REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2009-03296

BETWEEN

JAMAL FORTUNE

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. Gerald Ramdeen for the Claimant

Mr. Mitra Bhimsingh for the Defendant

R E A S O N S

The Proceedings

1. On 11th September 2009, this action was commenced against the Defendant by the Claimant by the filing of a Claim Form and Statement of Case. The Claimant, a prisoner incarcerated at the State Prison alleged that on the 1st March 2009 he was assaulted and beaten by two named prison officers as a consequence of which he sustained personal injuries. The Claimant was taken to the Port of Spain General Hospital on the 2nd March 2009 and examined by the doctors and X-rays were taken. He was treated for his injuries and discharged and told to return for treatment of the injury to his right ear on the 6th March 2009. However, the Claimant was not taken back to the Hospital for treatment despite the recommendations of the Prison Medical Officer. As a consequence, the Claimant alleged that he has lost hearing in his right and has suffered pain and damage. His claim is for, inter alia, damages for assault and battery as well as aggravated and/or exemplary and/or vindicatory damages.

2. The Claim Form and Statement of Case were served upon the Defendant on the 11th September 2009 but it was not until the 12th October 2009 that the Defendant entered an appearance.

3. As a consequence, the time for the filing and service of a Defence on behalf of the Defendant expired on the 23rd October 2009, that is, 42 days after service of the Claim Form and Statement of Case.

4. On the 2nd November 2009 the Claimant's Attorneys filed an application for permission to enter judgment in default of Defence and this application was supported by the affidavit of Terrence Davis, Attorney-at-Law.

5. On the 2nd December 2009, the Defendant's Attorneys applied for an extension of time to serve a Defence and this application was supported by an affidavit of Renessa Tang Pak, Attorney-at-Law. The grounds of this application are as follows:

    (i) The period for the filing of the Defendant's Defence has expired;

    (ii) The Defendant was unable to file its Defence by the deadline date for so doing since it is presently pursuing further investigations into the Claimant's claim;

    (iii) Given the preliminary instructions the Defendant has been provided with so far, the Defendant is of the view that it has a good and arguable defence to the allegations of the Claimant;

    (iv) Rule 10.3(5) of the Civil Proceedings Rules 1998 provides for the Defendant to make an application to the Court for an Order for an extension of time for the filing of a defence pursuant to which rule the instant application is made.

Summary of Facts

6. On the 2nd September 2009 the Claimant's Attorneys-at-Law dispatched a Pre-action protocol letter to the Defendant.

7. However, not having received an acknowledgement from the Defendant within seven (7) days of their Pre-action letter, the Claimant's Attorneys filed this action on the 11th September 2009.

8. According to the affidavit of Mr. Davis, the Claim Form and Statement of Case were served on the 11th September 2009 at 3.15 p.m. but according to Ms. Chan Pak, the proceedings were served on the 14th September 2009. Having seen the endorsement upon the Claim Form annexed to the affidavit of Mr. Davis as "T.D. 2", I accept that service was effected on the 11th September 2009 and not on the 14th September 2009.

9. The Defendant's Attorneys acknowledged receipt of the Claimant's Pre-action protocol letter on the 16th September 2009 wherein they indicated that the Chief State Solicitor's Department had just received the Pre-action protocol letter and that a full response would be provided by the 16th October 2009.

10. Ms. Chan Pak sought instructions from the Office of the Commissioner of Prisons on the 8th October 2009 but by the date when the Defence was due, that is, the 23rd October 2009, she still had not been provided with instructions. Accordingly, she was not in a position to provide the Claimant's Attorneys with a response by the 16th October 2009, as promised, or to serve a Defence within the time permitted.

11. On the 2nd November 2009, the Claimant's Attorney filed an application for permission to enter judgment against the Defendant, in default of defence.

12. On the said 2nd November 2009, Ms. Chan Pak wrote to the Claimant's Attorneys seeking a six-week extension of time from the 23rd October 2009 until the 4th December 2009 to serve a Defence.

