REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-01614, HCA 91 of 2005

BETWEEN

REED MONZA (TRINIDAD) LIMITED
REED PLASTICS LIMITED
PETPAK LIMITED **Claimants**

AND

PRICEWATERSHOUSE COOPERS LIMITED
1ST Defendant
PRICEWATERHOUSE LIMITED
2ND Defendant
HENRY PETER GANTEAUME
3RD Defendant
BRIAN HACKETT
4TH Defendant
RBTT MERCHANT BANK LIMITED
5TH Defendant

Before Hon. Madame Justice J. Charles

Appearances:

For the Claimants: **Mr. Stuart Young**

For the Defendant: **Mr. Mark Morgan**
(For the 1st, 2nd, 3rd and 4th Defendants)
Mr. Hamel Smith
(For the 5th Defendant)

Date of Delivery: 13 January 2011

JUDGMENT

[1] By an application filed on the 26th November 2009, the Claimants sought the following Orders:

(i) An extension of time from the 31st August 2009 to 31st December 2009 for the payment of security for Costs in the sum of Two hundred and fifty thousand dollars ($250,000.00) to the First, Second, Third and Fourth Defendants and in the sum of Two hundred and fifty thousand dollars ($250,000.00) to the Fifth Defendant.

(ii) That the matter be reinstated upon payment of the aforementioned sums.

CHRONOLOGY OF PROCEEDINGS

[2] By Writ of Summons filed on 4th February 2005 the Plaintiffs (hereinafter called Claimants) claimed against the First and Second Defendants the sum of Sixty Three Thousand Dollars ($63,000.00) being the amount of a secret commission allegedly paid to them by the Fifth Defendant in connection with a bond transaction, fees paid to them by the Claimants for services rendered in connection with the bond transaction, damages for breach of fiduciary and/or contractual duty and damages for professional negligence.

[3] As against the Third and Fourth Defendants the Claimants claimed damages for professional negligence and damages in tort for fraud or equitable compensation for dishonestly procuring and/or inducing and/or assisting and/or participating in the First and Second Defendant's alleged breaches of fiduciary duty.

[4] By their Defence filed on 7th October 2005 the First, Second, Third and Fourth Defendants denied that the Claimants are entitled to the reliefs sought in the said Writ of Summons and Statement of Claim or at all.

[5] By Summons filed on 27th September 2007 the First, Second, Third and Fourth Defendants applied to the Court for an Order pursuant to **Order 23 Rule (1) (1) (9)** of the **Rules of the Supreme Court of Judicature (RSC)** of Trinidad and Tobago that the Claimant do pay security for costs to them in the sum of One million, five hundred and eleven thousand, three hundred and twenty five dollars and fifty cents ($1,511,325.50) in the event that the Claimants are unsuccessful in their litigation and that all further proceedings be stayed until the security is given.

[6] By Summons filed on 28th November 2008 the Fifth Defendant also applied to the Honourable Court for an Order pursuant to **Order 23 Rule (1) (1) (9)** of the **RSC** that the Claimants do give security for Costs in the sum of $1,000,000.00 to the Defendant in the event that their litigation is unsuccessful and that all further proceedings be stayed until the security is given.

[7] On 9th April 2009 the application was determined before Mr. Justice Gregory Delzin who ordered inter alia that:

1) The Claimants pay security for Costs to the First, Second, Third and Fourth Defendants in the sum of Two hundred and fifty thousand dollars ($250,000.00) in total with twenty-eight (28) days of the date of the Order.

2) The Claimants pay security for Costs to the Fifth Defendant in the sum of Two hundred thousand dollars ($200,000.00) with twenty-eight (28) days of the date of the Order.

[8] On the 5th May 2009 the Claimant filed a Summons seeking an extension of time to 31st August 2009 within which to pay the security for Costs pursuant to the aforementioned Order of the Honourable Mr Justice Gregory Delzin.

[9] At a Case Management Conference on the 26th May 2009 before Justice Delzin an Order was made granting the Claimants' application that time be extended to the 31st August 2009 for the payment by then of the security for Costs; if payment not made the proceedings to be stayed.

