

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2016-01007**

BETWEEN

CIVIL PROJECTS CARIBBEAN LIMITED

Claimant

AND

NEAL ELLIOT

(Acting as Attorney for Phoolo Elliot by Power of Attorney DE201400067505)

1st Defendant

NEAL ELLIOT

**(Acting as Attorney for Bhramanand Sahadeo by Power of Attorney
DE201400212719**

2nd Defendant

PHOULO ELLIOT

3rd Defendant

Before the **Honourable Madam Justice Mira Dean-Armorer**

Appearances:

Mr. Martin George and Ms. K. Koorban, attorney-at-law for the Claimant

Mr. Stephan Mungalsingh, attorney-at-law for the Defendant

RULING

1. On April 4, 2016, the Claimant Civil Projects Caribbean Ltd instituted these proceedings against three Defendants¹. The Claimant applied for damages for breach of contract against the first Defendant and damages for misrepresentation against the third defendant.
2. On March 15, 2018, proceedings were struck out as against Neal Elliot, as the holder of powers of attorney for the first and second Defendants, on the ground that the claim disclosed no cause of action against him. Phoolo Elliot, against whom the proceedings remained alive, had by this time departed this life and on May 14, 2018, the Court appointed Neal Elliot as the Legal Personal Representative to the Estate of the late Phoolo Elliot for the purpose of continuing these proceedings.

¹ Neal Elliot, acting as attorney for Phoolo Elliot, Neal Elliot, acting attorney for Bhramanand Sahadeo and Phoolo Elliot.

3. After the Claimant obtained extensions of time, for the purpose of serving their Claim Form and Statement of Case on the Legal Personal Representative of the Estate of Phoolo Elliot, the third Defendant filed a Notice of Application² seeking a declaration that the Claim be automatically struck.
4. In response, the Claimant applied by a Notice of Application filed on May 31, 2018 for an extension of time to apply for judgement in default of defence.
5. On November 11, 2009, I declared that the Claim was automatically struck out and I dismissed the Claim.
6. My reasons for so doing are set out below.

The Applications

7. By his Notice of Application filed on April 29, 2019 Neal Elliot, as the Legal Personal Representative (LPR) of the estate of Phoolo Elliot, applied for these orders:

“1. A declaration that the Claimant’s Claim Form and Statement of Case filed on April 4, 2016 and the Amended Claim Form and Statement of Case filed on the April 26, 2016 are automatically struck out pursuant to Rule 8.13(4) and/or Rule 8.13(5) of the Civil Proceedings Rules.”

8. The Notice of Application was supported by the affidavit of attorney-at-law Stephan Mungalsingh.
9. By his affidavit, Mr. Mungalsingh deposed that on May 14, 2018, he attempted to point out to the Court that the matter had already been struck out, since the Amended Claim Form and Statement of Case had not been served on the third Claimant.
10. The Claimant responded by filing another Notice of Application on May 31, 2019, seeking an extension of time to apply for judgement to be entered against the third defendant.
11. Although no affidavit supported the Claimant’s Notice of Application, the Claimant filed an affidavit in response to the application of the third Defendant. This affidavit, sworn by attorney-at-law Keshavi Koorban, set out the procedural history of this matter.

² Notice of Application filed on April 29,2018

Facts

12. Following the filing of the Claim Form and Statement of Case on the April 4, 2016, the Claimant Amended both their Claim form and Statement of Case, on April 26, 2016
13. A Defence was filed on behalf of Neal Elliot, in his capacity as the holder of Powers of Attorney for the first and second Defendants. On March 15, 2018, proceedings were struck out as against Neal Elliot, on the ground that no reasonable cause of action was disclosed against him.
14. It came to the attention of the Claimants that the third Defendant, Phoolo Elliot, had died on November 13, 2017. Accordingly, pursuant to the Claimant's application for substitution, Neal Elliot was appointed to represent the Estate of Phoolo Elliot.
15. The Court extended time to the July 13, 2018, for the service of the Claim Form and Statement of Case on Neal Elliot in his capacity a Legal Personal Representative of the estate of Phoolo Elliot.
16. When the matter came up for hearing, many months later, on October 4, 2018, the Court was informed that the documents, which had been served on Neal Elliot were the Claim Form and Statement of Case and not the amended Claim Form and Statement of Case.
17. Accordingly, on the October 4, 2018, the Court granted an order by consent, extending time to October 5, 2018 for the service of the Amended Claim and Statement of Case. On this occasion, the Court adjourned the proceedings pending settlement.
18. The matter was again adjourned pending settlement on January 21, 2019, however, attorney-at-law for Neal Elliot obtained the Court's permission to file a Notice of Application to strike out the Claim. This Notice of Application was filed on April 29, 2019 and is the subject of this ruling.

