

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV.2012-04919**

**Between**

**HILTON AWONG**

Claimant

**AND**

**RAMCHAND MOHIT**

**PIARI MOHIT**

Defendants

**CV2012-04921**

**Between**

**HILTON AWONG**

Claimant

**AND**

**ABBY ANN JAISAIRE**

First Defendant

**SURESH RAMPERSAD**

Second Defendant

**AND**

**HOPE AWONG**

1<sup>st</sup> Defendant to Counterclaim

**AWONG AND PARTNERS LIMITED**

2<sup>nd</sup> Defendant to Counterclaim

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**Before The Honourable Mr. Justice des Vignes**

Appearances:

Mr. Dons Waithe Attorney-at-Law for the Claimant

Mr. Trevor Jadoonanan Attorney-at-Law for the Defendants

**DECISION**

1. On the 27<sup>th</sup> May 2014 the Claimant filed applications in these matters for orders that the time limited for the Claimant to file and exchange his Witness statements be extended up and to include the 20<sup>th</sup> June 2014 and for relief from sanctions for non-compliance with the Orders which I made on the 16<sup>th</sup> December 2013. These applications were supported by affidavits by the Claimant also filed on the 27<sup>th</sup> May 2014.
2. Having considered the applications, the affidavits in support and the submissions filed by the Claimant's Attorney on the 25<sup>th</sup> June 2014 and the submissions in response filed on the 7<sup>th</sup> July 2014 by Attorney for the Second Defendant in CV 2012-04919 and for the First and Second Defendants in CV 2012-04921, I have decided to refuse both applications and my reasons are set out hereunder.
3. Based on the pre-conditions set out at Rule 26.7 (1) and (3) I am first required to determine the following:
  - i. Were the Claimant's applications made promptly?
  - ii. Am I satisfied that the Claimant's failure to comply with my directions for the filing of witness statements by the 18<sup>th</sup> April 2014 was not intentional?
  - iii. Am I satisfied that the Claimant has a good explanation for his failure to file any witness statements by the 18<sup>th</sup> April 2014?
  - iv. Am I satisfied that the Defendant has generally been in compliance with the relevant rules?

4. The law is clear that it is only if the Claimant has satisfied these pre-conditions that the court may then take into account the factors set out in Rule 26.7 (4): see **Trincan Oil Ltd and others v Chris Martin**<sup>1</sup>

**Promptitude**

5. Having regard to the history of these matters, I am not satisfied that these applications were filed promptly. The terms of the directions which I gave on the 16<sup>th</sup> December 2013 were as follows:

*"Lists of documents to be filed and served on or before the 31<sup>st</sup> January 2014;*

*Agreed and Un-agreed Bundles of documents to be filed and served on or before the 28<sup>th</sup> February 2014;*

*Witness statements to be filed and exchanged on or before the 18<sup>th</sup> April 2014; in default, no evidence to be led from any witness who has failed to file a witness statement;*

*Pre-trial review fixed for the 26<sup>th</sup> May 2014 at 9.30 a.m. in POS 18."*

6. It is important to note that both the Claimant and his Attorney were present when I gave these directions and that the effect of my direction was that I granted to both parties just over four months to file their witness statements, a period of time which I consider to be quite generous. Further, the Orders of this Court were prepared by my Judicial Support Officer and sent to both Attorneys promptly after the 16<sup>th</sup> December 2013.
7. The Claimant failed to file any applications for extensions of time to file his witness statements prior to the 18<sup>th</sup> April 2014 and it was only on the 26<sup>th</sup> May 2014, at the Pre-trial review, when it was brought to the attention of the Claimant and his Attorney that he was in default in compliance and that no application for relief from sanctions had yet been filed, that the Claimant's Attorney sought time to file such an application. As a consequence, I directed the Claimant's Attorney to file and serve an application on or before the 28<sup>th</sup> May 2014 and, in default, the claim would stand dismissed with costs to

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<sup>1</sup> C.A. Civil No. 65 of 2009

be paid by the Claimant to the Defendants. I then adjourned the Pre-trial review to the 16<sup>th</sup> June 2014.

