

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No.: G 239 of 2016

BETWEEN

PAULA SHARLENE FOSTER

Plaintiff

AND

MICHAEL JUNIOR DAVIS

Defendant

CHAMBERS

Appearances: Mr. Clyde Allen, Attorney-at-Law for the Plaintiff
Mr. Paul Keeble, with Ms. Sulekha Tummala (on 11 September 2018) and
Mr. Andrew Woodcock (on 21 March 2019) of Hampson and Company,
Attorneys for the Defendant

Before: The Hon. Justice Ingrid Mangatal

Heard: 11 September 2018 and 21 March 2019

Judgment Delivered: 21 March 2019

Draft Reasons Delivered: 8 May 2019

Reasons Circulated: 14 May 2019



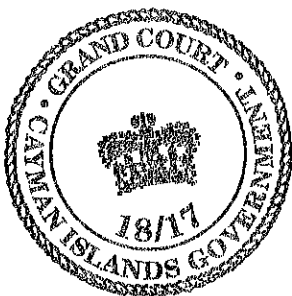
HEADNOTE

*Unless Order - Application for Entry of Judgment for breach of several orders, including
Unless Orders*

REASONS FOR JUDGMENT

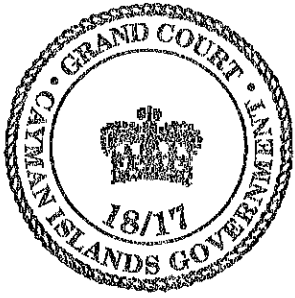
Introduction and Background

1. On 21 March 2019, on the application of Plaintiff, I refused leave to reopen a hearing after I had reserved judgment on the Defendant's application on 11 September 2018. On the application of the Defendant, I entered judgment for the Defendant dismissing the Plaintiff's action for failure to comply with paragraphs 1(i) and (ii) of an Unless order made 13 March 2018, and I also struck out a purported Witness Statement of the Plaintiff. These are my reasons for making these orders.
2. These proceedings were commenced by of Writ of Summons filed 14 December 2016 by Mr. Clyde Allen, Attorney on behalf of Paula Foster ("the Plaintiff"), naming Michael Junior Davis as the Defendant ("the Defendant"). The Statement of Claim describes a road traffic accident on 2 June 2014 involving the Plaintiff riding her motor cycle and the Defendant driving his Toyota, in which it is alleged that the Defendant drove negligently and collided with the Plaintiff's motorcycle, resulting in injuries, loss and damage.
3. Service of the specially endorsed Writ was acknowledged by Hampson and Company on behalf of the Defendant, and filed on 17 January 2017 when the Defendant indicated his intention to defend the claim. On 26 January 2017 Hampson and Company filed a Defence in which Mr. Davis denies all the allegations contained in the Plaintiff's Statement of Claim and puts the Plaintiff to strict proof.
4. On 4 May 2017 Hampson and Company filed a summons seeking to Dismiss and for Directions in the following terms:



1. *An order dismissing the Plaintiff's claim for non-prosecution under the inherent jurisdiction of the Court, and/or for contumelious disregard and non-compliance with the Rules of the Grand Court, by reason of the Plaintiff's:*

- (i) *Failure to comply with the Notice to Produce served on the Plaintiff on 24 April 2017 pursuant to GCR Order 24/10;*



(ii) Failure to make discovery by list in accordance with GCR Order 25/8(1)(a); and

(iii) Failure to disclose expert evidence in accordance with GCR Order 25/8(1)(b);

- 2. Alternatively, an order that unless the Plaintiff complies [with] the Notice to Produce, makes discovery by list, and discloses her expert evidence within 14 days of the date of this order, that the Clerk of the Court shall enter judgment for the Defendant dismissing the within action with the defendant's costs to be taxed;*
 - 3. The directions of this Court for the further conduct of this action pursuant to GCR Order 25/8(3) including as to exchange of witness statements, and delivery of the Plaintiff's schedule of loss and damages;*
 - 4. The Defendant's costs of this summons and of this action and such further and other relief as to this Honourable Court may seem just."*
5. At the hearing of the summons on 9 October 2017, Carter J (Actg.) made the following Directions Order (the "October Order"):

- "1. The Plaintiff shall provide the Defendant with copies of her documents by email in organised electronic (pdf) form no later than 20 October 2017.*
- 2. The parties shall in accordance with the provisions of GCR 38/2A exchange any witness statements and/or affidavit on which they intend to rely at trial on or before the close of business on 24 November 2017 giving notice of any intention to rely on hearsay evidence.*
- 3. The Plaintiff shall serve on the Defendant's attorneys an Interim Schedule of Loss and Damages which complies with the guidance*

provided by Williams J at paragraph 23 of his Judgment in Vernon v Green, Grand Court Cause No. 19 of 2015, unreported 25 May 2017, no later than 15 December 2017.



