THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SUB-REGISTRY SAN FERNANDO

Claim No. CV 2016 - 03172

BETWEEN

ARJOON HARRIPAUL Claimant

AND

DEPOSIT INSURANCE CORPORATION Defendant

Before The Honourable Justice David C Harris

Appearances:

Mr. Anand Ramlogan SC leads Mr. Alvin Pariagsingh and Mr. Douglas Bayley instructed by Ms. Kavita Sarran **for the** Claimant

Ms. Vanessa Gopaul led by Mr. Reginald Armour SC instructed by Ms. Elena Araujo **for the** Defendant

DECISION

Background

1. This is the decision on an application by the Defendant filed on May 31st 2019 for: (i) an extension of time to file the defendant's witness statements or further or in the alternative (ii) relief from sanctions for the failure to file the witness statements before the time prescribed by order of the court.

2. The Defendant did not file its witness statements by the last extended deadline of 29th May 2019[1] after three previous extensions were granted for the parties to do so:

3. The Original case management direction given by the court on 10th May, 2018 was for the parties to file and exchange witness statements by 29th November, 2018 with an express sanction in default;

4. The 1st NOA by consent, was filed on 27th November 2018, to extend time for filing of witness statements to 25th January 2019;

5. The 2nd NOA by consent was filed on 25th January 2019, to extend time for filing of witness statements to 30th April 2019; and

6. The 3rd NOA by consent was filed on 30th April 2019 to extend time for filing of Witness Statements to 29th May 2019.

7. The order for the filing of witness statements was subject to an express sanction imposed by the court that: "*The failure to file witness statements on the stipulated date will attract the sanction set out in CPR Part 29. 13*."[2] The sanction is clearly set out in the rule.

8. By Notice of Application filed on 31st May 2019, the Defendant seeks **(i)** a further extension of time to file its witness statements by 17th June 2019 or, to the same effect seeks **(ii)** relief from sanctions for failing to file on time, coupled with an extension of time to so file.

9. A further affidavit exhibiting the completed and signed witness statements was filed on the 17th June, 2019.

10. Counsel for the Claimant has objected to the Defendant's filing of the affidavit and witness statements thereto, essentially on the grounds that: **(i)** no leave was sought for its filing, **(ii)** it was filed after both Counsel for the parties had made certain submissions to the court on the last date of hearing – 6th June 2019; and **(iii)** in any event, the 17th June affidavit and witness statements thereto were not relevant having regard to the *concession* made by the Defendant at the said last hearing - that the *first threshold requirement for relief, of a "good reason", had not been established* - and therefore it left for this court as the sole issue for determination, whether a

1 See Ground 4 of Application

relief from sanctions application under CPR 26.7 was necessary. Presumably, if the court holds that a 26.7 relief application is not necessary, then the court moves on and deals in the usual manner with whether it ought to grant an *extension of time* to file the witness statements. To be clear, the Defendant's first line of offence is that this application is properly one of an application for an extension of time and not a 26.7 application for relief from sanctions.

The concession

11. It was suggested by the Claimant/Respondent that Counsel for the Defendant conceded certain issues. The Defendant has by way of notice, sought to withdraw its concession. The Defendant's Notice of withdrawal of the 'concession' filed on the 25th July 2019, provides that "*the first threshold requirement of a good reason has not been established*". The Claimant in turn has set out what they say forms the basis of the concession, by reference to the transcript of the proceedings of the hearing on the 6th of June where the relevant legal submissions of Counsel for the Defendant was made orally.

12. If I understand the import of the "concession" referred to, it is that if this court finds that the application properly before this court is one of a "relief from sanctions" and not for an extension of time, then the outcome is bound to be in favour of the Claimant, i.e. to keep out the witness statements.

13. The Claimant in his written submissions filed on the 27th June 2019, thankfully exhibited the relevant part of the transcript of the proceedings before the court of the 6th June, where it is contended by the Claimant that the Defendant's Counsel made the concession referred to. I accept the contents of the transcript for its true terms and effect.