Law

Civil Proceedings Rules 1998

19. The relevant rules are set out below:

"8.13 (1) The general rule is that a claim form may only be served within four months after the date when the claim was issued.

(2) The period of service is six months where the claim form is to be served out of the jurisdiction.

- (3) *The period of service of an admiralty claim form in rem is twelve months.*
- (4) *A claim (including a counter-claim, ancillary claim and other similar claims) shall be automatically struck out if a claim form is not served within six months of the time fixed by paragraph (1), or extended for service.*
- (5) *Where a claim form is duly served and a defendant either does not enter an appearance or file a defence and the claimant who can, does not apply for judgment pursuant to Part 12 within six months of becoming entitled to do so, the claim (including a counter-claim, ancillary claim and other similar claims) shall be automatically struck out.*
- (6) *The striking out of a claim under this rule shall not prevent a party from filing new proceedings in respect of the same cause or matter within the relevant period of limitation, except that where a claim is twice struck out, the claimant shall obtain the permission of the court to file new proceedings in respect of such cause or matter.”*

Submissions

20. The Court considered submissions on behalf of the third Defendant and the Claimant respectively, as well as the Reply Submission, which was filed on behalf of the third Defendant, at the Court’s direction.
21. Mr. Mungalsingh, learned attorney-at-law for the Neal Elliot, relied on **Joyce Lakheeran v Health Sciences Ltd**³ and argued that once a claim is automatically struck out pursuant to Part 8.13 (5) **CPR**, the Court has no discretionary power to revive the Claim. The Claim could only be revived by obtaining relief from sanctions.
22. The Claimant relied on the Written Submissions of attorney-at-law, Martin George. Mr. George relied on **Ansa Merchant Banking v. Sarah Swan**⁴, which cited the Privy Council decision in **Isaacs v. Robertson**⁵. Mr. George argued that an order which was made by a court of unlimited jurisdiction must be obeyed unless and until it was set aside by the Court.

³ CA P-214 of 2018

⁴ CA P-234-236 of 2017

⁵ [1984] UKPC 22

23. On behalf of the Claimant, Learned Counsel made this submission:

“...it is the Claimant’s position that the Representative of the Estate of the third Defendant accepted service of Claim and has waived any right to make any application for the Claim to be struck out on the basis that it was not served within the four month period as stipulated in the Rules...”

24. At the Court’s direction, learned attorney-at-law for the third defendant replied to the Claimant’s submission in respect of the authority of **Ansa Merchant Bank v. Sarah Swan**⁶.

The Authorities

Grafton Isaacs v. Emery Robertson⁷

25. **Isaacs v. Robertson** was an appeal from the Court of Appeal from St. Vincent and the Grenadines. Robertson had applied for an interlocutory injunction to restrain the appellants from entering certain disputed land. This was granted on May 31, 1979. Two months later, on July 31, 1979, the Respondent, Robertson issued a motion for contempt. Glasgow J dismissed the motion for contempt. The appeal was allowed.

26. At page 3 of his judgment Lord Diplock identified the main attack by the appellant in these terms:

“The main attack by the appellant on the Court of Appeal’s judgment was based on the contention that as a consequence of the operation of order 34 Rule 11(a)... the order made by the High Court granting the interlocutory injunction was a nullity; so disobedience to it could not constitute a contempt”.

27. Lord Diplock noted that Glasgow J at first instance accepted the proposition of the appellant. Lord Diplock agreed with the Court of Appeal on this ground:

*“...the short and well-established ground that an order made by a court of unlimited jurisdiction....must be obeyed unless and until it has been set aside by the Court...”*⁸