13. The Claimant's Attorneys responded to this request on the 4th November 2009 advising that they had already filed an application for judgment on the 2nd November, 2009, which was coming up for hearing on the 4th December 2009 and "*you could now seek relief from sanctions as you are in breach of the rules. See* ***Khanhai v. The Attorney General Civil Appeal No. 158 of 2009"***

14. Ms. Chan Pak continued to make several attempts to obtain instructions from the Office of the Commissioner of Prisons throughout the month of November but without success and by the 2nd December 2009, when she filed the application for an extension of time and deposed to her affidavit, she still had not been able to contact the Attorney-at-Law in that Office to ascertain the status of the investigations. According to her affidavit, at paragraph 9: "*…..As such I am unable to state up to the present date as to the timeframe within which the Office of the Commissioner of Prisons will be able to complete their investigations. Nevertheless I do not anticipate*

that it should take more than two months given the nature of the investigations."

Submissions

15. On the 3rd December 2009, the Claimant's Attorneys filed written submissions in support of the application for permission to enter judgment and in opposition to the Defendant's application to extend time to serve a Defence and on the 18th December 2009 the Defendant filed written submissions in support of its application and in opposition to the Claimant's application for judgment.

16. In considering these two applications, I will deal first with the Defendant's application for an extension of time since the outcome of this application will effectively determine whether the Claimant is entitled to succeed on his application for permission to enter judgment in default of defence.

Applicability of Rule 26.7 to application for extension of time to serve defence?

17. The time for service of a Defence herein expired on the 23rd October 2009 and the application for an extension of time was filed on the 2nd December 2009. The Court is empowered by Rule 10.3 (5) and (9) to grant an extension of time to serve a Defence upon application by a Defendant. Further, under its general powers of case management, the Court may

extend the time for compliance with any rule: SeeRule 26.1(1)(d). Since Rule 10.3 does not specify an express sanction for the default of the Defendant in serving a Defence within 42 days, the question arises whether on the application for an extension of time, the Defendant must apply for relief from sanctions and comply with the requirements of Rule 26.7.

18. On the 3rd February 2010, the Court of Appeal delivered its decision in ***Trincan Oil Limited v. Schnake, Civil Appeal No. 91 of 2009*** which has examined the issue of extensions of time to comply with the rules in the context of an application for an extension of time to appeal and provided useful guidance as to the correct approach to be adopted in considering such applications. Jamadar J.A., in delivering the judgment of the Court of Appeal, had this to say about the approach to applications for an extension of time:

> "*13. Having identified the issues, Justice of Appeal Yorke-Soo Hon then went on to pose and answer the following questions: (i) Should the Court extend time and grant relief from sanctions? and (ii) What are the considerations? The judge then proceeded first to accept the approach of the English Court of Appeal in* ***Sayers v. Clarke Walker*** *that the same "check list" prescribed for a relief from sanctions application should also be used for an extension of time application, and concluded that the same approach should be*

applied in Trinidad and Tobago. The consequence was that the requirements of Part 26.7, CPR 1998 would have to be satisfied on an application for an extension of time.

14. This review has proceeded and been argued on the correctness of this approach by the judge. In my opinion the judge was right in applying the provisions of Part 26.7 CPR 1998 in this case, but only because the time had already passed for the filing of an appeal against the judgment and orders of Gobin J. that had not been challenged in the original appeal.

15. In this case, because the time had already passed for appealing the unchallenged aspects of the judgment of Gobin J. and because this was due to the failure of the Appellant to comply with the provisions of the CPR., 1998 with respect to the time for appealing, the consequence of that failure and non-compliance was the imposition of an ***implied sanction****—that no appeal on these unchallenged aspects of the judgment of Gobin J. could be pursued. The crucial factor in this case is that even though the sanction that triggered the operation of Part 26.6 and 26.7, CPR, 1998 is not explicitly "imposed by the rules", it is necessarily implied because the consequence is the same as if it had been expressly 'imposed'. That is to say, the same sanction is impliedly 'imposed'.*

16. It is in this context, of implied and expressed 'imposed' sanctions having the same consequence, that the requirements of certainty and consistency in the application of the rules of court and the overriding objective of the CPR 1998 "to deal with cases justly" demand that the requirements of Part 26.7, CPR 1998 are to be applied in a case such as this.

