REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-04374

BETWEEN

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

Claimant

AND

SUPER INDUSTRIAL SERVICES LIMITED

1st Defendant

RAIN FOREST RESORTS LIMITED

2nd Defendant

Appearances:

For the Claimant:	Ms. Deborah Peake S.C., Mr. Jason K. Mootoo Instructed by Ms. Alana Bissessar
For the First Defendant:	Mr. Neal Bisnath Instructed by Ms. Lydia Mendonça
For the Second Defendant:	Mr. Ramesh Lawrence Maharaj S.C., Mr. Navindra Ramnanan Instructed by Ms. Odyllyan Pierre
Delivery Date:	8th February 2019

RULING

[1] By Notice of Application filed on 27 March 2017 ("the NOA"), the Claimant ("NGC") sought the following orders:

a) that the time for making the NOA be extended;

b) that the NOA be fixed for hearing, if necessary, after the determination of NGC's appeal to the Judicial Committee of the Privy Council ("JCPC" or "the Board") against the decision of the Court of Appeal ("CA decision") dated 23 November 2016 in Civil Appeals Nos. P186 and P190 of 2016 whereby the Court of Appeal ("CA") ordered:

i. that the instant claim filed on 24 December 2015 ("the Claim") was struck out pursuant to the provisions of **Rule 27.3(4)** of the **Civil Proceedings Rules 1998**, as amended, ("**the CPR**") and the action referred back to this Court for a hearing as to an inquiry as to damages pursuant to the undertakings given by NGC on the injunctions granted by this Court and for the assessment of costs; and

ii. that NGC pay SIS's and RFRL's costs of the appeals being two-thirds of the costs to be assessed in default of agreement; and

c) at the hearing of the NOA NGC be granted relief from the sanction of the striking out of the Claim by operation of **Rule 27.3** of the **CPR**.

[2] On 16 July 2018, NGC's appeal against the decision of the Court of Appeal was dismissed by the JCPC with the result that the instant claim stood automatically struck out pursuant to the provisions of **Rule 27.3 (4)** of the **CPR**. Pursuant to NGC's request, the NOA came on for hearing later that same day and directions were given by the Court for the filing of affidavits and submissions relative to that application. At that hearing, the Court,

after entertaining submissions from Counsel for the respective parties, also granted a freezing injunction against SIS and an injunction against RFRL, pending the hearing and determination of the NOA. The terms of those injunctions are in all material respects identical to those previously granted against SIS and RFRL which remained in place pending NGC's said appeal to the JCPC.

[3] With respect to the evidence before the Court on the NOA, NGC filed three affidavits, namely, the affidavits of Alana Bissessar filed on 27 March 2017 ("the First Bissessar Affidavit"), 16 July 2018 ("the Second Bissessar Affidavit") and 30 August 2018 ("the Third Bissessar Affidavit"). On 6 August 2018 Rainforest Resorts Limited ("RFRL") filed an affidavit of Winston Siriram in opposition to the NOA ("the Siriram Affidavit"). Super Industrial Services Limited ("SIS") followed suit on 9 August 2018 filing an affidavit of Romila Marajh in opposition ("the Marajh Affidavit").

Background History of the Claim

[4]

a) On the 23rd December, 2015 NGC made an ex parte application for and obtained a freezing order (Before the Hon. Mr. Justice Seepersad) up to a limit of 180 million dollars against SIS. The freezing order was obtained in support of an intended claim by NGC in arbitration against SIS for losses arising from the termination of a contract between NGC and SIS for the construction by SIS of a water recycling plant ("the Contract") and an injunction against RFRL. The injunction against RFRL restrained it from dealing with property and assets of SIS, the subject of securities granted to RFRL by SIS.

b) The securities consisted of 4 mortgages over 4 properties owned by SIS and a debenture over all the assets of SIS. The mortgage deeds were dated the 5th March, 2015 but registered in November 2015 to secure sums totaling TT 230 million dollars. The debenture was dated 12th November 2015 and registered on 18th November, 2015, to secure a sum of TT 100 million dollars.

c) On the same day NGC issued a Claim Form seeking declarations and Orders setting aside the said mortgages and debentures.

d) On the 4th April, 2016 the Claim was automatically struck out pursuant to **Rule 27.3 (4)**[1].

e) On the 31st May 2016, RFRL executed releases of the securities and on the following day registered the releases (hereinafter referred to as "the said releases")

f) At a hearing on the 10th June, 2016 the Court ruled that the Claim was not automatically struck out and continued the freezing order over SIS's assets up to a sum of TT$ 180 million dollars until determination of the intended arbitration proceedings and restrained RFRL from dealing with and disposing of the securities. The Court also ordered that the said releases be expunged from the records of the Registrar General.

g) By Notice of Appeal dated the 14th June, 2016 the Defendants appealed against the judge's decision that the Claim had not been struck out pursuant to **Rule 27.3(4)** (hereinafter referred to as "the strike out appeal").

[1] **National Gas Company of Trinidad and Tobago v SIS & anor** [2018] UKPC 17

h) On the 23rd November, 2016 the Court of Appeal allowed the Strike out appeal and ordered that the Claim was struck out.

i) The Claimant appealed the decision of the Court of Appeal dated the 23rd November, 2016 (allowing the strike out appeal) to the Privy Council (JCPC).

j) On the 16th July, 2018 the JCPC delivered judgment dismissing the Appellant's (NGC's) appeal; as a result, the order of the Court of Appeal on the 23rd November, 2016 that the Claim was in fact struck out pursuant to **Part 27.3 (4)** was upheld.