8. Having considered carefully the affidavits of the Claimant filed in these matters, I am of the opinion that his affidavits contain no or no reasonable explanation for the delay between the 18<sup>th</sup> April 2014 and the 27<sup>th</sup> May 2014 in filing this application. While the issue of promptitude will always depend on the circumstances of the particular case and will be influenced by context and fact, in these cases the Claimant had earlier failed to comply with my direction for the filing of his lists of documents by the 31<sup>st</sup> January 2014 and had filed applications for extensions of time and for relief from sanctions on the 21<sup>st</sup> February 2014. In respect of those applications, the Defendants' Attorney had consented to the extensions sought and on the 10<sup>th</sup> March 2014 I granted the applications without a hearing. This means that in February 2014 the Claimant's Attorney should have recognised that the Claimant had already failed to comply with my direction for the filing of his lists of documents and that he should ensure that he comply with the deadline for the filing of witness statements by the 18<sup>th</sup> April 2014.
  
9. The explanation given in the affidavits about an inadvertent mix-up of the dates for the filing of the witness statements with the next date of hearing is just not rational or reasonable. It is apparent that the Attorney did not focus his attention on the terms of the directions which I made in his presence on the 16<sup>th</sup> December 2013 or on the terms of the Court Orders that were sent to him by the Court and which clearly set out the dates for compliance as well as the adjourned date of the matter. In fact, at the Pre-trial review on the 26<sup>th</sup> May 2014, the Court had to bring to the attention of Attorney for the Claimant the fact of his non-compliance, that he had failed to apply for an extension of time prior to the expiration of the deadline, that he had not filed an application for relief from sanctions and that the possible consequence of the claimant's default could be the dismissal of the claims. Having regard to the earlier default by the Claimant and the exercise of the court's discretion to grant the Claimant relief from sanctions on 10<sup>th</sup> March 2014, I am of the opinion that any application for relief from sanctions should have been filed within days of the 18<sup>th</sup> April 2014 and not 39 days later, and only at the prompting of the court.

### **Intentionality**

10. The Court of Appeal has provided guidance in **Trincan Oil Limited v. Keith Schnake<sup>2</sup>** and **The Attorney General of Trinidad and Tobago v Universal Projects Limited<sup>3</sup>** that to establish intentionality what must be demonstrated is a deliberate positive intention not to comply with a rule or direction. This intention can be inferred from the circumstances surrounding the non-compliance.
  
11. On the evidence contained in the Claimant's affidavits, the Claimant stated that after the order was made on the 16<sup>th</sup> December 2014 he lost contact with his attorneys when he had to travel out of the jurisdiction for work. He also failed to attend at his Attorney's office and to give instructions and to attend his office to sign the witness statement. Of significance is the fact that he failed to provide any dates of his travel abroad. He then said that prior to his travels he made several attempts to set up meetings but once again he failed to provide any dates for these attempts. He went on to say that he was finally able to rearrange his schedule and tried to arrange a meeting between the 17<sup>th</sup> and 20<sup>th</sup> February 2014 but he was informed by his Attorney's secretary that his Attorney was attending court. This evidence is in conflict with the fact that the Claimant signed the application for relief from sanctions dated and filed the 21<sup>st</sup> February 2014 and deposed to an affidavit in support of that application on the 21st February 2014.
  
12. He goes on to say that he was unable to arrange a meeting in March 2014 because he had to travel out of the country again for business and for medical reasons. However, he failed to produce any proof of his travel abroad or his medical condition. His next attempt to communicate with his Attorney was between the 13<sup>th</sup> and 15<sup>th</sup> April 2014, three to five days before the expiration of the period of time for filing his witness statements.