4. *Either party has liberty to apply if so desired within one month after exchange of witness statements under paragraph 4 above for there to be a case management conference/directions hearing to consider inter alia whether there should be a split trial on liability.*

5. *Either party has leave to set this action down for trial any time after the expiration of the one month period for making application for a case management conference/directions hearing referred to in foregoing paragraph.”*

6. The Defendant’s attorneys then proceeded to file a second summons on 20 December 2017 seeking to dismiss the proceedings, or alternatively for an unless order (the “December Summons”), *inter alia* for an order dismissing the Plaintiff’s claim for non-prosecution by reason of the disregard of the October Order in that the Plaintiff had; failed to provide the Defendant with copies of her documents by email in accordance with the October Order paragraph 1; failed to exchange witness statement on or before the close of business in accordance with the October Order paragraph 2; and failed to serve an Interim Schedule of Loss and Damage no later than 15 December 2017 in accordance with paragraph 3 of the October Order. In the alternative, the Plaintiff sought an ‘Unless’ order seeking compliance within 14 days of the date of the order, or judgment for the Defendant in default.

7. On 13th March 2018 the December summons came before McMillan J, who in the absence of written submissions on behalf of the Plaintiff and no one appearing for the Plaintiff, did make an Unless Order as follows:

“IT IS HEREBY ORDERED THAT:

1. Unless the Plaintiff no later than 11 April 2018;



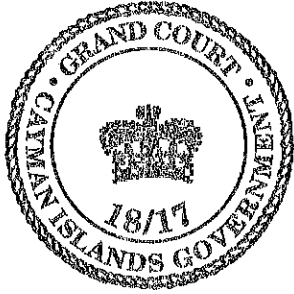
- i. *exchanges with the Defendant's attorneys any witness statement and/or affidavits on which she intends to rely at trial; and*
- ii. *serves on the Defendant's attorneys an Interim Schedule of Loss and Damages;*

the Clerk of the Court shall enter judgment for the Defendant dismissing the within action with the Defendant's costs to be taxed.

..."

8. In his legal submissions Mr. Keeble on behalf of the Defendant explained that McMillan J had declined to deal with paragraph 1(i) of the December Summons (the strike out application), as the judge had been made aware of the fact that the Plaintiff had provided her disclosure documents although Mr. Keeble argued they were not in the prescribed form and in accordance with the specific form set out in paragraph 1 of the October Order. The Judge had also been made aware by email from Mr. Allen on the evening before the hearing, that he was unable to attend due to his own ill-health and that no disrespect was intended. Mr. Allen's email to the Court of 12 March 2018 requested an extension of two weeks within which to provide the Witness Statement and four weeks within which to provide the Schedule of Loss. As can be seen from the Unless Order McMillan J accommodated Mr. Allen's request.
9. On 23 April 2018 the Defendants filed a third summons seeking entry of judgment (the "Judgment Summons"). Paragraphs 1 and 2 read as follows

1. *Entry of judgment for the Defendant dismissing the within action, and for the Defendant's costs to be taxed, by reason of the Plaintiff's failure to comply substantively or otherwise with sub-paragraphs 1(i) and/or 1(ii) of the Unless Order of 13 March 2018, made on foot of the Order of 9 October 2017, and as more particularly set out below:*
2. *Striking and/or expunging from the record the purported Witness Statement of the Plaintiff dated 12 March 2018,*



pursuant to GCR Order 38/2(8), and Order 41/6 in accordance with the dicta under 1999 SCP Order 38/2A, 13, and/or the inherent jurisdiction of the Court, as variously:

- (a) constituting a scurrilous, unfounded, procedurally misconceived, professionally disgraceful and contemptible personal attack on counsel for the Defendant at paragraphs 3 and 4 of the said Witness Statement, and on the Defendant's insurer at paragraph 5 of the said Witness Summons;*
- (b) being composed almost entirely of wholly inadmissible argument, gratuitous opinion, hearsay, speculation, and inflammatory remarks and repugnant allegations, including those referred to above, plainly intended to colour the mind of the Court and to prejudice the fair hearing of the matter;*
- (c) failing to comply with the fundamental requirements of GCR Order 38/2A(4) as to the inclusion of a statement as to the truth of the contents to the best of the knowledge and belief of the witness;*
- (d) being grossly incomplete by the Plaintiff's own admission within the said document, and grossly inadequate including lacking in the requisite and appropriate detail, particulars and dates, including failing to comply entirely with the requirement of the GCR Order 38/2A(4)(b) as to identification of documents referred to;*



(e) failing to comply with the fundamental requirements of 1999 SCP Order 38/2A/7 as to content of witness statements, and in particular that they (i) shall contain only such material facts as the witness is able to prove of his/her own knowledge, and (ii) must not contain inadmissible evidence, hearsay evidence, expressions of opinion or belief, and

(f) being scandalous, irrelevant or otherwise oppressive within the provisions of GCR Order 41/6.”

10. The Judgment Summons came before me on 11th September 2018.

The September Hearing

11. On 11 September 2018, I was provided with a bundle of documents and written submission on behalf of the Defendant. This bundle included amongst the pleadings and documents filed, the Purported Witness Statement of Paula Foster dated 12 March 2018 and the Purported Schedule of Loss dated 10 April 2018. I had received no written submissions from Mr. Allen. However, Mr. Allen attended the hearing and applied for the hearing of the Judgment Summons to be adjourned.

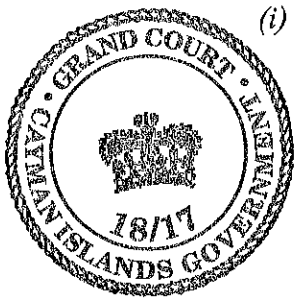
12. I refused the adjournment for a number of reasons, including that the Plaintiff's Attorney had had ample notice of the Defendant's application.

13. I heard submissions from Mr. Keeble on behalf of the Defendant, in addition to the written submissions prepared by him. In support of this summons, the Defendant had also filed the Third Affidavit of Sulekha Tummala on 31st July 2018 with Exhibit ST3. Mr. Allen on behalf of the Plaintiff made oral submissions only.

The Purported Witness Statement

14. At the hearing, Mr. Keeble argued that the Plaintiff's Witness Statement was wholly unacceptable as a Witness Statement as it consisted almost entirely of argument and opinion. In his written submissions he described the Witness Statement as also offensive and professionally unacceptable in that it attacked opposing counsel, and he submitted, it should be struck out in its entirety. In addition he argued that it did not comply with paragraph 1(i) of the Unless Order of 13th March 2018. In his written submissions he summarized the position as follows:

"The Plaintiff's purported Witness Statement is:



- (i) *composed almost entirely of wholly inadmissible and repetitive argument, gratuitous opinion, hearsay, speculation and inflammatory remarks and repugnant allegations, and irrelevancies, including reference to without prejudice exchanges, plainly intended to colour the mind of the Court and to prejudice the fair hearing of the matter;*
- (ii) *Comprises a scurrilous, unfounded, procedurally misconceived, professionally disgraceful and contemptible personal attack on the integrity of counsel for the Defendant at paragraphs 3 and 4 of the Witness Statement, and on the Defendant's insurers at paragraph 5;*
- (iii) *lacking by the Plaintiff's own admission the requisite and appropriate detail, particulars and dates, and fails to comply entirely with the requirement of GCR Order 38/2A(4)(b) as to identification of documents referred to;"*

15. Furthermore, he submitted that the document did not conform with the fundamental requirements as to content of a witness statement, in that it did not contain facts that the witness was able to prove of his or her own knowledge, and also should not contain inadmissible, hearsay, or expressions of opinion or belief. He submitted that the



document failed to include a statement of truth of the contents to the best of their knowledge or belief. The Defendant's attorney indicated that he had received this document via email only on 10 April 2018 (which was not an agreed form of service). A copy was submitted for the court file on 13 April 2018.