[10] The Claimants did not comply with the Order by the deadline of 31st August 2009 and on 2nd September 2009 filed an application for a further extension to the 23rd October 2009 by which to pay the security for Costs aforesaid. The return date of hearing for this application was the 8th October 2009 before this Court. On that date neither the Claimants nor their attorneys attended Court and no explanation was forthcoming for their absence. Attorney for the Fifth Defendant was present. Mr. Morgan for the Second, Third and Fourth Defendants was absent. This application was dismissed.

[11] At a Case Management Conference on 15th October 2009 Attorneys for the Second, Third, Fourth and Fifth Defendants as well as for the Claimants were all present. It was accepted by all that the Case Management Conference could not proceed since the proceedings were stayed by the Claimants' failure to pay security for Costs. The Case Management Conference was adjourned to 1st December 2009 to allow the Claimants to take any steps it considered necessary in light of the dismissal of their second application for an extension of time.

[12] On 26th November 2009 about six (6) weeks after the last Case Management Conference, the Claimants filed a third application for an extension of time to 31st December 2009 within which to pay security for Costs to the Defendants pursuant to the Order of Justice Delzin. This application did not seek relief from sanction.

THE SUBMISSIONS

[13] On 6th January 2010 this application came up for hearing. Both Mr. Morgan on behalf of the First, Second, Third and Fourth Defendants and Mr. Hamel-Smith on behalf of the Fifth Defendant resisted the application.

[14] The Claimants' application was supported by the affidavit of one Robert Gransaull, a director of the Claimants. Mr. Young submitted that the failure of attorneys to attend the hearing of the application filed on 2nd September 2009 was due to an administrative mix-up caused by the departure of instructing attorney from practice as well as his

mistaken belief that the matter was scheduled for hearing on 15th October 2009. He did state, however, that he became aware that the application had been dismissed on this date. No explanation was given for the failure of the Claimants to attend the hearing. No explanation was given, either in the grounds or in the affidavit of Mr. Gransaull for the failure to file a further application before six (6) weeks elapsed between 15th October 2009 to 26th November 2009.

[15] The reasons advanced for the failure to comply with the Order for the payment of security of Costs were as follows:

(i) that Mr. Gransaull had had difficulty in raising finances since the Claimants were no longer in operation and had little or no assets.

(ii) that in or around August 2009 a company, James W. Sneddon Limited passed a resolution to loan Mr. Gransaull the sum of Four hundred and fifty thousand dollars ($450,000.000) in order to satisfy the Order for the payment of security for Costs. It was expected that the monies would have become available by the second week of October 2009. The efforts to obtain the financing through Sneddon & Company failed.

[16] His wife who had a lease from the State for a parcel of land which was unencumbered sought and obtained a loan for Republic Bank Limited in the sum of Five hundred thousand dollars ($500,000.00) from which she intended to loan him the sum of Four hundred and fifty thousand dollars ($450,000.00) in order to satisfy the Order. It was expected that the loan would be disbursed sometime in December 2009 hence the request for an extension to 31st December 2009.

[17] At the date of hearing of the application the sum of Four hundred and fifty thousand dollars ($450,000.00) for security for Costs was paid into court.

[18] Additionally, the Claimants, during the time between when Delzin J made his Order on 26th May 2009 and the middle of August 2009 sought independent legal advice as to the

viability of their action herein. They received advice "at the end of August 2009" that the claim should be pursued.

[19] Mr. Young also submitted that the Defendants would not be prejudiced if the extension were granted. He further submitted that there was a good explanation for the breach that they had otherwise complied with all other Orders and directions of the Court and that the application had been made promptly.

[20] On behalf of the First, Second, Third and Fourth Defendants, Mr. Morgan submitted that the extension should not be granted because the Claimants were in breach of **Civil Proceedings Rules** (CPR) **Rule 26.7 (1)** to **(3)** in that they failed to satisfy any of the preconditions contained therein.

