

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-03761

BETWEEN

ROGER ALEXANDER

Claimant

AND

ALICIA'S HOUSE LTD

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances

Mr. S. Hosein for the Claimant

**Ms. G. Secharan-Scott instructed by Mr. De Silva
for the Defendant**

JUDGMENT

1. The claimant filed this action on the 16th September 2010. On the 13th January 2011 he made an application for judgment in default of defence. A day before it was listed for hearing the defendant filed its own application for relief from sanctions and for an extension of time to file a defence, a draft of which was annexed to the application. On the face of it there appeared to be a defence on the merits. It was not a sham. Both applications were heard on 25th March 2011 with the consent of the claimant.

2. At the outset counsel for the defendant accepted that she faced an uphill task. The relevant law has been settled since *Trincan Ltd v Schnake Civil Appeal No. 91 of 2009* and has been applied in similar situations routinely against defendants in this position. There is also a further difficulty arising from “implied sanctions” which now forms part of the CPR. The defendant was left to rely on an appeal to the court to do justice in the case by allowing the defendant an opportunity to have its case heard and decided on the merits, the procedural breach notwithstanding. Counsel emphasized that if I allowed the application it would cause no prejudice to the defendant, and since we were at a very early stage in the proceedings there could be no prejudice to the system, no trial date would be lost, no resources could properly be said to have been wasted.

3. This kind of appeal would ordinarily be rejected, but I have decided that it is imperative that serious consideration be given to it as I have become increasingly concerned in recent times that certain rules including the ones relevant here (Part 26.7) are systematically preventing me as a judge from doing substantive justice. The removal of a judicial discretion in procedural matters has been forcing judges to mechanistically apply rules to shut litigants out, even while we are conscious that our inability to do otherwise results in injustice. An argument that we are depriving litigants of the right to a hearing on substantive issues and possibly depriving litigants of a fundamental right to access to the court and to justice in circumstances where such a drastic consequence is unjustifiable by any standard, can no longer be ignored.

4. The defendant’s application raises issues of proportionality (on which I specifically invited submissions), the role of the court as contemplated by S.20 of the Supreme Court of

Judicature Act and the need to rethink the objective of the change in litigation culture in the civil justice system in the light of actual experience under the rules.

5. The following features make it appropriate in this case to consider the above issues on questions of pure principle. This case is an ordinary breach of contract suit. It does not involve a large money claim. It is by no means a “hard” case, that is, one in which what would normally amount to oppression will result if it goes either way. In other words, an outcome either way will hardly be likely to be affected by any personal sympathies that might cloud the issues.

6. The applications which are now before me are the first matters which call for judicial intervention at what can only be described as a relatively early stage in these proceedings. We are far from any directions even leading to a trial date. If the defendant’s application were to be granted it would have no impact on this judge’s case docket. I am sure that I could continue to be relied upon to properly manage the future conduct of the case so as to give effect to the overriding objective. I could make an appropriate order for costs. It would avoid the defendant having to file a new separate action on its counter claim as it would be entitled to do even if it did not succeed here. Such a new action would see the parties return to court at additional costs, and the new claim would find its way right back to my list.

7. If I refuse the application on the other hand, I doubt that it would have any more significant an impact on the litigation culture among lawyers except to remind them that we do not tolerate procedural breaches, even those which are the result of sheer human error and inadvertence. It would hardly put an end to such breaches as in reality so long as lawyers, their

clients and staff members are human beings there will be errors. But more significantly, a refusal would also result in the claimant having a judgment by default and in a denial of a hearing of the defendant's side. The administration of justice would see yet another litigant's case thrown out of court (and this Court has seen too many) and yet another judge relieved of this responsibility to do what judges are supposed to do, that is to decide on substantive issues between parties.

