

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 622 of 2022

BETWEEN:

[1] ELIJIO BRICENO

Claimant/Respondent

and

[1] KIDNEY CARE CENTER LTD
[2] CARLOS PERERA

1ST Defendant/1ST Applicant
2ND Defendant/2ND Applicant

Appearances:

Andrew Bennett, for Claimant/Respondent

Kimberly Wallace, for Defendants/Applicants

2023: 27 July
24 August
12 December

DECISION

[1] **FARNESE, J:** This strike-out application is the defendants' second in this claim. I previously dismissed the application to strike out Mr. Briceno's application for permission to file a derivative claim. I also gave permission for the derivative claim to be filed. I subsequently met with the Parties

and set a date for the derivative claim to be filed. That date came and went with no word from Mr. Briceno, so the Parties were called to appear for a report. Only the defendants' counsel appeared. She asked that the court strike out the claim for non-compliance of the court order. I asked for written submissions on the point and set a date for hearing the application. On the date of hearing, Mr. Briceno's counsel, Mr. Bennet appeared alongside his colleague, Mr. Morales, and asked for permission to provide a written submission on the 2nd strike-out application. Permission was granted and the hearing adjourned.

[2] In response to an opposing Party's non-compliance with a court's order, any other Party can either apply under Supreme Court (Civil Procedure) Rules [CPR] 26.3(1)(a) to strike out all or part of a statement of case or apply under CPR 26.4 for an "unless order" that will result in the claim being struck if not followed. By choosing to apply under CPR 26.3(1)(a), the defendants have pre-empted Mr. Briceno from bringing an application for relief from sanction. His defense to the strike-out application has, in effect, become his application for relief of sanction. I find that it is in keeping with the court's overriding objective to avoid applications that duplicate issues already before the court.

[3] CPR 26.8 outlines what the court would consider if the applicant directly requested relief from sanction. CPR 26.8 provides:

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;
(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.

(4) 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.

Because this is not an application for relief, I find that it is unjust to penalize Mr. Briceno for not complying with the form and timing requirements in CPR 26.8(1) in this case. The responsibility for the non-compliance rests with Mr. Briceno's counsel, Mr. Bennett. An affidavit is not necessary, in this case, to test that the explanation provided for the non-compliance is truthful. As Officers of the Court, Mr. Bennett and Mr. Morales have a duty to be frank and honest in all responses to the court's questions and in their disclosures. Moreover, the Defendants have not challenged the explanation provided for the non-compliance. CPR 26.8(4) is also not directly applicable to this case. I find it illogical, however, not to apply CPR 26.8(2) and (3) given the basis of the request to strike out the claim is non-compliance with the court's order.

- [4] Mr. Bennett and Mr. Morales readily admitted that their law firm is solely responsible for the non-compliance. I have no reason to believe that the non-compliance was intentional. The other instance of non-compliance was Mr. Briceno's failure to appear at the hearing where the application to strike out the claim was first made. CPR 26.8(2)(c) requires general compliance, not perfection. I believe denying relief on the bases of these two instances of non-compliances sets the bar too high.
- [5] Mr. Bennett confirmed that the breach can be promptly remedied as the claim will largely rely on the affidavit submitted in the leave application. The matter is also early in the proceedings and the standard case management orders to prepare for trial have not been made and no trial date has been set. Finally, this claim is purely a private law matter and the decision on this application does not raise issues of broad interest to the administration of justice.
- [6] Consequently, this application turns on whether there is a good explanation for the non-compliance and the effect of my decision on each of the Parties. If I find that there is not a good explanation, I must strike out the claim. CPR 26.8(2) states that the court can only grant relief if I am satisfied that a good explanation exists. It would be manifestly unfair to conclude that I have discretion if that finding comes in a strike out application versus an application for relief from sanction given what I've stated above about the court's interest in avoiding unnecessary applications.

- [7] Mr. Bennett states that the failure to file the derivative claim is the result of a mistake as to which lawyer in the firm had carriage of the matter. He also noted that no perfected order was ever filed with the court's oral directions for when the derivative claim and defence were due. This does not relieve counsel of his duty to comply with the court's orders, but it does help explain why the mistake over who had carriage of the claim persisted until the strike out application was filed.
- [8] I find that Mr. Bennett has provided a good explanation for the non-compliance. I distinguish this case from that of **Tillett v McFadzean**,¹ where lack of diligence, **Nasi v Richards**,² where poor time management, and **Romero v Franco**,³ where the issue of lack of oversight of tasks delegated to staff were the explanations provided. This case involves an unintentional mistake.
- [9] There is merit in both Parties submissions about the purpose and effect of the CPR. The rules ensure that each Party is justly and fairly treated by the court. Non-compliance causes delays and increases costs. The CPR, however, is not so draconian whereby every non-compliance is fatal to one's claim or defence. If that was the intent, there would be no means to request relief from sanction. The discretion given by the CPR to the court when deciding strike-out and relief from sanction applications means that the court assesses each application on a case-by-case basis and do what is just in the circumstances.
- [10] Given the stage of these proceedings, I find no evidence that Mr. Briceno's non-compliance has significantly prejudiced the defendants' ability to defend against the derivative claim. To grant the defendant's application, however, effectively ends Mr. Briceno's claim. The strike-out remedy is often described as the "nuclear" option. The courts are frequently cautioned to sparingly exercise this discretion and only in the clearest of cases.⁴ I find no compelling reason that, on principle, the same is not true for the denial of relief from sanction where the consequence will bar a Party's access to the court with little prejudice to the other Party.

¹ Claim No. 613 of 2017.

² Claim No. 276 of 2011.

³ Claim No. 808 of 2021.

⁴ *Thompson v Flowers et al.*, Supreme Court Claim No. 631 of 2020 at para 2.

[11] The defendants' application to strike out Mr. Briceno's derivative claim is dismissed. Mr. Briceno is warned that the court expects his strict compliance to deadlines going forward unless dates are extended with the court's permission or, where appropriate, by consent of the Parties. The court is also making no order as to costs. Although I held that CPR 26.8(4) is not directly applicable, the spirit of this rule ought to be observed in these circumstances. Had this matter come before the court as an application for relief from sanction, the defendants would not have costs awarded against them.

[12] IT IS HEREBY ORDERED THAT:

1. The application to strike out the claim is denied.
2. Mr. Briceno must file his derivative claim by 5th January 2024.
3. No costs are awarded.

**Patricia Farnese
High Court Judge**