

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2006-03532

BETWEEN

**SIMEON CHARLES
CAROL CHARLES**

Claimants

AND

OCEAN VIEW DEVELOPMENT

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. Gerald Ramdeen
Mr. M. Seepersad for the Claimants

Mr. A. Manwah for the Defendant

REASONS

History of Proceedings

1. This action was commenced on the 8th November 2006 by the filing of a Claim Form and Statement of Case. In summary, the Claimants alleged that they were in exclusive possession of certain lands since July 1983 and that as a consequence, the Defendant's title thereto has been extinguished under Real Property Limitation Ordinance.
2. On 27th January 2009, Best J. granted the Defendant leave to serve Defence and Counterclaim on or before 27th February 2009. The learned Judge also ordered that witness statements in affidavit form be filed and exchanged on or before the 30th April 2009 and statements of issues and facts and propositions of law be filed and served on or before the 30th April 2009. The matter was then adjourned to the 26th May 2009 for a case management conference and the trial of the action was fixed for the 6th October 2009.
3. On 30th April 2009, the Defendant applied for an extension of time to file and exchange its witness statements and to file its statement of issues and facts and propositions of law. The grounds of the application were that *"the persons who are to give evidence on behalf of the Defendant are very frequently out of the jurisdiction. I have been unable to obtain and confirm essential instructions to comply with the Order."* It appears, however, that this application was not heard prior to the trial date on the 6th October 2009.
4. On 6th October 2009, Justice Best extended the time for the Claimant and the Defendant to file witness statements to "on or before the 3rd November 2009". The matter was then adjourned to the 8th December 09 for a further case management conference, pending settlement. However, there is no record on file that the time for the filing of the statements of issues and facts and propositions of law was extended by the learned Judge.

5. The Claimants filed witness statements in their names on the 3rd November 2009.
6. On 3rd November 2009, the Defendant filed an application for relief from sanctions but the same was withdrawn on 9th December 2009. The Defendant was directed by this Court to file and serve an application for relief from sanctions on or before the 18th December 2009.
7. On 18th December 2009, the Defendant filed an application for relief from sanctions and this was supported by an affidavit in the name of the Defendant's Attorney-at-Law, Mr. Anthony Manwah (hereinafter referred to as "the Manwah affidavit")
8. On the hearing of this application, the Claimants' Attorney informed the Court that the Claimants were not taking issue with the promptitude of the Defendant's application but were otherwise objecting to the application for relief from sanctions. Accordingly, the Court is required to consider, first of all, whether the Defendant has satisfied the pre-conditions of Rule 26.7(3) before going on to consider the factors set out in Rule 26.7(4).

Was the Defendant's failure to comply intentional.

9. According to paragraph 8 of the Manwah affidavit, the witness statements of both officers of the Defendants company were prepared prior to the 3rd November 2009 which were similar to their previous statements. Also, draft witness statements were prepared for additional witnesses "*based on instructions given by the two officers of Company as to what witnesses would say.*" The names and details of witnesses were still to be provided. Further, as a consequence of the evidence given in other matters concerning the said lands before Jones J. in which she gave decisions on 1st December 2008 against the Defendant, Mr. Manwah had advised the

Defendant that they needed additional witnesses about the length of time that the Claimants were in occupation of the lands. Those matters are under appeal. After that decision, attempts were made to settle this matter but settlement was not achieved prior to trial date on 6th October 2009.

10. However, the witness statements of the officers of the Company were not filed on 3rd November 2009 and it was not until 26th November 2009 that Mr. Manwah was told that the additional witnesses were now refusing to give evidence. Mr. Manwah frankly states in his affidavit that he did not think that the evidence of the two officers was sufficient in the light of the evidence of Mr. Paul Williams, land surveyor in the previous matters.
11. Apart from the witness statements, the Defendant also did not file a statement of issues and propositions of law and it is apparent that the time for filing same had not been extended since original deadline of 30th April 2009.
12. Based on facts as stated in the Manwah affidavit, it is evident that Attorney for the Defendant had formed the view that that evidence was insufficient to defend the matter in the light of the evidence of Paul Williams. He had so advised the Defendant's officers but by the time the officers told him that the potential witnesses were no longer willing to give evidence, the deadline for filing and exchange of witness statements had already expired. The Defendant now wishes an extension of time to file witness statements of the very same witnesses whose statements had been prepared prior to the expiration of the deadline. In my opinion, the failure to comply with the Order of Best J. was intentional in the sense that the Attorney had formed the opinion that such evidence standing alone without supporting testimony from additional witnesses would not controvert the evidence of the Claimants and support the defence as served.