[21] Mr. Morgan argued that this application was not only one for an extension of time but also for relief from sanctions. As such, the Claimants had to satisfy the preconditions for relief under **Rule 26.7.**

[22] He submitted that that the Claimants had to show that the application had been made promptly in accordance with **Rule 26.7 (1)**. On the facts of this case, Counsel for the Claimants became aware of the dismissal of this application dated 2nd September 2009 on 15th October 2009 yet only filed the instant application six (6) weeks thereafter. This does not satisfy the requirement for promptness under the regime of the Civil Proceedings Rules. He relied upon the authority of **Trincan Oil Limited and others v Chris Martin Civ. App. No.65 of 2009** to urge the Court to dismiss the application on this ground.

[23] Mr. Morgan further submitted that the Claimants were also in breach of **Rule 26.7 (2)** and **3 (b)** in that no explanation was forthcoming for the delay of six (6) weeks between the Claimants' knowledge of the dismissal of the application of 2nd September 2009 to the filing of the new application.

[24] With respect to the application of 2nd September 2009 Mr. Morgan submitted further that the First, Second, Third and Fourth Defendants had not been served.

[25] That notwithstanding Counsel also argued that the explanation given for the failure to comply with the Order for payment of Security for Costs on or before 31st August 2009 did not meet the standard as required under **Rule 26.7** in that:

(i) there was no evidence of any effort by the Claimants to obtain the money between May and the middle of August 2009 when Sneddon agreed to loan Gransaull the money;

(ii) by the middle of August 2009 Gransaull know that he would not be able to comply with the Order yet only made an application on the 2nd September 2009;

(iii) the Claimants' action of seeking and obtaining legal advice as to the viability of the claim in mid August 2009 was evidence of a deliberate act by the Claimants to delay compliance with Justice Delzin's Order until satisfied that they had a case;

(iv) no explanation had been furnished as to why Sneddon Limited had not finalized the loan arrangements;

(v) the Claimants had not complied with all other rules/directions of the Court;

(vi) the Claimants also failed to indicate when Mrs. Gransaull applied for the Republic Bank loan or when Mr. Gransaull knew that the financing from Sneddon Limited was unsuccessful.

[26] Mr. Hamel-Smith adopted Mr. Morgan's submissions except that he conceded that the claimants' application of 2nd September 2009 had been made promptly.

THE LAW

[27] In **Trincan Oil Limited and others v Chris Martin,** the Court of Appeal reviewed an Order made at a Case Management Conference granting Claimants relief from sanction and extending the time for the filing of witness statements. The application for this extension was the second made by the Claimants some four (4) weeks after the deadline for the last extension. Jamadar J.A., in delivering the judgement of the Court, explained the operation of **Rule 26.7** of the CPR thus;

> *"The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied."* (p.6, para. 13)
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> *"No relief would be granted if the threshold test were not surmounted."* (p.7, para. 16)
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> *"First, this application must have been made promptly. It was made some one and one-half months after the period for the filing of the witness statements and no explanation for this delay had been given. From the evidence it is clear that even before the 15th December, 2008 it was known to the Claimant that he would be unable to file all of his witness statements by that date. An application for an extension of time ought to have been made before that date… One and one-half months, in the absence of any explanation, is not prompt in the context of the time lines of the CPR, 1998 and in the context of the orders that were made by*

the judge, and in particular in light of the order made on the 21st November, 2008." (p.9, para. 24)

"Secondly, there being no explanation for the delay in filing the application the application was starved of necessary evidence as required. In any event the evidence that was given was lacking in sufficient detail." (p.10, para. 25)

[28] Further, **Pendragon International Limited and Others v Bacardi International Limited Civ. App. No. 3 of 2007 (C.A. Anguilla)**, the Court stated at p. 7, para. 11:

"It is noteworthy, however, that in Richard Frederick v Owen Joseph and Others, this court noted that in Sayers v Clarke Walker (a firm), the English Court of Appeal stated that where a rule stipulates the time within which a procedural step is to be taken, although no sanction is expressly stated for failure to comply with that rule, failure to comply within the time stipulated would have the same effect as if a sanction were imposed because of the consequence of the court's possible refusal or unwillingness to grant an extension for failure to comply."