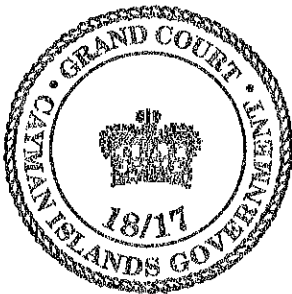
16. Mr. Keeble concluded by submitting that the document should be "*expunged from the record*" pursuant to GCR Order 38/2(8) and Order 41/6, and/or the inherent jurisdiction of the court as set out in paragraph 2 of the Defendant's Judgment Summons.
17. Mr. Allen submitted that the Witness Statement satisfied the requirements of the Unless Order as it was provided to the Defendant before 11 April 2018 i.e. on 10 April 2018 via email.

Failure to Comply with Unless Order

18. In addition to the requirement to exchange evidence, the Unless Order also required the Plaintiff to serve on the Defendant's Attorneys an Interim Schedule of Loss and Damages. Mr. Keeble argued that this also did not comply with what would be expected in that it was "*narrative, highly subjective, and lacking all of the relevant constituents of a Schedule of Loss and Damages*". The document was provided by the Plaintiff's attorney via email on 10 April 2018 to the Defendant's attorney and a hard copy was submitted for the court file on 13 April 2018.
19. It was argued by Mr. Keeble that the Unless Order of 13 March 2018 was not complied with and that judgment should be entered for the Defendant in accordance with paragraph 1(ii) of the Unless Order, dismissing the action. In response Mr. Allen disagreed. He submitted that the Schedule of Loss had been properly provided within the required time frame.
20. When concluding his submissions Mr. Keeble referred to the case of *Vernon v Green* Unreported Judgment, 25 May 2017 by Williams J, in which Mr. Allen also appeared for the Plaintiff and Mr. Keeble also appeared for the Defendant. Reference was made in

particular to paragraph 23 of that judgment in which Williams J addressed the requirements of a Schedule of Loss and Damages.

21. At the conclusion of the hearing I reserved judgment.
22. After the September hearing, on 14th September 2018, Mr. Allen wrote to the Court, oddly, for the first time attaching written Legal Submissions. In his covering letter he stated as follows:



“Further to the hearing this week before Mangatal J where she has reserved her Judgment in this matter, can you kindly place the following documents before her which consists of Legal Submissions and various Emails, the contents of which speak for themselves. Various issues were raised in Chambers before the Learned Judge and I consider it proper that she should have an opportunity to review these documents before the Learned Judge makes a final decision.

I have sent a copy of this letter and the attachments to Mr. Keeble.”

23. The same day, the Court received an email from Hampson and Company, in which Mr. Keeble raised strong objections to the material which Mr. Allen had provided, being passed to the Court. I was informed that additional material had been delivered for my attention and as a result, on 17 September 2018 I instructed my Personal Assistant to inform Mr. Allen that if he wished the Court to consider more material that he should proceed to file a summons supported by an affidavit, seeking to re-open the hearing.
24. After a delay of two months when nothing was filed with the Court by Mr. Allen, on Friday 16th November I directed that Mr. Allen file the summons requesting re-opening of the hearing, with a supporting affidavit, by 30 November 2018.
25. A summons was finally filed by Mr. Allen on 18 December 2018, with an Affidavit of Paula Foster in support, seeking the following:-

“1. That the Plaintiff seeks leave of this Honourable Court to waive without prejudice privilege, if it is applicable so that the Plaintiff

can adduce evidence by relying on correspondence dated as follows....



2. *The basis of the above request is that the Defendant or his attorney, Mr. Paul Keeble, has sort to mislead the Grand Court on the issue of the facts and/or liability generally as to the exact point of impact. The Defendant and/or his attorney are now endeavouring to mislead this Honourable Court and thus waste the Court's time, increase costs and to cause the Plaintiff to suffer serious prejudice by adopting a position that is wholly untenable and different from that adopted by the Chartered Insurance Practitioner, Mr. David Merriott, and part of the reason for the interim payment of CI\$5,000.00 made payable to the Plaintiff.*
3. *That the Defendant is to provide a copy of their report referred to in their email dated 10 December 2014 sent at 2.41 pm from Merriott to Chambers as mentioned above which was prepared by Vehicle Solutions on behalf of the Defendant and/or their insurer.*
4. *That this is a case in which the Plaintiff will based on (1) the evidence to include witness statements to the police and so on (2) the findings of fact in this case and (3) the earlier correspondence at mentioned above, recover above substantial damages against the Defendant.*
5. *That this Honourable Court do grant an Order pursuant to GCR Ord. 29 r.10 and 11 which provisions are set out below that the Defendant do make to the Plaintiffs an Interim Payment of CI\$300,000.00 or such sum as the Court thinks just and that any such payment so made on account of any damages which the Defendant may subsequently be held liable to pay to the Plaintiffs on the ground that, inter alia, if this matter were to go to trial that*



the Plaintiffs will recover substantial damages here and for the time being presently estimated at over CI\$800,000.00.....”