8. From the above, the answer as to how these applications should be determined might appear to be obvious, except that Part 26.7 is clear and the Court of Appeal in Trincan v. Schnake rightly confirmed what it says and went on to state that the objective of a change in litigation culture is sufficient to justify even a harsh result, so the policy underlying the rule has remained. Trincan v. Schnake arose in the context of an application to extend the time for appealing. In that case the parties had had a full hearing and determination on substantive issues before at first instance. While the pronouncements of the Court of Appeal were clearly intended to apply generally, to my mind that distinction must be borne in mind. The Appeal Court may not have had to fully consider that it was shutting a litigant out of the justice system entirely because of a procedural default. As the law stands this distinction is however not sufficient to make the defendant's case.

9. The matter involves what I believe are broader philosophical arguments. These arguments were raised and addressed in a paper produced and delivered by attorney, Mr. Rishi Dass at a seminar hosted by the Law Association in April 2010. Indeed it appears that in a large measure counsel for the defendant has adopted them and demonstrated their applicability to the

facts of this case with a degree of concision and clarity. I am grateful for the opportunity to consider these new matters in this troublesome area. I could not improve on Mr. Dass' scholarship and would do an injustice to his effort if I attempted to. Suffice it to say, I consider his treatise "**The quest for proportionality under the Civil Proceedings Rules 1998**" to be essential reading for all who are concerned with or about the administration of civil justice in Trinidad and Tobago under the CPR since 2005. I have reproduced certain parts of his work.

10. Having considered the matters raised, my findings are as follow. I accept that rules of court may limit or govern the exercise of a judge's discretion in procedural matters. Indeed in **Charmaine Bernard (Legal Representative of the Estate of Regan Vicky Bernard) v Ramesh Seebalack [2010] UK PC 15** the Privy Council accepted that there is a place even for inflexible rules in any justice system. But I find that when the enforcement of a procedural rule produces a result so disproportionate to the offence as to effectively prevent a judge from doing substantive justice for an insufficient reason, then the rule goes too far. It introduces an element of what can only be called arbitrariness which has no place in any judicial process.

11. The duty of the court to do substantive justice and a corresponding right of litigants to the exercise of its jurisdiction is provided by S. 20 of the Supreme Court of Judicature Act. The section states -

"The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act and the Constitution shall in every cause or matter pending before the Court grant, either absolutely or on such terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by him in the cause or matter, so that, as far as possible, all matters in

controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided”.

12. Inflexible rules of court both in the text and the interpretation cannot readily oust the jurisdiction of the court to replace it with justice by default. Such rules would be ultra vires. Counsel for the defendant cited the case of *Strachan v The Gleaner Co. Ltd [2005] UK PC 33*. Mr. Dass too referred to this case in his paper to underscore the importance of affording litigants a hearing on the merits of their case. The following quotation from his paper is relevant:

“The Board of Privy Council made a point of the need for flexibility in dealing with judgments not decided on the merits, and set out the position ‘pre CPR’:

“52. Strachan v The Gleaner Co Ltd [2005] 1 WLR 3204 on an appeal from the Court of Appeal of Jamaica. The judgment of the Board was delivered by Lord Millett. At paragraph 21 of his judgment Lord Millett said this:

“A default judgment is one which has not been decided on the merits. The courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion: see Evans v. Bartlam [1937] AC 473, 480 where Lord Atkin (discussing the provisions of English rules in substantially the same terms as section 258) said:

*‘The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.’”
(Emphasis supplied)*

The Board then noted that the approach under the CPR would be the same and proceeded to set aside the judgment”

“58. It follows that, whether one applies section 258 of the Code or rule 1.2 of the CPR, the result is the same:

viz. that in deciding what order to make for the future the Court of Appeal was required to have regard to the overriding objective of dealing with cases justly.”

13. If the wording of the relevant English rule is different to ours, then a strained interpretation which achieves the same philosophical result must be justifiable. Judges must simply be allowed to judge. The interpretation of the rules must allow a sufficient discretion in matters of procedure which does not unlawfully limit the jurisdiction of the Court. If we have not so interpreted them before in a manner which preserves the breadth of the jurisdiction of the court, (and I confess that I myself have not) then it is not too late.

