defendant/Applicant.

DECISION ON PERMISSION TO AMPLIFY A WITNESS STATEMENT

[1] The Claim alleges that Mr. Jackson defamed Mr. Brayshaw through various Facebook posts which the Claimant alleged prevented him from benefitting from a lucrative business contract. Trial between the Parties began on March 28th, 2023 where, while hearing objections to the witness statements, the Defendant moved to strike out portions of the statements that relied on documents that were not sufficiently identified as required by Rule 29.5(1)(c) of the *Supreme Court (Civil) Procedure Rules* (CPR). These documents included copies of the allegedly defamatory Facebook posts, a copy of the contract the Claimant alleges to have lost because of the posts, and a copy of an email terminating said contract. These three items were exhibited to the affidavit that was filed with the claim form but were not exhibited to the witness statement or

included on the list of documents shared during standard disclosure. CPR Rule 28.13(1) provides that a party "may not rely on or produce any document not so disclosed."

[2] When Counsel realized that the CPR does not permit him to rely on documents that were included with the statement of case, he asked the Court's permission to amplify the Claimant's witness statement and introduced these documents into evidence. The Defendant objected and, after a discussion of how to proceed, I adjourned the trial to allow the Parties to provide submissions on whether the Court ought to permit the Claimant to amplify the witness statement. For the reasons provided below, Mr. Brayshaw is permitted to amplify his witness to add the documents exhibited to his pleadings.

[3] Both Parties cited *King and Brints Security Limited v. Sulph*[1] in support of their positions. At issue in *King* was the late filing and serving of witness statements. Young J declined to strike out the Statement of Case and permitted witness statements to be relied upon at trial after receiving an application for relief from sanction under CPR Rule 26.8.

[4] The Claimant asks that this Court consider the interests of justice and the demands of the CPR's overriding objective to deal with cases justly to permit him to rely on the undisclosed documents. Mr. Nembhard admits that his inexperience and ignorance caused the non-compliance. He acknowledges that his action were a "grave" misunderstanding and error and asks that the Claimant not be prejudice by his failure. Unlike *King,* where disclosure was permitted after an intentional failure to disclosure, his failure was not intentional. He will promptly disclose the documents if permitted by this Court. The Claimant also notes that the Defendant has not asked for the Court to impose a sanction. He further notes that disclosure at this stage would not be unduly prejudicial to the Defendant when balanced with the impact on the Claimant if the disclosure is refused. The Defendant has had access these documents since the Claim was initiated and are the focus of his Defence.

[5] The Defendant relies on Young J's statement that Rule 26.7(2) operates to give sanctions "automatic effect," to argue that, the court has no discretion to grant relief without an application.

[1] S.C. Claim No. 142 of 2018 [*King*].

The Defendant further asserts that even if I am minded to grant relief, the mandatory and cumulative requirements outlined in *Clarke v. Rancharan.*[2] Rule 26.8 have not been satisfied. The Defendant argues that the present case is distinguishable from *King* because disclosure never occurred. The breach was intentional and attempting to rectify this breach at trial is inconsistent with the requirement of promptness.

[6] To begin, the obligation is on the Claimant to ask for relief from the Court and is not contingent on a request by the Defendant. I accept that Rule 26.7(2) establishes that sanctions are of automatic effect. I also accept that requirements for relief from sanction outlined in Rule 26.8 are mandatory and cumulative as outlined in. Although Rule11.6(2)(b) also gives me discretion to dispense with the requirement for an application to be in writing, I acknowledge that the requirement in Rule 26.8(1)(b) requiring that such an application be supported by evidence on affidavit appears to conflict with that requirement. No affidavit was provided. Nonetheless, I find relief from sanction is appropriate in this case.

[7] I granted permission for the Claimant to file written submissions following a discussion with the Parties as to whether the Claimant ought to proceed by way of an application for relief from sanction under Rule 26.8 or written submissions on the amplification point. A review of the recording of the hearing confirmed that the provision of written submissions would be provided. I made this decision after consulting Rule 28.13 which provides the Court with discretion in response to a failure to disclose. The exercise of discretion is governed by Rule 1.2(a) which requires me to give effect to the overriding objective which includes dealing with cased expeditiously, saving expense, and considering the impact on the allocation of the Court's resources. Using the power granted to me in Rule 26.2, I proposed an order of my own initiative that allowed each Party an opportunity to make representations as required by Rule 26.2. The Claimant filed written submissions to which the Defendant replied.

[8] If waiving the requirement of an affidavit is an error, the error was mine. It would be unjust to penalize the Claimant because his Counsel followed the Court's directive. I also do not find that the Defendant has suffered any prejudice by this decision. While affidavits are sworn thereby

[2] S.C. Claim No. 10 of 2018 at para 10.

potentially attracting legal sanctions if they contain untruths, Mr. Nembhard is an Officer of the Court. He has a duty of full and frank disclosure in addition to an expectation that he will be honest in all dealings. Disregard or negligence in that duty can attract the Court's sanctions. The rule of law would collapse if the Court could not rely on lawyers speaking truthfully without an affidavit.

[9] I find the requirements of Rule 26.8(2) have been met in this case. Rule 26.8(2) provides:

> (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.

Mr. Nembhard's actions were not intentional. While it is true that he was aware that the documents exist and could have disclosed them, I believe intentional would require evidence that Mr. Nembhard made a choice, understanding there was a duty to disclose, to not do so. I have no reason to disbelieve Mr. Nembhard genuinely misunderstood the rules and believed he did not have to disclose the documents as they were on the pleadings. While the Court should be able to rely on the lawyers appearing before her to understand the requirements of the CPR, perfection is an unreasonable standard. That each of us is fallible is reflected in the Rule 26.8(2)(c). The Court only permits relief from sanction where the defaulting party "has generally complied with all other relevant rules, practice directions, orders and directions." Mr. Nembhard has not demonstrated a pattern of disregard for the rules and orders of the Court.

[10] I also find granting relief is appropriate after weighing the following factors listed in Rule 26.8(3):

> (a) the interests of the administration of justice;
> (b) whether the failure to comply was due to the party or his legal practitioner;
> (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.

Given the devastating consequences of not permitting the evidence on the Claimant's case and my conclusion that the breach was unintentionally caused by the Claimant's lawyer, I find justice would not be served by denying relief. The Defendant has had access to these documents since being served with the Claim. A cursory review of the Defendant's Statement of Defence and Witness Statement clearly contemplate these documents. Moreover, any prejudice to the Defendant can be remedied during his examination-in-chief through the amplification process. Cost for this application will also be awarded to the Defendant. Disclosure can be immediately affected and trial has already been adjourned to consider this matter, so no further harm will be done by granting relief.

[11] It is hereby order that:

(1) Relief from sanction is granted and the Claimant is permitted to amplify his Witness Statement by exhibiting the documents annexed to his Statement of Claim.

(2) Costs of $1500 are to be paid personally to the Claimant by Mr. Nembhard for this application on or before the continuation of trial date.

Date: Friday, April 21, 2023

Patricia Farnese
Justice of the High Court of Belize