Has the Defendant a good explanation for the breach?

13. The Attorney candidly admits that he formed the opinion that the evidence of the two officers was insufficient in the light of the evidence given by Mr. Paul Williams in the previous matters. He also formed the opinion that more evidence was needed about the length of time that the Claimants were in occupation of the lands. That is apparently the reason why he did not file the witness statements which he had prepared. Having taken that position, he now wishes to say that he should be granted relief from sanctions for his deliberate decision based on his opinion and that he should be permitted to file the very same witness statements that he confesses he does not think will be sufficient to support his client's defence and to refute the Claimants' evidence. This is illogical and to permit such an application would be tantamount to permitting an abuse of the court's process since the court is being invited to permit a Defendant to adduce evidence at a trial in support of a defence when the defendant's attorney has already formed the opinion and advised the Defendant that that evidence will be insufficient to refute the Claimants' evidence. Bearing in mind that the original deadline for the filing of the witness statements was fixed by Justice Best since 27th January 2009 and it was only at the trial on the 6th October 2009 that Justice Best granted an extension to the 3rd November 2009, the Defendants should have appreciated that the Court had already been very accommodating and that they should not miss this extended deadline for the filing of its witness statements. In the circumstances, I am not satisfied that the Defendant has given a good explanation for their failure to file its witness statements in compliance with the Order of Justice Best.

14. With respect to the failure of the Defendant to file a Statement of issues and facts and propositions of law, the only explanation given for this default in the Manwah affidavit is “*because of the attempt to have this matter settled.*” The fact that parties are attempting to settle a matter does not relieve them of the obligation to comply with the orders and directions of the court. Parties are always encouraged by the Court to conduct negotiations for the settlement of a matter but the judgment of Jones J. had been given since December 2008 and therefore they ought to have filed these documents by 30th April 2009. Although an application had been filed for an extension of time on the 30th April 2009, no such order was made by the court and therefore the Defendant remains in default since the original deadline. I am not satisfied that the Defendant has given a good explanation for their failure to comply with this aspect of the Order of Best J.

General compliance with the Orders and directions

15. I am of the opinion that the Defendant has not generally complied with the rules, orders and directions of the court for the following reasons:

- (a) This action, having been commenced since November 8, 2006, there is no record on the court file that the Defendant has ever filed an appearance.
- (b) The Defendant did not serve a Defence within the time prescribed by the rules and only obtained an extension of time to do so on the 27th January 2009.
- (c) The Defendants, having filed a Defence and Counterclaim on the 27th February 2009, failed to serve same until the 9th December 2009.

16. In the circumstances, having regard to the dicta of Jamadar J.A. in **Trincan Oil Limited v. Martin, Civil App. No. 65 of 2009 at paras. 13,** the Defendant has failed to comply with any of the requirements of Rule 26.7 (3) and accordingly, its application for relief from sanctions is hereby dismissed with costs to be paid by the Defendant to the Claimants to be assessed. However, I am not prepared to certify these costs as being fit for Advocate Attorney since, from the documents filed herein on behalf of the Claimants, there are conflicts between who is the instructing Attorney and the Advocate herein. When the Claim was filed, Mr. Seepersad was described as the Advocate Attorney and Mr. Ramdeen as the instructing Attorney. However, by July 21, 2008, Mr. Terrence Davis filed an affidavit on which he was described as the instructing Attorney although there was no indication from the Court file that a change of Attorney had been filed. Then, when the Defence to the Counterclaim was filed on the 6th January 2010, Mr. Ramdeen was once again described as the instructing Attorney. The roles were reversed, however, on the following day when the written submissions were filed and Mr. Seepersad was now described as the instructing Attorney and Mr. Ramdeen as the Advocate Attorney. While it is possible under the Legal Profession Act for an Attorney to act as an instructing Attorney in one matter and as Advocate Attorney in another matter, I do not consider it proper for these roles to be interchanged during the course of the same matter especially since the assessment of costs will vary for the services rendered, dependent on the time spent by Advocate and instructing Attorneys and their different hourly rates based on their years in practice.

Dated this 22nd day of March 2010.

André des Vignes
Judge