17. However, because of the significant differences in the relief from sanctions provisions in Trinidad and Tobago when compared to England and particularly the threshold requirements provided for at Part 26.7 (1) and (3), in my opinion it would not be appropriate to apply strictly the Part 26.7 requirements and approach to applications for an extension of time that are made ***before*** *any sanctions are imposed—whether implied or expressed.*

18. Thus, to the extent that the judge mean or could be interpreted as saying that in any application for an extension of time after an appeal has been filed, the requirements of Part 26.7 must be satisfied, I am of the opinion that such an approach is too restrictive. In my opinion, in applications for an extension of time made before a sanction is imposed the strict requirements of Part 26.7 do not apply. In such a situation the court has to exercise its general discretion in determining whether or not to grant an

extension of time. In such a case it may very well be that all of the factors stated in Part 26.7, CPR 1998 will need to be considered and weighted (without any thresholds) including the merits of the appeal and questions of prejudice. However, this question does not arise for determination in this case and I make no definitive suggestions as to what the proper approach should be."

19. What then are the consequences of the failure of the Defendant to serve a Defence within the time prescribed the rules? In my opinion, the following consequences flow from such a default:

    (i) Rule 10.2 (3) provides that "if a defendant fails to file a defence within the time period for filing a defence, judgment for failure to defend may be entered if Part 12 allows it."

    (ii) The parties may agree to an extension of the period for filing a defence up to a maximum of three months after the date of service of the claim form and only one such agreement may be made. Any further extensions may only be made by court order: Rule 10.3 (5),(6),(7)(9).

    (iii) A claimant needs permission from the court if he wishes to obtain a default judgment on any claim which is a claim against the State: Rule 12.2 (a).

20. In the instant matter, the Defendant has not filed a defence within 42 days of service of the claim form and statement of case as required by Rule 10.3 (3) and did not secure the Claimant's agreement to an extension of time as permitted by Rule 10.3 (6). The application to the court for an extension of time has been filed after the expiration of the time limited for serving a defence. Therefore, the Defendant will not be permitted to defend this matter without the court's permission and, on an application to the court supported by evidence, the Claimant may be granted permission to enter a judgment in default of defence.

21. In my opinion, these consequences amount to an implied sanction since the consequences of the Defendant's default is the same as if it had been expressly imposed by the rules. Accordingly, following the reasoning of the Court of Appeal in ***Trincan Oil v. Schnake***, I am of the opinion that the Defendant must satisfy the requirements of Part 26.7, CPR 1998 on this application for an extension of time to serve a Defence.

Admissibility of evidence

22. The Claimant has raised a preliminary objection to the admissibility of certain evidence contained in paragraphs 5 and 8 of the affidavit of Ms. Tang Pak on the grounds that the affidavit has failed to comply with Rule 31.3. Upon a review of these paragraphs, it is obvious that insofar as Ms. Tang Pak sought to rely on information provided to her by Mr. Paul

Isaacs, Attorney-at-Law at the Office of the Commissioner of Prisons, she failed to comply strictly with the requirements of Rule 31.3 (2) in that although she gave the source of her information, she did not state that she verily believed the information provided to her to be true and correct. Accordingly, since this evidence is clearly not within the personal knowledge of Ms. Tang Pak, the Defendant will not be permitted to rely upon the statements attributed to Mr. Isaacs for the truth thereof. However, having regard to the criteria that I need to take into account in my determination of this application, I do not consider it necessary to make a formal order striking out the sentences that refer to what Mr. Isaacs said to Ms. Tang Pak.