[29] In **Dominican Agricultural and Industrial Development Bank v Mavis Williams Civ. App. No. 20 of 2005**, the Court of Appeal heard an appeal against the extension of time for appealing against a judgment of the High Court in favour of the respondent. The reason given by the appellant for failing to file its appeal on time was that a decision on whether to appeal was deliberately deferred until after the assessment of damages. Upon completion of the assessment where the award of damages to the respondent was substantial the appellants sought to proceed with the appeal. In delivery of the decision of the Court, Barrow J.A. opined:

"The only inference that I can draw from the fact that the appellant acted after taking legal advice is that the appellant deliberately disregarded the rule that imposed a time limit for appealing. Integral to that inference

is the conclusion that the appellant also disregarded the consequence." (para. 12)

"Such conduct, to my mind, is an abuse of the process of the court because the appellant has chosen to disregard the imperative created by the rules to appeal within a stated time and instead to substitute its own decision as to the time within which it will appeal. Such conduct threatens the very foundation of the new ethos that CRR 2000 introduced, which includes the fundamental principles that the court must control the pace of litigation and no longer the parties and that casual non-compliance with clear rules must not be tolerated." (para. 18)

"The court is no longer able to exercise, as it did in the past, an "unfettered discretion" and relieve against sanctions where the defaulter fails to satisfy a particular criterion. The court has no power to overlook inordinate delay of intentional compliance." (para. 19)

CONCLUSION

[30] Having considered the evidence and submissions in this case I make the following findings:

a) The Claimants' application dated 26th November 2009 seeking relief from sanctions and an extension of time in which to pay security for Costs do not meet the requirements for promptness as mandated by Civil Proceedings Rules 26.7 (1) in that the application was filed some six (6) weeks after counsel for the Claimants became aware that the earlier application dated 2nd September 2009 had been dismissed on 8th October 2009 for non appearance of Claimants and counsel.

b) That no explanation has been furnished to the Court for the delay in seeking relief from sanction and an extension of time for the payment of security for costs between 15 October 2009 to 26th November 2009.

c) The explanation provided for non compliance with the Order of Delzin J dated 26th May 2009 was lacking in sufficient detail in that no evidence was provided in relation to:

(i) The efforts by the claimants to obtain the money between May and the middle of August 2009 when Sneddon Limited agreed to lend Gransaull the money

(ii) The reason why Sneddon Limited had not finalised arrangements for the loan

(iii) When did Gransaull first become aware that financing from Sneddon Limited was no longer forthcoming.

(iv) When did Mrs. Gransaull apply to Republic Bank for the loan to satisfy the payment for security for costs.

d) That the Claimants are also in breach of **Rule 26.7 (3) (c)** in that they have not generally complied with all other rules, practice directions, orders and directions.

[31] The Court notes that this was the Claimants' third application for an extension of time within which to comply with the Order of Delzin J dated 5th April 2009. They failed to meet earlier deadlines on three occasions in the circumstances detailed above.

[32] The Court also took note of the fact that after the extension was given on 26th May 2009 to 31st August 2009 the Claimants sought legal advice as to the viability of their claim. They received advice at the end of August that the Claim should be pursued.

[33] To my mind a reasonable inference to be drawn from this item of evidence is that the Claimants took a decision to await advice on whether to continue with this action and that this occasioned further delay in complying with Delzin J's Order of 26th May 2009. In the circumstances I have also come to the conclusion that the failure to comply with the Order of Delzin J was intentional.

[34] Having regard to my findings above and applying the principles in **Trincan Oil Limited v Chris Martin** and **Pendragon International Ltd. V Bacardi International Ltd.**, I therefore hold that the application is dismissed with costs payable by the Claimants to the Defendants.

JOAN CHARLES
JUDGE