Extension of Time

[5] The first issue that falls to be determined on the Application is whether, in the circumstances of this case, NGC ought to be granted an extension of time for the making of its application for relief from the sanction of its claim having been automatically struck out.

[6] **Civil Proceeding Rules 27.3 (3), (4), (5), (6)** under the rubric Case Management Conference provides as follows:

> *(3) If the court does not— (a) dispense with a case management conference under rule 27.4(1) and give directions under rule 27.4(2); or (b) give notice of a case management conference within— (i) 14 days of the filing of a defence, where there is only one defendant; (ii) 14 days of the filing of the last defence, where there are two or more defendants; or (iii) 14 days of the expiration of the period for the filing of the last defence, where there are two or more defendants, the claimant shall within 28 days of the relevant period identified in*

subparagraph (b) apply for a date to be fixed for the case management conference.

(4) If the claimant does not so apply, the claim shall be automatically struck out.

(5) The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4).

(6) In considering whether the court grants relief, the court shall have regard only to whether the defendant has suffered any prejudice and rule 26.7 shall not apply.

[7] Pursuant to this rule the claim herein was automatically dismissed on 4th April 2016 and NGC had until 23rd May 2016 to seek relief from the sanction imposed by the rule. This however is without prejudice to the power of the judge, in an appropriate case, to extend the time for making such an application pursuant to **Part 26.1 (d)**.

[8] It is to be noted that the sole consideration for the Court in deciding an application pursuant to sub paragraph 4 is whether the Defendant has suffered any prejudice; the rules specifically provides that the sanctions regime set out in **CPR 26.7** shall not apply.

Extension of Time - Claimant's Submissions

[9] The Claimant submitted that in determining the issue of whether it should be granted an extension of time to file this application for relief from sanction, the Court should have regard to the overriding objective and the issue of prejudice to the Defendant. Applying the case of **Rowley v**

Ramlogan[2] the Claimant further argued that the weight to be given these factors was a matter for the Court, having regard to the circumstances of the case. The Claimant argued further that the Court should exercise its discretion having regard to the overriding objective of the **CPR** outlined in **Rule 1.1(1)**[3] – to deal with cases justly. The factors to be taken into account in dealing with cases justly are enumerated in **CPR 1.1(2)** and are as follows:

> *"(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."*

[10] The Claimant, relying on the case of **Roland James v The Attorney General of Trinidad and Tobago**[4]**,** contended that the factors set out in **CPR 26.7(1)**, **(3)** and **(4)** "would generally be of relevance to the Application and should be considered" in deciding the application for an extension of time[5].

[2] Civ App 215 of 2014
[3] "The overriding objective of these Rules is to enable the court to deal with cases justly."
[4] Civ App No. 44 of 2014
[5] Claimant's Submissions filed on 28 Sep 2018, para. 12

The Factors under CPR 26.7(1), (3) and (4)

Promptness

[11] The Claimant argued that it acted promptly in filing this Application since:

(a) From 26 February 2016 to 25 May 2016, after the Statement of Case and Defences of the parties had been filed, SIS and NGC engaged in 'without prejudice' discussions which were initiated by the First Defendant with a view to resolving the claim and, to that end, with the concurrence of RFRL, made repeated requests to the Court to adjourn the matter to facilitate such discussions, with the last such adjournment being granted to 21 June 2016;

(b) It was not until the letter dated 6 June 2016 from SIS's attorneys at law that any suggestion that the claim might have been struck out arose and that prior thereto NGC and its attorneys at law were of the genuine belief that it was wholly unnecessary for the Court to have given further "notice" of a case management conference and/or for NGC to apply for a date to be fixed for a case management conference having regard to the fact that at all material times there was already in place a date of hearing for the matter fixed by the Court;

(c) Further, immediately following the assertion made by SIS's attorneys on 6 June 2016 that the Claim had been automatically struck out, NGC filed a relief from sanctions application on 7 June 2016 ("the First Relief from Sanctions Application");

(d) The First Relief from Sanctions Application was eventually withdrawn by NGC on 10 June 2016 immediately following the

Ruling of Charles J on that day that the claim was not automatically struck out, which rendered the Application otiose;

(e) Thereafter, until 23 November 2016, the day on which the Court of Appeal Decision was delivered, Charles J's ruling that the claim had not been struck out remained operative;

(f) On the said 23 November 2016, the Court of Appeal, (Narine JA, Jones JA and Rajkumar JA) granted an immediate interim stay of the operation of its order[6];

(g) That initial stay of the Court of Appeal was continued without interruption from time to time by various panels of the Court of the Appeal (Jamadar JA, Moosai JA, Pemberton JA) with the panel which heard NGC's application for final leave to the JCPC (Archie CJ, Moosai JA, des Vignes JA), continuing the stay until the hearing and determination of NGC's appeal to the Board[7]; and

(h) Notwithstanding the existence of the stay, out of an abundance of caution and entirely without prejudice to its position on the appeal to the JCPC, NGC filed the NOA on 27 March 2017, seeking *inter alia* an order that it be fixed for hearing (if necessary) after the determination of the appeal to the Board.