⁶ CA P-234-236 of 2017

⁷ PCA No. 2 of 1983

⁸ PCA No. 2 of 1983 page 3

Ansa Merchant Bank v. Sara Swan

28. This was an appeal to the Court of Appeal, after the judge struck out three claims filed by Ansa Merchant Bank. It was on April 01, 2016, that three claims were filed by Ansa Merchant Bank against four defendants, one being Sara Swan.
29. The issue was that the claim forms and statements of case were only served on Sara Swan and the third Defendant. Sara Swan filed her Defence on July 27, 2016, but did not serve them on the bank until August 26, 2016. A month later, on September 26, 2016, Ansa Merchant Bank filed notices of withdrawal and discontinuance in all three claims.
30. However, the notices were not served on the respondent and it was common ground on the appeal that in those circumstances, the notices of withdrawal and discontinuance had no effect. No Case Management Conference (CMC) was fixed prior to May 01, 2017. On March 29, 2017, that the respondent, applied to have the notices of discontinuance and withdrawal set aside. A date was fixed by the Court, for the hearing of the issue of cost. The hearing came up on May 1, 2017, and the judge set aside the notices of discontinuance and ordered that the appellant pay the costs of the respondent's application. The date of the costs hearing was heard on May 25, 2017.
31. The hearing of May 25, 2017, the Judge ordered that the claimant pay to the respondent the costs of the applications in the sum of \$2,500.00 each; directed that written submissions be filed on all legal implications with regards to the appellant's decision to reconsider the notices of discontinuance and adjourned the CMC and her decision to 17th July 2017.
32. Sara Swan, in her written submissions in response to those filed by the Ansa Merchant Bank, submitted that the claims ought to be struck out on two grounds: pursuant to part 27.3(3) for a failure to apply for a case management conference within the time limited by the rule and, alternatively, pursuant to part 26.2 (1)(a) on the ground of failing to comply with part 27.3(3). It was at that point, for the first time that either of these two rules had been cited to the judge.
33. The judge failed to hear further submissions, and gave an oral decision, determining:
 - (i) *"an application to fix a case management conference ought to have been made by the appellant by the 26th September 2016;*

- (ii) (ii) 27th December 2016 was the last date by which the appellant ought to have applied for relief from the sanction of not applying to have a case management conference fixed;
- (iii) (iii) the notices of discontinuance filed on 26th September had no effect and therefore part 27.3 was unimpinged in its application and
- (iv) (iv) the appellant had failed to comply with that rule.”⁹

34. The judge therefore struck out the claims against Sara Swan and ordered that the Bank pay the costs of the claims on a prescribed cost basis up to the stage of the case management conference; quantified those costs and the costs payable to the respondent on its application to set aside the notice of discontinuance and ordered the payment of those costs as quantified.

35. Upon appeal, Justice of Appeal Jones had this to say:

“14. From the reasons given by the judge two points become clear. Firstly her decision to fix a CMC was a conscious decision made by her. The judge gives two explanations for this decision. According to her the appellant’s behavior was not in keeping with the overriding interest of dealing with cases justly, as mandated by CPR1.1; and fixing a CMC allowed her to exercise the extensive case management powers available to her under the CPR. This she thought was necessary so as to receive submissions from attorneys and, presumably, come to a decision “on the way forward, regarding costs and other procedural implications.” It is clear therefore that as far as the judge was concerned there was a valid exercise of her jurisdiction to fix a CMC. 15. Secondly her decision to strike out the claims was not pursuant to the automatic striking out under part 27.3(4), but rather in the exercise of her power under part 26.2(1)(a). The judge’s rationale being that up to that time the appellant had failed to make the necessary application pursuant to part 27.3 (3) and therefore failed to comply with a rule thereby bringing part 26.2 (1)(a) into operation. In doing so she specifically rejected the respondent’s argument that the claims were liable to be struck out pursuant to part 27.3 in favor of his alternative argument that the claims be struck out pursuant to part 26.2(1)(a).”¹⁰

⁹ CA P-234-236 of 2017 at paragraph 8 of the judgment

¹⁰ CA P-234-236 of 2017 at paragraph 14 of the judgment

36. Her Ladyship went on to say that:

“17. Part 26.2 (1)(a) permits a judge to strike out a claim if there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings. This is the rule applied by the judge.

18. It is common ground that the time for the appellant to have applied to have applied for a case management conference had long passed and so had the time limited by part 27.3(5) for making the application for relief from the sanction of dismissal contained in the rule.”¹¹

37. On assessing what the Court of Appeal should do in those circumstances, Justice of Appeal Jones gave the following ruling:

“34. The question for our determination here therefore is whether in all the circumstances, and in particular in the light of the order of 1st May 2017, the judge was correct in dismissing the claims because of the failure of the appellant to comply with part 27.3 of the CPR. In arriving at her decision to strike out the claims the judge made two errors: (i) she failed to appreciate that her order of the 1st May was an existing and valid order the effect of which was to grant the appellant relief from the sanction imposed by part 27.3 (4); and (ii) she failed to give the appellant the opportunity of addressing her on the effect of the two rules, part 27.3 and part 26.2(1) raised by the respondent in her submissions.

35. The effect of these errors is that the order of the judge dismissing the claims and granting the respondent’s costs of the claim cannot stand. Accordingly the appeal is allowed and the matter remitted back to the judge for further management.

