

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2016 - 00073**

**Between**

**KISHORE BEHARRY**

**(TRADING AS BEHARRY EARTHWORKS AND GENERAL SERVICES)**

**Claimant**

**And**

**TOYOTA TRINIDAD AND TOBAGO LIMITED**

**Defendant**

**Before the Honourable Mr Justice Ronnie Boodoosingh**

**Appearances:**

Mr Matthew Gayle instructed by Mrs Bina Maharaj for the Claimant

Mr Faarees Hosein for the Defendant / Mr Roger Kawalsingh for the Defendant on the Application

Date: 5 April 2017

## **Ruling**

1. The parties were to file and exchange witness statements by 6 February 2017. On that day, in the afternoon period, counsel for the defendant notified the court's Judicial Support Officer, through email, that the defendant's courier was on his way to file the witness statements but there was delay caused by road conditions which would prevent the courier from making it to the court before the close of business that day.
2. The email received by the court's Judicial Support Officer was not an application for an extension of time, nor was it an application to vary the existing order of the court. The email was in fact a prompt notification of the fact that the defendant would not be able to file their witness statements on time.
3. At the next hearing, which was just a couple of days after, the defendant was ordered to file evidence in support of an application. The defendant filed an application for an extension of time. The correct application to be filed would have been a relief from sanctions application. The court is, however, entitled to consider the application filed applying the criteria under Part 26.7 of the Civil Proceedings Rules, as amended, to see whether it crosses the threshold for relief from sanctions to be granted. To hold otherwise, would require the defendant to file an additional relief from sanctions application. This would not be in keeping with the overriding objective in terms of efficiency and cost.
4. Part 26.7 provides:

### **“Relief from sanctions**

- 26.7** (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
- (2) An application for relief must be supported by evidence.
- (3) 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 breach; and
  - (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

- (4) 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 attorney;
  - (c) whether the failure to comply has been or can be remedied within a reasonable time; and
  - (d) whether the trial date or any likely trial date can still be met if relief is granted.
- (5) 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."

5. I will now go on to consider the requirements which must be examined separately. Additionally, the case of **Rowley v Ramlogan, CA P215 of 2014**, guides the court's approach. Rule 1.1, which discusses the overriding objective of the CPR, is also relevant. Rule 1.1 provides:

- "(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) Dealing justly with the case includes—
  - (a) ensuring, so far as is practicable, that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with cases in ways which are proportionate to—
    - (i) the amount of money involved;
    - (ii) the importance of the case;
    - (iii) the complexity of the issues; and
    - (iv) the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously; and
  - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

### **Was the application made promptly?**

6. Counsel for the defendant informed the court by way of email dated 6 February 2017 that he would not have been able to file the witness statements by the date stipulated in the court order as a result of difficulties experienced by his courier. He asked that the order of the court be varied to accommodate filing on the next day. The court permitted filing on the

next day, mindful that the next hearing was just a couple of days later. The application was not in its proper form as it was sent via email. Nonetheless, counsel for the defendant contacted the court as soon as it was possible. In the circumstances it would likely not have been feasible to file an application for an extension on the same afternoon. At the next hearing, counsel for the defendant was instructed to prepare the application in its proper form, to which counsel complied. I find that in the circumstances, there is no issue of lack of promptness.

### **Was the failure to comply intentional?**

7. Having read the submissions of both sides, I find no reason to conclude that the failure to comply was intentional. Counsel for the defendant submits that events as they unfolded were outside of the control of the attorney and definitely not the fault of the defendant. The courier was on his way to file. It cannot be said in those circumstances that the failure to comply with the order was intentional.