[12] The Claimant argued further that it could not reasonably be said that it was guilty of culpable delay in that:

(a) NGC was conscientiously engaging in "without prejudice" discussions up until 25 May 2016 initiated by SIS (to the knowledge and concurrence of RFRL)[8] in an attempt to arrive at a global

[6]Exhibit "A.B.13" to the First Bissessar Affidavit
[7] Exhibit "A.B.20" to the Third Bissessar Affidavit pg 17
[8] First Bissessar Affidavit at paragraphs 16 to 22

settlement of the claim; at the same time the parties made successive joint requests of Charles J to adjourn the delivery of her decision on the various applications for interim injunctions then before her, for the purpose of continuing those discussions, with the last such request being made on 17 May 2016.[9] Those settlement talks eventually came to an abrupt and unexpected end as a result of a letter from attorneys at law for SIS issued on 25 May 2016,[10] by which time the adjourned date for delivery of the decision of Charles J on the said applications had been rescheduled with their consent to 21 June 2016.[11]

(b) Following the letter from SIS's attorneys to the Registrar dated 6 June 2016 in which SIS contended that the claim had been automatically struck out pursuant to **Rule 27.3 (4)**, NGC acted promptly by filing the First Relief from Sanctions Application the next day so as to secure the continuation of the claim in the event that Charles J determined that it had in fact been struck out by virtue of the said rule.

[13] The Claimant asserted that NGC was not alive to the possibility that it was in breach of **Rule 27.3 (3)** or that it needed to apply for relief pursuant to **Rule 27.3 (5)** until SIS's said letter of 6 June 2016. Up until that time the parties and the Court treated the claim as subsisting – as evidenced by the filing of pleadings and the series of joint requests for the decision of Charles J on the two interlocutory applications before her to be adjourned pending settlement discussions. Indeed, the JCPC itself described the consequence of NGC's claim being automatically struck out as "unexpected."[12]

[9] Exhibits A.B.4 and A.B.5.
[10] para 22
[11] para 21
[12] para 46

[14] Further still, the NOA was filed in circumstances where no trial date has yet been fixed. Accordingly, it cannot be said that the NOA has caused any trial date to be lost, nor has it occasioned prejudice to SIS and RFRL.

[15] NGC submitted in the round that it acted with alacrity:

i. in filing the First Relief from Sanctions Application as soon as it became reasonably apparent that one may have been required, but that Application became otiose in the light of the ruling of Charles J on 10 June 2016; and

ii. in filing this Application during the subsistence of the claim well in advance of the Order of the Privy Council and during the time the claim was still subsisting by virtue of the orders of the Court of Appeal staying the CA Decision.

Good explanation for the breach

[16] NGC submitted that its explanation for failing to file its application for relief within the requisite 3-month period, in the first instance, and thereafter prior to filing this NOA, is a good one. In support of its submission the Claimant relied upon the following grounds in addition to those outlined above:

(a) this case was the first occasion that the applicability of **Rule 27.3 (3)** arose for judicial consideration in circumstances where a matter had already been docketed to a judge who had embarked upon the hearing of interlocutory applications filed therein, and the parties were, with the sanction of the Court, engaging in ongoing settlement

discussions; and

(b) there was a reasonable basis for uncertainty as to the applicability of the Rule to the circumstances of this case, as evidenced by the first instance decision of Charles J,[13] the dissenting judgment of Rajkumar JA in the Court of Appeal and the judgment of the Court of Appeal delivered by Jamadar JA (Moosai JA and Pemberton JA concurring) on NGC's application for conditional leave to appeal to the JCPC in which the Court found that NGC's case on appeal was reasonably arguable with a realistic chance of success.[14]

General Compliance

[17] NGC submitted that it has complied with all orders and directions in the matter to date as outlined below:

(a) It filed its Claim Form on 24 December 2015 and Statement of Case on 26 January 2016 in accordance with the Order of Seepersad J dated 23 December 2015;[15] and

(b) In accordance with the Order of the Charles J dated 10 June 2016:

i. NGC provided Standard Disclosure on 23 September 2016;

ii. on 28 October 2016, it filed its Statement of Facts; and

iii. on 28 October 2016, it also filed its Statement of Issues.

[13] Exhibit A.B. 11 to the Second Bissessar Affidavit
[14] Judgment of Jamadar JA dated 27 March 2017 paras 17- 19
[15] Exhibit A.B.1 to the First Bissessar Affidavit

The interests of the Administration of Justice

[18] On this issue the Claimant submitted that good administration of justice in the instant case favours the grant of relief. The refusal of relief will not bring an end to proceedings between NGC and SIS and RFRL because limitation is not an issue between the parties and the arbitration between SIS and NGC is ongoing. If relief is refused, NGC will be constrained to refile its claim, and re-apply for the grant of injunctions against SIS and RFRL.

Failure to comply due to party or attorney

[19] On this head the Claimant stated that the failure to comply in this case arose as a result of a genuine and reasonable belief as to the inapplicability of **Rule 27.3 (3)** and **(4)** to the circumstances of this case,[16] a belief shared by Charles J and Rajkumar JA, recognised as such by Jamadar JA, Moosai JA and Pemberton JA and accepted by Archie CJ, Moosai JA and des Vignes JA.

Ability to remedy failure within a reasonable time

[20] This consideration is inapplicable because once the Court grants relief, no action is required on the part of NGC because **Rule 27.3 (7)** automatically mandates that a case management conference be held within 28 days of the order granting relief.

[16] First Bissessar Affidavit paras 37 and 38

Whether trial date can be met if relief granted

[21] No trial date has as yet been fixed in this matter, nor is there even a trial window allocated. In the circumstances, this factor is irrelevant for the purposes of the NOA.

Overriding Objective

[22] The requirement that the Court deals with cases justly pursuant to the overriding objective is in favour of granting the extension of time sought since the striking out of NGC's claim at this stage will occasion a result that is both unexpected and undeserved.

Prejudice

[23] On the issue of prejudice occasioned by the grant of an extension of time to NGC to pursue its relief from sanction application the Claimant, relying on **Jimdar Caterers Limited v The Board of Inland Revenue[17],** submitted that the question of prejudice is to be considered in relation to all parties to the claim.[18] "It is for the judge to consider on which party lies the greater risk of prejudice if the application is granted or refused."