14. What does this court have before it with respect to the alleged concession? Firstly, it has the Notice filed by the Defendant on the 25th July 2019 withdrawing its concession. Can the Defendant do so? It appears they can. There is no law drawn to my attention or otherwise coming to the court's attention that suggests that in our circumstances such concession, made as it was, cannot now be withdrawn. Save possibly for the fact it was withdrawn after 6th June hearing and submissions (and the written submissions) and with early notice by Senior Counsel for the Claimant at that last hearing, of his intention not to address the issue that the withdrawal of the concession now raises, there is no impediment here.

15. The Claimant has been somewhat deprived of the opportunity of addressing the court fully on the various considerations on whether the Defendant has met the threshold requirements of 26.7 or those for an application for the extension of time to file the witness statements. Counsel for the Defendant, I noted in the transcript, was careful to introduce a caveat, that it is not for her to tell Senior Counsel what to address or not, in his submissions. On the determination of the substantive application as filed, the deliberation by the court will rely on the uncontested facts before the court already and the application of the well discoursed law on the issue, on which the court does not wish to be addressed any further.

16. Secondly, the court has before it the 6th June transcript. What is most notable about the content is the vague, guarded and obscure discourse emanating from the counsel in this transcript as lawyers are often times apt to be. So at page five of the transcript for instance, Senior counsel is noting that: *"….the middle stump, as it were, lies in the…… whether they have a good explanation…and there are cases on point….I mean it is fair to say that the …. you know* ***, they accept some vulnerability on that point ….."*** (emphasis mine).For this court's part, it begs the question doesn't it; what 'vulnerability' is that, exactly?

17. Then, Ms Gopaul, without accepting that she has no good reason in fact and the defendant having in earlier affidavits by Ms Araujo set out the Defendant's Counsel burdensome workload, then acknowledges at page seven of the transcript, the general position that a Counsel's work load and or inadvertence is not a *good reason* in an application for relief from sanctions; But, in another line, adds a caveat to this workload etc. pronouncement, in relation to meeting the requirements of an *application to extend time*. Then there is Senior Counsel's utterance at page 21 lines 3-6 of the transcript that; "…*Because my learned friend has quite properly conceded that there is no good reason. So if there is no good reason and you need relief from sanctions that's the end of it*". I am unable to locate any express concession from the counsel for the Defendant from the transcript or my recall. But, the absence of any objection or contrary position at the hearing emanating from Counsel for the Defendant in response to Senior Counsel's statement of the concession, speaks volumes. In the end however, if it were unclear as to what conversation took place between Counsel privately and what in my mind was the "coded" banter between Counsel before the court, it was subsequently clarified I would think, by the Defendant in the Notice of withdrawal where

the concession as it were, was there stated as: *the first threshold requirement of a good reason, had not been establishe*d.

18. The court accepts the withdrawal. There is now no concession – if that is what it was - by the Defendant on the issue of the existence of *a good reason*. Further to that, this court does not understand it to be that the resolution of the issue is one for the parties to consent to or not. Whether there is a good explanation or not for failing to comply with the court order is a matter for the court's determination only. There is no notice to admit facts in this matter. The parties cannot otherwise decide when to comply with a court order or not by deciding amongst themselves whether or not a set of facts satisfy the rules. In any event, this court is not relinquishing its authority on this determination and guards its jurisdiction to make this determination.

19. So, what is left here is that the application for both extension of time and that of relief from sanctions are before this court.

The sanction-issues arising

20. At the onset, I must note that **if** the Defendant has indeed failed to meet the requirements of 26.7, then the sanction is not necessarily one of not permitting the filing of and reliance on the said witness statements. Upon application of the various considerations, including those set out in 26.7(4); 26.1(1) (w); the powers of the court under part 26 generally; and Part 1 of the CPR and if the facts permit it, the sanctions could vary widely to sanctions other than keeping out the witness statements and bringing the matter to an end without testing the evidence and/or the law.

21. Much has been said about the sanction imposed for the failure to file the witness statements by the date fixed by the court – 29th May 2019. It is clear that the court was not silent on the issue of a sanction for failure to comply with its order, but in fact did fix a sanction and did so by express reference to the rule in CPR r.29.13 in the original order of 10th May 2018. The subsequent consent orders extending time did not expressly include that reference to the rule. I think it implied in any event. However, for the purposes of the reasoning in this decision, it makes no difference whether it is expressed or not.