36. The decision in this case is not one to which this Court has come to lightly. It flies in the face of the basic principles of efficiency and case flow management entrenched in the CPR. Ultimately however this case turns on its particular facts and in particular the principle that an order made by a court of unlimited jurisdiction stands until set aside”¹²

¹¹ CA P-234-236 of 2017 at paragraphs 17 and 18

¹² CA P-234-236 of 2017 at paragraphs 34-36

Joyce Lakheeram v. Health Sciences Consultants Limited¹³.

38. Part 8.13(5) and 8.13(5) **CPR**¹⁴ received the consideration of the Court of Appeal in ***Joyce Lakheeram v. Health Sciences Consultants Limited***¹⁵. The Court of Appeal considered the other leading cases on this issue being, ***Ansa Merchant Bank v. Sara Swan*** and an old English case by the name ***Isaac Robertson***.

39. In ***Joyce Lakheeram***, Justice of Appeal Mendonça, distinguished ***Ansa Merchant Bank v. Sara Swan*** and had this to say:

“In this case there is no provision in 8.13 (5) or any other rule that allows the court to act once the matter is automatically struck out. The court does not have any discretionary power in the rule to make an order that would revive the claim. What is required is an application for relief from sanctions and that was not made.”

40. I will consider the effect of 8.13 (5) first in the light of the ruling in ***Lakheeram***¹⁶. I have set out Part 8.13(5) for ease of reference:

“8.13(5) Where a claim form is duly served and a defendant either does not enter an appearance or file a defence and the claimant who can, does not apply for judgment pursuant to Part 12 within six months of becoming entitled to do so, the claim (including a counter-claim, ancillary claim and other similar claims) shall be automatically struck out.”

41. In these proceedings the Claim Form and Statement of Case were served on the representative of the estate of Phoolo Elliot on July 10, 2018. This was done in error since both the Claim Form and the Statement of Case had, by that time been amended more than two years before.

42. On the October 4, 2018 the Claimant’s obtained the court’s permission to serve the amended claim form and statement of case.

43. The third Defendant ought to have filed his defence within 28 days of October 4, 2019. That is to say, by November 1, 2018. After that date, the Claimant would have been entitled to enter judgment.

¹³ CA/CIV P214 of 2018

¹⁴ Civil Proceedings Rules 1998

¹⁵ CA/CIV P214 of 2018

¹⁶ CA/CIV P214 of 2018

44. Accordingly, by Part 8.13(5) **CPR**¹⁷ the Claimant should have applied to enter judgment within 6 months, which would take us to May 1, 2019.
45. This was clearly not done, and on the May 31, 2019, the Claimant applied to the Court for an extension of time to enter judgement without applying for any relief from sanctions.
46. By the reasoning of Mendonça JA in **Joyce Lakheeram**¹⁸, the Court has no power to revive the claim when it has been automatically struck.
47. Accordingly, in these proceedings it is my view that under the authority of **Joyce Lakheeram**¹⁹ these proceedings have been automatically been struck by the operation of part 8.13(5). Although my ruling on Part 8.13(5) makes it unnecessary for me to proceed to consider 8.13 (4), I proceeded nonetheless to consider the effect of this rule.
48. It was a matter of the procedural history of these proceedings that the Claim Form and Statement of Case, filed on April 04, 2016. These were amended on April 26, 2016. The Amended Claim Form and Statement of Case should have been served on the third Defendant by August 26, 2016. By Part 8.13(4), the Claim would be automatically struck out if there has been no service within six (6) months, that is to say by February 04, 2017.
49. The ruling of the Court of Appeal in **Lakheeram** was pellucidly clear: that a claim once automatically struck cannot be revived unless the Claimant seeks and obtains relief from sanctions. In such a situation, it is my view that the permissive order of the Court would have had no effect, without an order granting relief from sanctions. The Court's order would have been equivalent to beating the metaphorically dead horse.
50. Accordingly, it was my view that the Claim was automatically struck out from February 04, 2017 and could not be revived by the Court's extensions of time.
51. The question which arose in these proceedings was whether the extensions which were granted by the Court had the effect of reviving the Claim which had been automatically struck out.

¹⁷ Civil Proceedings Rules 1998

¹⁸ CA/CIV P214 of 2018

¹⁹ Ibid

52. I therefore rule that the claim is automatically struck out and the Claimant must pay to the third Defendant the cost of and associated with this action.

Date of Delivery: November 11, 2019

Justice Mira Dean-Armorer