Extension of Time - Defendants' Submissions

[24] The Defendants argued that the Claimant has provided no reasonable explanation for not filing this application promptly by at least November, 2016 when the Court of Appeal delivered its judgment to March 2017 when

[17] Civil Appeal No. P256 of 2016
[18] See para 61 of the judgment

the application was filed. In the circumstances, taking into account the overriding objective of the **CPR**, the Court ought to exercise its discretion in favour of the Defendants by striking out the Claimant's application.

[25] They argued further that the Claimant's delay on filing and failing to actively pursue this application has caused considerable prejudice to the Defendants, particularly given the fact that a Freezing Order has been in place throughout the duration of these proceedings. The Defendants submitted that the Claimant, on the other hand, would suffer no prejudice should the application be refused since the limitation period has not expired and the claim can be refiled. It was also submitted that no prejudice would be occasioned the Claimant should it refile the claim, since no issue of an abuse of the Court's processes can arise in these circumstances since a case management conference had not been fixed and all the hearings before the Court up to this point were procedural hearings which did not relate to the substantive claim.

Analysis

[26] In **Roland James v The Attorney General of Trinidad and Tobago**[19], the Attorney General applied for an extension of time for the filing of a defence in the face of an application for judgment to be entered against the State in default of defence. The Rule under which the extension of time was sought was **Rule 10.3 (5)** of the **CPR**. It is similar to Rule 26.1 (1) (d) in that no express criteria are set out in the CPR as to the factors to be taken into account in considering whether to grant or refuse the extension. In addressing that issue Mendonça JA, who delivered the judgment of the Court (with which the other members of the Court of Appeal (Jamadar JA

[19] Civ App No. 44 of 2014

and Rajnauth-Lee JA) agreed, adopted an approach consistent with that taken by Rajnauth-Lee JA in her judgment in **Rowley v Ramlogan** (supra) which was delivered on the same day. He opined below:

> *"[20] Unlike rule 26.7, rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises, how the Court's discretion is to be exercised. I think because no criteria is mentioned in rule 10.3(5) it was intended that the Court should exercise its discretion having regard to the overriding objective (see Robert v Momentum Services Ltd. [2003] EWCA Civ. 299).*
>
> *[22] It is relevant to note that the list in 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances. This begs the question, what other circumstances may be relevant. In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.*

[23] ……The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.

[24] Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application……

[27] Firstly, it must be borne in mind that the court on the hearing of the application for an extension of time is not engaged in a rubber stamping exercise. It must not be taken for granted that such an application, as opposed to an application for relief from sanction, is one that the court must or ordinarily grant."

[27] Both parties agree that the Court, in determining the application for an extension of time, must take into account the overriding objective of the CPR, to decide cases justly; as well the factors outlined in **Rule 26.7 (1)**, **(3)** and **(4)** are of relevance and must be considered by the Court. They are:

a) the promptness of the application,
b) whether the failure to comply was intentional,
c) whether there was a good explanation for the breach and,
d) whether the party has generally complied with all other relevant rules, practice directions, orders and directions,
e) the interests of the administration of justice,
f) whether the failure to comply was due to the party or attorney;
g) whether the failure to comply has been or can be remedied within a

reasonable time; and

h) whether the trial or any likely trial date can still be met if relief is granted.

As well as the above, I must have regard to whether any of the parties would be prejudiced by the granting of an extension of time.

[28] I am satisfied that, in all the circumstances of the case, and consistent with my duty to decide this application having regard to the overriding objective of the **CPR** to deal with cases justly, an extension of time ought to be granted the Claimant to apply for relief from sanction for failing to apply for a date to be fixed for a case management conference.

[29] I am guided by the factors outlined by Mendonça JA in **Roland James v The Attorney General of Trinidad and Tobago** supra as to the factors to be taken into account by a Court in determining an application for an extension of time pursuant to the **CPR 26.1**.

[30] I am of the view that the application was made promptly having regard to the procedural history outlined above. The Claimant, as at April 2016 when the claim stood dismissed, had been engaged in discussions with the Defendants with a view to settling the claim. When advised by the Defendants of the effect of **CPR 27.3** on the claim by letter dated 6th May 2016, the Claimant filed its application one day later on the 7th May 2016. This Court ruled on the 10th June 2016 that the claim had not been struck out and that the claim and injunctive relief granted thereunder subsisted. I agree with the Claimant that while that Ruling was in effect, there was no need to file the Notice of Application. After the Court of Appeal allowed the Defendants' appeal and held that the claim was indeed struck out on the 23rd November 2016, that Court also granted a stay of the operation of its order on the same day. This stay continued until the judgment of the

JCPC upholding the Court of Appeal's Ruling. This Notice of Application had been filed while the stay of the Court of Appeal's Order was in effect and before the final decision of the JCPC. I do not consider, in these circumstances, that there was any delay in filing this application. In my view the Claimant has satisfied the requirement of **CPR 26.7 (1), (3)** and **(4)**. The explanation for the breach as explained above is a good one. As submitted by the Claimant, this was the first occasion that the interpretation of this Rule had engaged the attention of the Court foursquare. Their, as well as this Court's erroneous interpretation of the Rule, account in some measure for the delay in applying for the extension within the stipulated timeframe. I take into account the opinion of Rajnauth JA[20] that "a good explanation does not mean the complete absence of fault…what is required is a good explanation not an infallible one." In my view the Claimant's failure to comply with **CPR** 27.3 (5) amounts to an excusable oversight[21].