### **Is there a good explanation for the breach?**

8. Counsel for the defendant has provided an explanation for his failure to file his witness statement within the specified time. A good explanation does not mean the complete absence of fault: **Rawti Roopnarine and another v Harripersad Kissoo and others C.A. No. 52 of 2012**. In that case, Mendonca J.A. further noted that when considering the explanation for the breach, it must not be subjected to such scrutiny as to require a standard of perfection. What is required is a good explanation and not an infallible one: **AG of Trinidad and Tobago v Miguel Regis C.A. No. 79 of 2011**.
9. The explanation afforded by counsel for the defendant sought to provide reasons for the inability of the courier to get to the court before the close of business that day. I find the explanation provided to be a good one in the circumstances and satisfies this requirement. Perhaps knowing the traffic situation in this jurisdiction when anything can happen at any time, the courier may have left earlier. Thus this is not a perfect reason, but one which may be acceptable all things considered.

**Has there been general compliance by the defendant?**

10. Counsel for the claimant contends that the defendants have failed to comply with some of the orders of the court. The claimant also identifies specifically, that one of the witness statements was signed in final form on 7 February 2017, when the witness statements should have been filed on 6 February 2017, thereby making compliance of the court's order impossible. Counsel for the defendant has attempted to explain this position. I find counsel's explanation weak, but not so much so as to rule that there has not been general compliance on his part.
11. Further, the claimant raised the issue that the defendant sought an extension of time to file the agreed list of documents, which was granted by this court. Further, counsel for the claimant contends that both sides were unable to finalise the agreed list and imputes fault on the part of counsel for the defendant. This conduct does not amount to non-compliance. The order required the parties to file an agreed list, if any. The fact that both parties could not, for whatever reason, come to an agreement, meant that no **agreed** list could be filed.
12. Compliance does not mean perfect compliance in every way. Nonetheless, I find that there was general compliance with the orders of the court.

**Is it in the interest of the administration of justice that relief be granted?**

13. Denial of this application means that no witness statements will be filed on behalf of the defendant. The defendant will have no evidence to defend this claim brought against it. It is in the interest of this justice for this court to decide matters fairly, and to do so it must be based on the evidence before it. Otherwise this will cause serious prejudice to the defendant.
14. Therefore, a denial of the defendant's evidence, particularly in these circumstances, do not serve the interests of justice. I find that it would serve the interests of justice to allow for the statements to be admitted: **Rowley v Ramlogan** applied. To deny the defendant the opportunity to advance evidence to the court would not be a proportionate application of the rules for being late by one day.

**Was the failure to comply due to the party or his attorney?**

15. Based on the submissions of the defendant, the events as unfolded on 6 February 2017, were not as a result of the defendant, nor his attorney. The events appeared to be outside of their control. This point has not been refuted by the claimant. Perhaps the busy schedule of counsel for the defendant necessitated the application for an extension of time. However, no blame can be laid at the defendant's feet.

**Can the failure to comply be remedied within a reasonable time?**

16. As stated previously, the court was promptly notified of the defendant's inability to file the statements on the stipulated date. The defendant then proceeded to file the witness statements the following day, believing that he had obtained the necessary variation of the court's order. At the next hearing, the defendant was asked to file the application supported by evidence. This was done within the time frame stipulated. In the circumstances, the failure to comply was remedied within a reasonable time. Thus the breach has already been remedied.

**Can the trial date or any likely trial date be still met should relief be granted?**

17. No trial date has been set. Therefore no timelines of the court has had to be altered. There will be no delay.

**The Overriding Objective**

18. Having regard to the overriding objective of the CPR as set out by Part 1.1, this court is required to deal with cases justly. A failure to admit the statements will not leave the parties on equal footing. Requiring the defendant to file an additional application will not save expense. Then, on the principle of proportionality, this case is quite important to the parties and the matter must be dealt with expeditiously. This requires an examination of the current application by applying Part 26.7 and not requiring the defendant to file a new application.

And further, it requires this court to determine this application promptly in order that further directions can be given and have the matter progress.

### **Prejudice**

19. Failing to allow the statements would clearly lead to prejudice on the part of the defendant. There is no alternative where allowing the statements would lead to prejudice on the part of the claimant. Further, there is no delay to cause any prejudice to either party.

20. In the circumstances, I find that the defendant's application has met the threshold as required by Part 26.7 of the CPR. Therefore, the application is granted and I will allow the defendant's witness statements to be used at the trial.

21. There will be no orders for costs.

Ronnie Boodoosingh

Judge