Was application made promptly?

23. As earlier stated, the last day for service of a defence herein was the 23rd October 2009. Since that date was a Friday, the date when the implied sanction was imposed was Monday 26th October 2009 since the Defendant did not have the Claimant's agreement to an extension of time beyond that date and the Defendant had not applied for an extension of time **before** the expiration of the time limited for the service of a defence.

24. The Defendant, by its letter of acknowledgement dated 16th September 2009, had promised to respond to the Claimant's Attorney by the

16th October 2009 but had failed to do so due to the absence of instructions from the Commissioner of Prisons.

25. On the 2nd November 2009, the Defendant wrote to the Claimant's Attorneys seeking an extension of time of six weeks from the 23rd October 2009 until the 4th December 2009 to serve a defence.

26. However, on the same day, the Claimant had applied for permission to enter judgment and, by letter dated 4th November 2009, so informed the Defendant and suggested that the Defendant "*could now seek relief from sanctions as you are in breach of the rules*". The Claimant's Attorney also informed the Defendant that the application for judgment was coming on for hearing on the 4th December 2009.

27. Notwithstanding the obvious default in serving a defence since 23rd October 2009 and the warning from the Claimant's Attorney that he intended to seek the court's permission to enter judgment in default, the Defendant failed to make this application until the 2nd December 2009, two days before the hearing of the Claimant's application for judgment. There is very little in the affidavit of Ms. Tang Pak which explains satisfactorily this delay. It is apparent that, despite her efforts, Ms. Tang Pak had not been provided with instructions and she decided to hold off on making this application for as long as possible in the hope that she would be given

sufficient instructions by the Commissioner of Prisons to at least be in a position to say to the court that she had received full instructions and a defence could be served shortly. Unfortunately, Ms. Tang Pak found herself in no better position by the 2nd December 2009 and it is at that point that she was left with no other option but to file this application. According to her affidavit at paragraph 9:

> "*9. On the 27th November 2009, 30th November 2009 and 1st November 2009 I made attempts to contact Mr. Isaac at the Office of the Commissioner of Prisons to get a response concerning the status of the investigations but was unsuccessful as he was not in office. I also made attempts to contact him on his mobile telephone but was also unsuccessful in my attempts. As such I am unable to state up to the present date as to the timeframe within which the Office of the Commissioner of Prisons will be able to complete their investigations. Nevertheless I do not anticipate that it should take more than two months given the nature of the investigation.*"

28. In all the circumstances, I am not satisfied that this application could not have been filed by early November at the latest when the Defendant became aware of the rejection of its request for an extension of time and of the Claimant's application for judgment. There is no proper explanation given by Ms. Tang Pak for the delay in making this application and therefore, in my opinion, this application has not been made promptly.

Was the failure to comply intentional?

29. In ***Trincan Oil Limited v. Schnake*** (ibid), Jamadar J.A. addressed the issue of intentionality at paragraph 41 of his judgment:

> "*41. In my opinion, to establish intentionality for the purposes of Part 26.7 (3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the compliance. However, where as in this case, there is an explanation given for the failure to comply with a rule which, though it may not be a 'good explanation', if it is nevertheless one that is consistent with an intention to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied.*"

30. On the facts recited by Ms. Tang Pak, she had acknowledged receipt of the Pre-action protocol letter and promised to respond by the 16th October 2009. She had entered an appearance on the 12th October 2009. She had sought instructions from the Commissioner of Prisons on the 8th October 2009 but by the time limited for serving a defence, she had not been provided with such instructions. Based thereon, I am satisfied that the Defendant's failure to serve a defence on time was not intentional.

Is there a good explanation for the breach?

31. The Defendant's explanation for the failure to serve a Defence on time is that, despite its several efforts, the Commissioner of Prisons failed to provide sufficient instructions in time. What is not explained satisfactorily or at all, however, is why the Commissioner of Prisons failed to provide those instructions prior to the expiration of time for the service of the defence or even up to the date of the filing of the application for an extension of time.