[31] Taking into account:

i. the amount of the Court's resources already allotted to this claim,
ii. ensuring that the parties remain on an equal footing,
iii. the expense of refiling the claim and the application for injunctive relief,

it is consistent with the overriding objective of the **CPR** as well as the administration of justice to grant the order for an extension of time.

[32] In my view the greater risk of prejudice lies on the Claimant if the extension is not granted. NGC's claim is for declarations and orders setting aside mortgages and debentures created over the property and assets of SIS in favour of RFRL. The Claimant alleged that these transactions were

[20] **Rowley v Ramlogan** Civ App 215 of 2004
[21] **Attorney General of Trinidad and Tobago v Universal Projects Limited 2011 UK PC 37**

fraudulent and created by SIS in order to dissipate its assets in the event that an order was made against it in arbitration proceedings between the parties. RFRL, on the 31st May 2016, executed releases of the securities and registered the releases the following day. I note that the freezing order granted against SIS merely restrained that Defendant from removing from Trinidad and Tobago or in any way disposing of, dealing with or diminishing the value of its assets in Trinidad and Tobago up to a value of $180 million TT dollars. SIS could dispose of any of its assets in the ordinary or proper cause of its business and no bank need to inquire as to the application or proposed application of any money withdrawn by SIS if the withdrawal appears to be permitted by the order. RFRL, meanwhile, conducted no business and had seemingly been incorporated and used by Winston Siriram for the purpose of taking mortgages and debentures for SIS for a financial transaction which never materialised.

[33] The grant of an extension of time would not affect any trial date since none has been fixed. There has also been general compliance by the Claimant with all orders and directions of the court to date.

[34] I am of the view that if the extension is not granted, more prejudice may accrue to the Claimant, given the risk of dissipation of assets by SIS which I have already found to exist in my earlier Ruling on 10th May 2016.

Relief from Sanctions - Claimant's Submissions

[35] The threshold for the grant of relief from the sanction of NGC's claim being automatically struck out pursuant to **Rule 27.3 (4)** of the **CPR** is low - the sole factor to be considered on an application for relief is the question of prejudice.

[36] The Claimant submitted that on the evidence before the Court, SIS and RFRL have not suffered any prejudice by reason of NGC's failure to apply for a date to be fixed for a CMC for the following reasons:

(a) SIS's complaints contained in the Marajh Affidavit as to the alleged prejudice the freezing injunction has had upon its business operations; and

(b) RFRL's complaints contained in the Siriram Affidavit that it has been prejudiced because:

i. it has had litigation looming over its head for over 2 ½ years and will be subjected to an extended period of litigation if relief from sanctions is granted to NGC; and

ii. its ability to conduct business is affected and immeasurable damage has been caused it by reason of these proceedings,

are all irrelevant to the question of prejudice under Rule 27.3 (6) because they do not arise by reason of NGC's failure to issue a notice requesting the fixing of a CMC. Those complaints arise either by reason of the existence of the litigation, the orders of injunction made therein and/or the parties having invoked the appellate process following the initial decision of this Court.

[37] The Claimant submitted that, should the Court consider the question of prejudice generally, there is no proper basis upon which any finding can be made as to genuine prejudice in respect of either SIS or RFRL.

[38] With respect to RFRL, the undisputed evidence is that it was incorporated in the year 2000, does not have a phone number listed in the telephone

directory or internet, has no physical offices or staff and conducts no business from which it earns any or any substantial income, and was used by Winston Siriram for the sole purpose of taking mortgages and debentures from SIS in respect of a financial transaction which never materialised.[22]

[39] The Claimant contended that SIS's complaint of prejudice as a consequence of the freezing injunction granted against it, is unsupportable for several reasons:

(a) SIS has failed to provide any or any credible evidence to support its complaints of loss of business, damaged relationships with creditors and suppliers, problems tendering, operation of business accounts at their bank these.

(b) The freezing order[23] granted against SIS was in standard terms and merely restrained SIS from removing from Trinidad and Tobago or in any way disposing of, dealing with or diminishing the value of its assets in Trinidad and Tobago up to a value of TT$180 million. It did not prohibit SIS from dealing with or disposing of any of its assets in the ordinary and proper course of its business[24] and expressly provided that no bank need enquire as to the application or proposed application of any money withdrawn by SIS if the withdrawal appeared to be permitted by the Order[25]. The freezing order was never intended to and did not in fact restrict SIS from continuing to carry on its ordinary business operations or place any restrictions on its normal banking operations.

[22] See para 6 of the Third Bissessar Affidavit and exhibits "A.B.17", "A.B.18" and "A.B.19" thereto
[23] Exhibit "A.B.12" to the Second Bissessar Affidavit
[24] Freezing Order, Clause 1 (vi)
[25] Freezing Order, Clause 1 (xiii)

(c) If which is denied, SIS in fact experienced prejudice as a result of the freezing injunction granted against it, it was at all times within the power of SIS to avoid any alleged prejudice following the grant of the freezing order, and it failed and/or refused to take any steps to avoid same. In this regard it is to be noted that clause 1 (viii) of the Order provided that the Order would cease to have effect if SIS, inter alia, made provision for security of TT$180 million dollars by another method agreed with NGC's representatives. Notwithstanding this provision, and despite SIS's claim that it had real estate assets well in excess of TT$180 million[26] SIS took no steps to discharge the freezing order by entering into a reasonable agreement with NGC to provide such assets as security[27].

(d) If which is not admitted, SIS's bankers ever acted wrongfully or illegally in interpreting the freezing order, that is not a circumstance for which NGC can properly be held responsible; nor can it be characterized as loss or prejudice occasioned as a consequence of the making of such order. Indeed, if SIS considered itself to be adversely affected by reason of the interpretation of the freezing order by its bankers, it was always open to SIS to commence action against its bankers to remedy the situation or alternatively, apply to the Court for clarification of the order, as it had previously done before Mohammed J on 29 December 2015[28]. However SIS chose not to take any of these steps.

