

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-03315

BETWEEN

PORT AUTHORITY OF TRINIDAD AND TOBAGO

1ST Claimant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2ND Claimant

AND

NYREE ALFONSO

1ST Defendant

INTERCONTINENTAL SHIPPING LIMITED

2ND Defendant

JOHN POWELL

3RD Defendant

BEFORE THE HON. JUSTICE JOAN CHARLES

Appearances:

For the Claimants:

Mr. Shiva Maraj led by Dr. Claude Denbow S.C.
Instructed by Mrs. Donna Denbow

For the First Defendant:

Ms. Vijaya Maharaj led by Mr. Ramesh Lawrence
Maharaj S.C.
Instructed by Ms. Vahini Seunath

For the Second and Third
Defendants:

Mr. Rishi Dass led by Mr. Fyard Hosein S.C.
Instructed by Ms. Theresa Hadad

Date of Delivery:

7th February 2020

REASONS

[1] By Notice of Application dated the 26th November 2019 the Claimants sought leave to amend their list or documents filed on the 15th October 2019, pursuant to the Order of this Court, by amending the disclosure statement attached thereto pursuant to CPR 28.7 by:

- a) stating the name and position of the person responsible for identifying individuals who might be aware of any documents which should be disclosed; and
- b) identifying those individuals who have been asked whether they are aware of any such documents and state the position of those individuals.

[2] This application, together with correspondence from attorneys for the Defendants indicating their objection to the grant of this application were brought to my attention in January 2020. I considered the objections of the Defendants which were as follows:

- (i) that an application for Relief from Sanctions ought to be made by the Claimants as part of their application.¹
- (ii) that the Claimants' application was in breach of CPR 28.9 and CPR 28.13 which were mandatory; no application for Relief from Sanctions having been filed, the said application should be withdrawn;²
- (iii) all Defendants indicated that they wished to be heard on the application since it should not be determined without a hearing for the reasons stated above.

¹ letter dated 29th November 2019 from Ms. Seunath on behalf of the First Defendant; letter dated 6th December 2019 from Ms. Hadad on behalf of the Second and Third Defendants.

² Letter from Ms. Hadad dated 6th December 2019

[3] I considered the Application and written objections of the Defendants and decided that the application could be determined in chambers and that an Application for Relief from Sanction was not necessary. I therefore granted leave to the Claimants to amend their list of documents filed on the 15th October 2019 insofar as it pertained to the disclosure statement pursuant to CPR 28.7 6(a) and (b) CPR 28:9(1) (a) and (b) on the 27th January 2020.

REASONS

[4] The CPR 28.9³ does not impose a sanction for non-compliance; as a result I did not consider that the Claimants were required to file an application for Relief from Sanctions for the amendment sought.

[5] Additionally, I did not specify a consequence for non-compliance with the Order for disclosure made on the 25th July 2019 and varied on the 17th October 2019. I therefore concluded that this application could be determined pursuant to CPR 26.8⁴ since the consequence for breach of the CPR 28-9 was ‘not specified by any rule, practice direction or Court Order.

[6] I also bore in mind the Court’s responsibility to deal with cases justly pursuant to CPR 1.1.⁵ I am of the view that granting the Claimant’s application was in furtherance of the overriding objective by saving

CPR 28.9 - Requirement for party to certify that he understands duty of disclosure 28.9 (1) The lay party must certify in the list of documents— (a) that he or she understands the duty of disclosure; and (b) that to the best of that party’s knowledge the duty has been carried out. (2) If it is impracticable for the party to sign the certificate required by paragraph (1) it may be given by that party’s legal practitioner. (3) A certificate given by the legal practitioner must also certify— (a) the reason why it is impractical for the party to give the certificate; and (b) that the certificate is given on the party’s instructions. (4) In the case of a list served on behalf of a company, firm, association or other organisation the certificate must be made by the person identified in rule 28.7(6)(a).

⁴ CPR 26.8 General power of the court to rectify matters where there has been an error of procedure (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order. (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders. (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right. (4) The court may make such an order on or without an application by a party.

⁵ CPR 1.1 (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.

expense and dealing expeditiously with the case especially in light of the fact that trial dates were already set for the 24th, 25th, 26th and 27th March 2020.

[7] I determined that this Order would ensure that the parties would be on an equal footing in that the obligation standard disclosure was met by both sides timeously so as to allow for the proper preparation of their respective cases. I noted that the duty of disclosure continues until the trial is concluded; ⁶ that the duty to disclose extends to documents that come to a party's notice at any time during the proceedings whereupon that party must immediately notify every other party and serve a supplemental list of those documents; further, that an application for specific disclosure of documents or classes of documents can be made by any party without notice at a case management conference.

[8] This is an important commercial case with complex and novel issues which require vigilance by the Court to ensure that all parties are treated equally in furtherance of the overriding objective. In my view the granting of Order above did not undermine a fair trial of the issues in this case.

[9] I also took into account CPR 26.7 (1) to (3)⁷ in deciding this application.⁸ The factors outlined therein include:

- a) the promptness of the application,
- b) whether the failure to comply was intentional,

⁶ CPR 28.12 (1) – (3) (1) The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded. (2) If documents to which that duty extends come to a party's notice at any time during the proceedings that party must immediately notify every other party and serve a supplemental list of those documents. (3) The supplemental list must be served not more than 14 days after the new documents have come to the notice of the party required to serve it.

⁷CPR 26.7 (1) – (3) (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.

⁸ Roland James v The Attorney General of Trinidad and Tobago

- 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.

[10] As well as the above, I had regard to whether any of the parties would be prejudiced by the granting of the Order to amend the list of documents aforesaid.

[11] I am of the view that the application was made promptly, one month from the date of my Order on the 17th October 2019. Further, when advised by the First Defendant that the disclosure statement was not in compliance with CPR 28 by letter dated 20th November 2019, the Claimants acted promptly by filing their application on the 27th November 2019. I do not consider that the breach was intentional; it appears to be an oversight due to the attorneys' failure as opposed to the Claimants'. A review of the history of this claim to date reveals that the Claimants have generally complied with all directions, orders and practice directions. The omission could have been remedied within a very short time. The Claimants' only explanation given was the desire to save time given the Defendants' objection. I considered that this was a case of a glaring omission by the Claimants' attorneys which was apparent on the face of the documents – no further explanation was needed.

[12] If the application had not been granted, both sides would be prejudiced in the conduct of their respective cases; however the greater risk of prejudice

lay with the Claimants since the burden of proving their case lay with them. As noted above, the obligation to disclose continues throughout the proceedings. The right of the Defendants to seek specific disclosure or any other order pertaining to disclosure was not prejudiced by the granting of this Order. I therefore decided that it was in the interest of the administration of Justice to grant the Order.

[13] I also took into account the fact that trial dates had been fixed for the 24th, 25th, 26th and 27th March 2020; the disposition of the application would aid in the retention of those dates.

[14] Having taken into consideration all of the above factors, I made the Orders outlined above.

Joan Charles
Judge -