32. The Defendant was notified of the Claimant's claim by letter dated 2nd September 2009 and by the service of the Claim Form and Statement of Case on the 11th September 2009. Accordingly, the Defendant was under an obligation to obtain instructions from the Commissioner of Prisons on the allegations made by the Claimant and to serve a defence within forty-two days. If more time was needed the Defendant's Attorneys had the option of requesting an extension of time prior to the expiration of that time period either from the Claimant's Attorneys or from the court. They failed to exercise that option.

33. More importantly, there is no explanation given in the Tang Pak affidavit as to what exactly were the difficulties being experienced by the Commissioner of Prisons in providing instructions on this incident which allegedly occurred on the 2nd March 2009. It is a relatively recent incident

and the names of the officers were given and yet all that I have been told about the period prior to 23rd October 2009 is contained in paragraph 5 of the Tang Pak affidavit as follows:

> " *I formally requested instructions from the Office of the Commissioner of Prisons on 8th October 2009. Sometime at the end of October 2009 Mr. Paul Isaacs, Attorney-at-Law at the Office of the Commissioner of Prisons telephoned me….."*

34. This paragraph demonstrates that despite having received a pre-action letter dated 2nd September 2009 and despite having acknowledged receipt thereof on the 16th September 2009, the Defendant's Attorneys did not seek instructions from the Commissioner of Prisons until the 8th October 2009. It also demonstrates that prior to the 23rd October 2009, there had been no response whatsoever from the Commissioner of Prisons. Since there is no admissible direct evidence from the Commissioner of Prisons before me as to the reasons why it was not possible to provide the Defendant's Attorneys with sufficient instructions to enable them to serve a Defence by the 23rd October 2009, I am not satisfied that I have been provided with a good explanation for the failure of the Defendant to serve a Defence by the 23rd October 2009.

Has the Defendant generally complied with all other relevant rules, practice directions?

35. The Claimant dispatched a Pre-Action protocol letter on the 2nd September 2009. Clause 4.4 of the Practice Direction on Pre-Action Protocols provides as follows:

> "*The defendant should acknowledge the claimant's letter in writing within 7 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is needed.*

36. On the 11th September 2009 the Defendant was served with the Claim Form and Statement of Case. Rule 9.3 provides that as a general rule the period for entering an appearance is 8 days after the date of service of the claim form. The Defendant entered an appearance on the 12th October 2009.

37. On the 16th September 2009, the Defendant acknowledged receipt of the pre-action protocol letter which "*was just received by our department*" and promised to provide a full response by the 16th October 2009. The Defendant did not provide any response to the Claimant by the 16th

October 2009 as promised and only communicated with the Claimant's Attorney on the 2nd November 2009 to seek an extension of time to serve a defence.

38. Based on this short account of the Defendant's actions since it was first notified of the claim herein, I am not satisfied that the Defendant has generally complied with the practice directions and the relevant rules.

Conclusion

39. In the circumstances, I am of the opinion that the Defendant has failed to satisfy the requirements of Rule 26.7 (1) and (3). Having regard to the decision of the Court of Appeal in ***Trincan Oil Limited v. Chris Martin, Civ. App. No. 65 of 2009***, I do not propose to consider the factors contained in Rule 26.7 (4) since the Defendant has failed to make the application promptly and to satisfy the threshold pre-conditions at Rule 26.7(3). Accordingly, I am not prepared to grant the Defendant relief from sanction and to extend the time for service of a defence. The Defendant's application is therefore dismissed with costs to be assessed and paid by the Defendant to the Claimant.

40. Further, in respect of the Claimant's application for permission to enter judgment in default of defence against the Defendant, I am prepared to grant this application and the costs of this application and of the action are also to be assessed and paid by the Defendant to the Claimant.

Dated this 26th day of February 2010.

André des Vignes
Judge