(e) The suggestion by SIS that the existence of the freezing order by itself resulted in SIS being unable to satisfy certain tender requirements and/or attract prospective contracts are not

[26] Marajh Affidavit, para 9
[27] Third Bissessar Affidavit paras 14 and 15
[28] First Bissessar Affidavit Exhibit "A.B.2"

sustainable. Since the commencement of this action on 24 December 2015 up to 30 August 2018, at least 12 other High Court Actions were commenced against SIS by a variety of parties for payment of monies due to them. This does not include arbitrations which are not recorded in the High Court Registry. Further, 2 High Court Actions were commenced by SIS against other parties. Some of these actions remain pending.[29] If SIS experienced difficulties in meeting tender requirements (which generally require disclosure of all litigation including arbitrations) or winning new work, those difficulties would nonetheless have obtained without the freezing order.

Relief from Sanctions - Defendants' Submissions

[40] The Defendants contended that the Claimant's real purpose in attempting to restore this claim is to continue the freezing order so as to oppress the Defendants and to inflict commercial prejudice to the said Defendants.

[41] The Defendants argued that the grant of Freezing Orders are discretionary and the jurisdiction ought to be invoked only for the real purpose of protecting the assets and not to inflict harm and prejudice on the commercial operations of the Defendants. Citing Chong JA in **J Trust Asia Pte Limited v Group Lease Holdings Pte Limited and ors[30]** the Defendants also argued that an interlocutory injunction should only be

[29] See para 13 of the Third Bissessar Affidavit and exhibit "A.B.21" thereto.

[30] *"The basic requirement for issuing an interlocutory injunction is that it must "appear" to the court to be just or convenient that such order should be made": s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed). The expression "just or convenient" first appeared in s 25(8) of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) (UK), which was enacted to confirm the jurisdiction of the High Court to grant an injunction to protect a pre-existing right in law or equity following the procedural fusion of those two bodies of law. In modern cases, the analysis involved is understood to consist in the broad question whether the ends pursued by the plaintiff are thought to justify the judicial means of injunctive relief: see David Bean, Isabel Parry and Andrew Burns, Injunctions (Sweet & Maxwell, 11th Ed, 2012) at para 1-13. The essential criterion is injustice, but "[t]he exercise of the jurisdiction must be principled": Mercedes Benz AG v Leiduck [1996] 1 AC 284 ("Mercedes Benz") at 308F per Lord Nicholls of Birkenhead"*

issued when it appears to the Court to be just or convenient that such an order be made.

[42] The Defendants submitted that there is an exercise of the Court's discretion to be deployed in order to avoid injustice to the Defendants:

i. The Court must consider whether the continuation of the injunction might destroy the Defendants' business or confidence.

ii. The Court should be satisfied before granting relief that the effect of the injunction will be to promote justice overall and not to work unfairly or oppressively; part of this exercise involves taking into account the interests of both parties and the likely effects of an injunction of the Defendants.

[43] The Defendants argued that the Claimant's failure and or refusal to accede to the First Defendant willingness to submit the real properties of the First Defendant as security, which by the Claimant's own valuation is in excess of the value of the Claim ($180 million dollars) as assessed by the Claimant's valuators is unjustified; the only inference to be drawn from these facts is an intention to cripple the Defendants financially and to inflict commercial prejudice. It was therefore submitted that the grant or continuation of a Freezing Order would constitute a clear abuse of process.

Analysis

[44] I agree with the Claimant's submission on the issue of prejudice to the Defendants occasioned by the Claimant's failure to fix a date for the case management conference. The Defendants have argued that they have suffered prejudice occasioned by the continuance of the freezing order, describing the Claimant's conduct as 'oppressive' and designed to 'inflict

commercial harm on SIS. It was also argued that the continuation of the freezing order will destroy the Defendants' business or confidence.

[45] I am of the view that granting Relief from Sanction serves the interest of justice in this case. The Claimant is seeking to ensure that the assets belonging to SIS are available to satisfy any judgment which it may obtain in arbitration proceedings; SIS is not prevented from carrying on its business until the determination of arbitration proceedings which are ongoing. There is no evidence before me that the Claimant is pursuing this claim with an oblique motive – that of ruining SIS's business. Several claims have been filed against SIS in the High Court for monies due and outstanding, some of which are ongoing. If SIS has suffered any difficulty in its business, this fact may be a contributing factor as opposed to the Claimant's failure to file its application for Relief from Sanction within the time frame permitted. With respect to RFRL, the undisputed evidence is that despite being incorporated since 2000, it had not conducted any or any significant business or generated any significant income. From the evidence of its Managing Director, Winston Siriram, it would appear that the transactions involving RFRL taking mortgages and debentures over SIS's assets for a non-existent financial transaction was its most significant business activity to date. On the evidence before me, RFRL has not established that there is any prejudice that has accrued to it or will accrue to it by reason of the Claimant's application for relief from sanctions.

The Effect of the Order Granting Relief - Claimant's Submissions

[46] NGC argued that a necessary consequence of granting relief from the sanction of automatic striking out is that the injunctions which were

continued against SIS and RFRL on 10 June 2016 remain in place.

[47] The Claimant asserted that on a plain reading of **Rule 27.3 (5)** relief is granted from the sanction imposed by **Rule 27.3 (4)** i.e. the automatic striking out of the claim. NGC contended that if the sanction was the automatic striking out of the claim on 4 April 2016, the relief from that sanction must be to treat the claim as not having been struck out on that date. Anything less than complete relief, would necessarily mean that the sanction remained operative in part, a situation not envisaged by the Rule.