26. I agreed to allow the listing of the summons, in spite of the delay and unusual contents, and after some further back and forth regarding the completion of a listing form, the matter was finally listed before me on 21 March 2019. Additionally, on 1 March 2019 the Defendant filed the Third Affidavit of Erwin Freeland.

27. On 18 March 2019, a letter from Hampson and Company was received by my PA, expressing concern in the following terms:

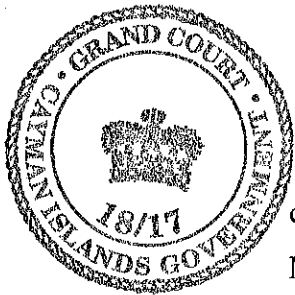
“...The Plaintiff has not delivered a Hearing Bundle in this matter in accordance with the Practice Directions, nor have we been served (in any form) with Exhibit “PF1” to the Affidavit of Paula Foster....”

28. I understand the Plaintiff’s Attorneys did not provide the Defendant’s Attorneys with a copy of the bundle, which included a copy of the exhibit referred to in the Affidavit of the Plaintiff filed 18 December 2018, until the afternoon before the hearing.

29. At 5 pm on 20th March 2019, the evening before the scheduled date for the summons, the Plaintiff’s Attorney delivered a Judge’s bundle on behalf of the Plaintiff. The hearing was scheduled for 9.30 am the following day. This bundle included written Legal Submissions on behalf of the Plaintiff and included in the bundle at Tab 4 was the Exhibit PF1 referred to in Ms. Foster’s affidavit, and in Hampson and Company’s letter. It also contained correspondence labelled “without prejudice”.

The March Hearing


30. I considered the history of this matter including the documents submitted and the actions taken by both attorneys, very carefully, and it is my view that there has been contumelious disregard for the Court’s orders and process by the Plaintiff’s Attorney-at-Law. The Plaintiff’s Summons filed 18 December 2018 sought to adduce further evidence and other types of applications including relying upon a small mountain of



correspondence between himself and the Defendant's Insurer's Loss Adjuster, Mr. David Merriott; claiming also that the reason for this is that the Defendant's Attorneys have sought to mislead the Court as to the exact point of impact of the accident. In addition, the Plaintiff's summons included an application for an interim payment which was not before me when I had reserved judgment.

31. In my judgment, there was absolutely no proper basis provided to the Court upon which the hearing could be re-opened. Not only were both the Defendant's Bundles and documents filed late, but there was nothing properly provided that could not have been provided from the time of the hearing on 11 September 2018. I therefore on the 21st March 2019 refused the Plaintiff's application to re-open the hearing and dismissed the other applications, which were simply not permissible after I had reserved judgment on the Defendant's summons dated 23 April 2018 seeking the entry of judgment.
32. In my view, the Plaintiff had plainly failed to comply in real terms or in substance with paragraphs 1(i) and (ii) of the Unless Order made by McMillan J on 13 March 2018. The Plaintiff at no time provided any proper explanations for such persistent and contumelious default, and in any event neither sought, nor obtained any relief from sanctions. Instead, the Plaintiff's Attorney's approach was to launch a personal attack on the Defendant's Attorney in a purported witness statement of the Plaintiff dated 12 March 2018, and to make a myriad of allegations against Mr. Merriott.
33. Under paragraph 2 of the Defendant's Summons, I also struck the purported Witness Statement of the Plaintiff from the record, as being an inadmissible scandalous document, consisting mainly of a personal attack on Counsel for the Defendant and the Defendant's insurer, and because it did not comply with the requirements of GCR Order 38/2A.
34. I also ordered costs to the Defendant in respect of both applications, and of the action, to be taxed if not agreed.
35. I refused leave to appeal on the basis that there is no realistic prospect of success.
36. Whilst Courts do not exist to punish litigants, the Court's orders and the Grand Court Rules must be properly complied with if matters are to proceed in an orderly and sensible

fashion. Parties and/or their Attorneys cannot be allowed to ignore all the rules of pleading and procedure, and Court orders setting out time lines. There are plainly consequences for such blatant disregard.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