14. I find that in its present form Part 26.7 unlawfully interferes with the jurisdiction of the court because it fails to make a distinction between errors and omissions which cause no serious prejudice to parties or to the administration of justice and others which do. As it stands at present, the breach in the instant case is treated in the same way and would result in the same far reaching consequences as far more serious ones which would affect a trial date or cause a significant increase in costs to parties. There is no allowance for flexibility which would lead to a more proportionate response by a judge. The flaw may well be in the text of the rule, but in its application and interpretation, the role of the court can no longer be dismissed.

15. In its judgment in the case of **Charmaine Bernard v Ramesh Seebalack [2010] UK PC 15** the Privy Council also warned that inflexibility in the rules of court can lead to injustice as it is ordinarily understood. However, it paid due regard to comments of the Court of Appeal in relation to the litigation culture in Trinidad and Tobago and these aims of rules insofar as they

were intended to produce a change in the laissez-faire attitude to civil litigation and to introduce more discipline in the conduct of it. This court too zealously embraced this aim in the early days of CPR in the belief that they were acceptable and necessary, but six years into the new system the question has to be asked, is there no price which is too high for this cultural shift? If the pursuit of these objectives leaves a judiciary with judges whose hands are tied, who must suppress their instinctive aversion to injustice, who are constantly apologizing for not being able to do other than as the rules dictate, then I daresay this could not have been the intention of the Rules Committee and if it was, this could not be right. Procedural rules cannot systematically deny access to substantive justice.

16. I hold that in this particular case, the refusal to grant relief would result in a denial of a right to a hearing, when such a deprivation would be a disproportionate response to the procedural breach involved. The court will not deprive the defendant of his fundamental right of access to the court in these circumstances. The defendant's application is allowed. The defendant is granted relief from sanctions. The time for filing the defence is extended to 9th may 2011. The claimant's application for judgment in default is accordingly refused. The defendant will pay the claimant's costs of both applications in the sum of \$4,000.00.

17. I am mindful of the undesirability of an appearance of individual resistance to a policy which is well intentioned. This ruling is not in any way to be perceived as an attempt to undermine the efforts of the Rules Committee and the Chief Justice and the Judiciary as a whole to improve the administration of civil justice or the success achieved to date in this effort. From my own observations, since the introduction of CPR there has generally been a significant improvement in the approach to civil litigation on the part of the profession. Ultimately the

success of the civil justice reforms should be measured, not by the number of cases we determine without a hearing, but by the quality of substantive justice that judges are able to deliver.

18. It is the hope of this court that the Rules Committee would formally amend the rules to expressly allow judges a discretion in procedural matters which is sufficiently wide to avoid injustice. It would erase the impression created by the removal of our discretion in too many instances under the CPR, that civil court judges who are assigned dockets containing more than 1500 cases at any given time cannot truly be trusted to properly manage them so as to achieve the overriding objective.

19. A respectful suggestion to the Rules Committee as to what the rules should be aiming to achieve in this regard is to be discerned from guidance as the proper approach of the Court which was cited by Mr. Dass and which is to be found in the judgment of Bingham LJ in the case of Costellow v Somerset CC[1993] 1 WLR 256 @ pg.263-264:

“As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with the time limit: Ord. 19, r. 1; Ord. 24, r. 16(1); Ord. 25, r. 1(4) and (5); Ord. 28, r.10(1) and Ord. 34, r. 2(2) are examples. This principle is also reflected in the court’s inherent jurisdiction to dismiss for want of prosecution.

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot

compensate. This principle is reflected in the general discretion to extend time conferred by Ord. 3, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord. 3, r. 5, and would indeed involve a substantial rewriting of the rule.

The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate”.

Dated this 6th day of May 2011

CAROL GOBIN

JUDGE