[48] Relying on the authority of **Marcan Shipping (London) Ltd v Kefalas and anor**[31] NGC submitted that **Rule 26.6 (2)** supports this conclusion in that it provides inter alia that a sanction imposed by the Rules "*has effect unless*" relief is applied for and obtained by the defaulting party. It necessarily follows that the sanction has absolutely no effect once relief is granted.

[49] The Claimant relied on the case of **Vareed Jacob v Sosamma Geevarghese and ors**[32], from the Supreme Court of India which cited with approval the case of **Nandipati Rami Reddi v Nandipatti Padma Reddy** which held that when a suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration, shall stand revived, and concluded that "interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the Court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and restoration."

[31] [2007] 3 All ER 365
[32] AIR2004SC3992 para 19

[50] NGC submitted further that **Rule 27.3 (5)** of the **CPR** does not by its terms expressly or impliedly exclude the operation of interlocutory orders made in the action upon relief from sanction being granted. Accordingly and applying the reasoning of the Supreme Court of India, the interlocutory injunctions granted on 10 June 2016 stand revived upon relief being granted.

The Effect of the Order Granting Relief - Defendants' Submissions

[51] The Defendants contended that in the event that relief is granted pursuant to **Rule 27.3 (5)**, the effect of such relief is to reinstate and/or restore the Claim only and not the injunction; the Claimant in such a case ought to re-apply for its injunctive relief.

[52] The Defendants asserted that this interpretation is supported by the plain wording of the **Rules** which provides:

> ***27.3 (4) "If the claimant does not so apply, the claim shall be automatically struck out.***
>
> ***(5) The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4)."***

[53] The Defendants submitted that the sanction imposed by **Rule 27.3 (4)** is the Claim; pursuant to **Rule 27.3 (5)** it is the Claim that is restored and not the injunction; the court should therefore give effect to the language of the Rule which admits of only one interpretation[33].

[33] Dyson LJ opined *"Nevertheless, if the language of the rules admits of only one interpretation, it must be given effect."*

[54] The Defendants submitted further that the Supreme Court of India held that restoration of a claim does not restore an injunction which was granted prior to the Claim being dismissed. They asserted that the freezing Order in the instant case is akin to what is referred to as a "supplementary interlocutory Order" in the said judgment and submitted that a similar approach ought to be applied to the facts of this case[34].

Analysis

[55] In **Vareed Jacob v Sosamma Geevarghese and ors** a majority decision of the Supreme Court of India, the Court, citing **Smt. Radhey Bai v SMT Savitri Sharma**[35] from the Delhi High Court opined:

> *"It is therefore obvious that on setting the dismissal aside, the court has to appoint a day for proceeding with the suit and not for trying the suit de novo. This indicates that the further proceedings in the suit have to start from the stage and point where they were pending before the suit was dismissed and there is no requirement of law that upon such restoration the entire proceedings must be reached again. Consequently, on restoration of a dismissed suit all the previous proceedings and the interim orders revive and do not require a fresh order to*

[34] Sinha S.B J *"From the decisions rendered by different High Courts, therefore, the law that emerges is that there exists a distinction between ancillary orders which are required to be passed by the court in aid of or supplemental to the ultimate decision of the Court; as contradistinguished to an order passed under Part VI of the Code of Civil Procedure in terms whereof an order is passed in favour of a party to the lis which may not have a bearing on the ultimate result of the suit. An interlocutory order passed in a suit may not also have anything to do with the relief prayed for by the plaintiff. An order for injunction or appointment of receiver can be passed even at the instance of the defendant. An order which has been obtained by the defendant may not revive on restoration of the suit. Supplementary proceedings, thus, envisage that such a power must be specially conferred upon the Court which are required to be passed in the interest of justice irrespective of the fact as to whether the same would ultimately have any bearing with the reliefs claimed in the suit or not. In absence of any statutory provisions such a power cannot be exercised whereas a power which is ancillary or incidental, can always be exercised by the Court in aid of and supplemental to the final order that may be passed. Furthermore, a jurisdiction expressly conferred by a statute and an inherent power, subject to just exceptions, must be treated differently. I am, therefore, of the opinion that the interim order of injunction did not revive on restoration of the suit. The Courts, however, would be well-advised keeping in view the controversy to specifically pass an order when the suit is dismissed for default stating when interlocutory orders are vacated and on restoration of the suit, if the court intends to revive such interlocutory orders, an express order to that effect should be passed"*

[35] AIR2004SC3992 para 41

give them vigour."

[56] Our Rules of Court are silent on the issue of whether an interlocutory order is revived along with the claim if relief from sanction is granted pursuant to **CPR 27.3 (5)** and **(6)**. I am of the view that where a claim automatically struck out pursuant to **CPR 27.3** is later restored, interlocutory orders given when the claim previously subsisted are revived with it. This view is buttressed by the fact that **CPR 27.3 (7)** provides that where the court grants relief from sanction, a case management conference should be scheduled within 28 days of the order. It seems to me that if it was intended that interlocutory orders such as the freezing order in this case were not to be revived when the claim is restored, then this provision ought to have been clearly spelt out.

[57] I consider that this view is consistent with the overriding objective of the **CPR** and the plain language of the Rule and I so hold.

Bias

[58] The Defendant submitted that this Court ought to recuse itself on the ground of bias because this Court made conclusive findings of fact in its Ruling on the Application for a Mareva Injunction delivered on 10th June 2016.