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<sup>2</sup> C.A.CIV.123/2010

<sup>3</sup> Civil Appeal No. 104 of 2009

13. In relation to intentionality the Defendants by their written submissions dated 7<sup>th</sup> July 2013 submitted that a party must be taken to intend the consequences of his action or inaction as the case may be and in support relied on the decision of Gobin J. in **The Attorney General of Trinidad and Tobago v Universal Projects Limited**<sup>4</sup>.
14. On appeal from this decision, however, the Court of Appeal<sup>5</sup> provided the following guidance. Jamadar J.A. stated:

*“With respect to the first proposition, that a party is deemed to intend the consequences of its inaction or its laxity, this proposition is also inapt for the purposes of Part 26.7 (3) (a) of the CPR, 1998. Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice, negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order. **All of these reasons may be assessed as not providing any good explanation for the breach of the order**, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7 (3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7 (3) and wedded to all of the requirements of Part 26.7.*

*In my opinion, to satisfy intentionality in Part 26.7 (3) (a) a more positive intention not to comply is required. That is to say, what must be shown is that the motive for the failure to comply was a deliberate intent not to comply. It is accepted that this positive intention can be inferred from circumstances, but in this case it is difficult, given the history of the matter, to characterize the motive for non-compliance as intentional. In circumstances such as these, it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended. However, because the consequences of actions or omissions or choices*

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<sup>4</sup> H.C.4897/2008 at para 9 (i)

<sup>5</sup> Civil Appeal No. 104 of 2009 at paras. 69-70

*are not intended, does not necessarily exempt one from taking responsibility for them. In this case the Appellant must accept full responsibility for the consequences of its actions, omissions and choices”*

15. Based on the explanation given by the Claimant as to the efforts made by him to comply with the terms of my order, I am satisfied that the Claimant's failure to comply was not intentional. In my opinion, the Claimant neglected his obligation to provide instructions to his Attorney to enable him to comply with the direction to file his witness statements by the deadline given and preferred to give priority to his work commitments. For this neglect, he must accept full responsibility and the Court is entitled to take such facts into account in assessing whether the Claimant has provided a good explanation for his breach. However, this does not mean that he intended not to comply.

**Good explanation for breach**

16. Based on the facts as contained in the Claimant's affidavits, the Claimant failed to provide any explanation for his failure to go to his Attorney's office to provide instructions shortly after the Orders were made in December 2013 or in January 2014. He contradicted himself when he said he could not meet with his Attorney in February 2014 but yet he signed an application for an extension of time and for relief from sanctions and an affidavit in support on the 21<sup>st</sup> February 2014. He travelled abroad on business in March and he only attempted to contact his Attorney in April 2014, a few days before the deadline expired. The Claimant having brought these proceedings against the Defendants since 2012 neglected his obligation to provide instructions to his Attorney to enable him to comply with the direction to file his witness statements by the deadline given and preferred to give priority to his work commitments. His conduct exemplified what I can only describe as a '*laissez-faire*' approach to this litigation that the Civil Proceedings Rules 1998 were intended to root out. The Court of Appeal has repeatedly condemned the '*laissez-faire*' approach to litigation<sup>6</sup> and the late applications by this Claimant are reflective of such an attitude which the court cannot condone or encourage.

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<sup>6</sup> Andrew Kanhai v Darryl Cyrus and the Attorney General of Trinidad and Tobago C.A.CIV.158/2009

17. Accordingly, I am not satisfied that the Claimant has provided a good explanation for his breach.

**General compliance with Rules and Directions**

18. The Defendants served a Counterclaim upon the Claimant on the 14<sup>th</sup> March 2013 in CV 2012-04919. Up to 6<sup>th</sup> May 2013, the Claimant had failed to file a Defence to Counterclaim or to file an application for an extension of time. On the 6<sup>th</sup> May 2013, this was brought to the attention of the Claimant's Attorney. Since the Defendant's Attorney indicated that he would not object to an oral application for an extension of time, I granted an extension to the 15<sup>th</sup> May 2013 for the Claimant to file a Defence to Counterclaim.

19. The Claimant also failed to comply with my direction for the filing and service of a List of Documents by the 31<sup>st</sup> January 2014 which necessitated an application for relief from sanctions which was filed on the 21<sup>st</sup> February 2014. Once again, the Defendants' Attorney consented to this application.

20. In the circumstances, I am not satisfied that the Claimant has generally complied with the Rules or my directions in this matter.

**Conclusion**

21. In all the circumstances, since the Claimant has failed to satisfy the threshold requirements of Rule 26.7 (1) and (3)(b) and (c), I hereby dismiss both applications with costs to be paid to the Claimant to the Defendants.

**Dated this 20<sup>th</sup> day of October 2014**

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**André des Vignes**  
**Judge.**