[59] The findings of fact complained of by the Defendants are contained in paragraphs 51, 52 and 67-69 of the said Ruling which the Defendants assert amount to findings which are to be determined at trial. The Defendants therefore submit, that 'a fair-minded and informed observer' having considered the facts would conclude that there was a real possibility that the Court was biased.

[60] The Claimant argued, contra, that the test of the fair-minded observer was not satisfied on the facts of this case – that there was no or no proper basis to conclude that there was a real possibility that the Court was biased. Further, that the informed, fair-minded observer would understand that the statements by the Court in paragraphs 51, 52 and 67-69 were no more than provisional views which the Court was required and entitled to arrive at in order to determine the Application.

[61] The Claimant submitted that even if apparent bias is made out, the Defendants waived said apparent bias by failing to raise the issue at hearings before this Court after the judgment of the JCPC was delivered. NGC submitted further, that in light of the Defendants' delay in raising the issue, they ought not to be permitted to raise it at this time.

[62] The Defendants, in turn, contended that the issues of waiver and delay are not applicable on the facts of this case since:

i. they did raise the issue at the earliest opportunity; the hearings before this Court on 16th July 2018 was urgently scheduled by the Court following the decision of the JCPC;

ii. the hearing was a procedural one for the purpose of giving directions;

iii. the Defendants did not wait until the Court adjudicated on the application before raising the issue of apparent bias; there therefore was no delay.

Analysis

[63] The test for bias was outlined by Mendonça JA in the **The Attorney**

General v Dr. Wayne Kublalsingh and Ors[36] as follows:

> *"2.The test for apparent bias in this jurisdiction is that as stated in Porter v Magill [2002] 2 AC 357. The question is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased (see Porter v Magill at para. 103).*
>
> *3. It has been pointed out that the test incorporates the words "real possibility" as opposed to "real probability." In other words, the burden on the person alleging apparent bias is not as onerous as the burden of proving that it is more likely than not that the tribunal is biased (see Civil Appeal No. 145 of 2009 Sadiq Baksh and ors. v Magistrate Ejenny Espinet and others per Narine, J.A. at para. 65). On the other hand, mere suspicion of bias is not enough. A real possibility must be demonstrated on the available evidence.*
>
> *4. The test is an objective one. In essence it requires the Court to ascertain the view of the public, through the eyes of a fair-minded informed observer, whether the Judge was or would be biased. The test therefore acknowledges and gives effect to a critical requirement that justice must not only be done but must be seen to be done. It is the "public perception of the possibility of unconscious bias" that is the key (see Lawal v Northern Spirit Ltd. [2003] UKHL 35 at para. 14).*

[36] Civil Appeal No. P018 of 2014 para 2-5

5. Bias is an attribute of the mind which prevents the Judge from making an objective and impartial determination of the issues he has to resolve. (see In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700 para. 87). A Judge may therefore be biased because he has reason, unrelated to the facts and the law, to prefer one outcome of the case to the other, or he may be biased because he has reason, again unrelated to the facts and the law to favour one party rather than the other".

[64] In my view an informed, fair-minded observer would know that the issues before the Court on the application for the Mareva Injunction/Discharge were:

a) whether the Claimant had a good, arguable case;
b) whether the Claimant has satisfied the Court that there are assets within the jurisdiction;
c) was there a real risk of dissipation of those assets.

[65] Further, that in order to determine the above issues, the Court had to undertake a preliminary appraisal of the Claimant's case in order to determine whether it had an arguable case without engaging in a trial of the action or pre-empting the decision of the arbitration.

[66] The Court also had a duty to consider **all of the evidence** as at the date of the application to continue/discharge the injunction.

[67] In order to determine whether there was a real risk of dissipation of SIS's assets, the informed, fair-minded observer would take into account that this Court had to make a preliminary finding on the evidence before it as to whether the mortgages and debentures created by SIS over its assets

were executed to 'create legal rights and obligations which they give the appearance of creating; whether the evidence of Winston Siriram of RFRL that no monies were owed it by SIS, since no monies were advanced by RFRL to SIS despite mortgages from SIS to RFRL to secure $230 million dollars allegedly advanced to SIS by RFRL, debentures of $100 million dollars over SIS's assets, was material in determining this issue.

[68] The fair-minded and informed observer would, in my view, take into account the fact that the Court bore in mind the test in determining whether the Claimant had a good arguable claim in determining whether to continue the injunction[37]. Additionally, the Court proceeded to analyze all of the evidence as it stood before her in order to determine whether there was a real risk of dissipation of assets by SIS. The statements made at paragraphs 51, 52, and 67 to 69 upon a consideration of all the facts of this case by the informed, fair-minded observer would not lead him to a conclusion that the Court "had crossed the line between what would be in the nature of provisional findings that ought to have been made…and made what can fairly be said to be final findings[38].

[69] In the circumstances I hold that there is no proper basis upon which the fair-minded and informed observer can conclude that there is a real possibility that the Court is biased and should recuse itself.

Conclusion

[70] In the circumstances I order:

i. that NGC is granted an extension of time to the 27th March 2017 to file its Application for Relief from Sanctions;

ii. that NGC is hereby granted Relief from Sanctions;

[37] Ruling of Charles J, 10th May 2016, para 50

[38] **Lake Asphalt of Trinidad and Tobago 1978 Limited v Trinre Insurance Limited, Fides Limited CA P-181/2018**

iii. the application for the Court's recusal is refused;

iv. the claim and Injunction granted on the 10th June 2016 are hereby restored;

v. a case management conference is fixed for 28th February 2019, 9:00 am, POS 09,

vi. The Applicant to pay the Defendants' costs to be assessed by the Registrar in default of agreement.

Joan Charles

Judge