22. Rule 29.13(1) bars the Applicant from calling a witness whose witness statements has not been within the time specified – 29th May 2019, unless the court permits. This begs the question: does the court so permit? Rule 29.13(2) suggests that the court can permit it even at trial, but only if the Applicant has a good reason for not earlier seeking relief under rule 26.7. This last provisions suggests that the rule contemplates the relevance of a section 26.7 application at the only time possible really, which would be after failure to comply with the court order – by 29th May 2019[2].

23. The Applicant could have made, what would be the high-risk application contemplated by r. 29.13(2), to rely on a late filing of a witness statement at trial and attempt to surmount the threshold laid down in 29.13(1). There are two other dominant options available to the litigant/defendant that present themselves in this case, and indeed are implied under rule 29.13; that is: **(i)** the filing of an application for an extension of time to file the witness statements prior to the time limit for so doing, or **(ii)** the filing of an application for relief from sanction, upon the passing of the time limited by the court or rules, for the filing of the said witness statements.

Application for an extension of time

24. Part 26.8, read in conjunction with Part 29.13, along with the learning in the ***Hagley case***, suggests that the default on the part of the Defendant in failing to file its witness statements by the date fixed for doing so – 29th May 2019, may be remedied by the exercise of a mere case management discretion of the judge. This discretion being to extend the time for compliance, having considered a variety of pertinent factors, not least of which is the question of prejudice to the Claimant.

25. I can do no better than to set out the learning in the Judgment of Mdme Justice of Appeal Rajnath-Lee in the case of ***Dr. Keith Rowley v Anand Ramlogan*** Civ App P215 0f 2014 where Jamadar JA; Yorke Soo-Hon JA and M. Rajnauth-Lee JA presided, Mme Justice Rajnauth-Lee delivered the Judgment after hearing submissions from Mr. D. Mendes SC for Appellant and Deborah Peake SC/ Mr. Gerald Ramdeen, for the Respondent, and set out the considerations for a court in dealing with an application under Part 26 for an extension of time. This is set out in the excerpt below:

26. *"……I agree, that the trial judge's approach in applications to extend time should not be restrictive. In such applications, there are several factors which the trial judge should take into*

[2] See CPR rule 26.6 and rule 26.7(1).

account, that is to say, the Rule 26.7 factors (without the mandatory threshold requirements), the overriding objective and the question of prejudice. These factors, however, are not to be regarded as "hurdles to be cleared" in the determination of an application to extend time. They are factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for extension of time. The trial judge has to balance the various factors and will attach such weight to each having regard to the circumstances of the case. Of course, not all the factors will be relevant to every case and the list of factors is not exhaustive. All the circumstances must be considered. In addition, I wish to observe that this approach should not be considered as unnecessarily burdening the trial judge. In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors. The following Rule 26.7 factors are therefore applicable without the restriction of the threshold: (a) whether the application was made promptly; (b) whether the failure to comply was not intentional; (c) whether there is a good explanation for the application; (d) whether the party in default 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 his attorney; (g) whether the failure to comply has been or can be remedied within a reasonable time; and (h) whether the trial date or any likely trial date can still be met if relief is granted. Rule 1.1(1) sets out the overriding objective of the CPR which is to enable the court to deal with cases justly. Dealing justly with the case includes - (a) ensuring, as far as practicable, that the parties are on an equal footing; (b) saving expenses; (c) dealing with case 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. In addition, inherent in the overriding objective to enable the court to deal with matters justly are considerations of prejudice. It is for the judge to consider on which party lies the greater risk of prejudice if the application is granted or refused. The court will take account of the various disadvantages to the parties should the application be granted or refused." (Emphasis added)

27. The *"**Hagley case**"**,*** a Court of Appeal decision of 20th November 2017, is relied upon by the Applicant/Defendant on this application for an extension. I agree that the cited case suggests that

if the sanction for failure to file the witness statements is that which is set out in rule 29.13, it gives the Applicant the opportunity to seek relief even up to trial.

28. I do not think that this necessarily assists the Applicant on all issues because surely, the later the application the greater the potential prejudice to the Claimant/Respondent and indeed the greater the hurdle to overcome the requirements for an extension of time as set out by Mdme Justice Rajnath-Lee in the said case: ***Dr. Keith Rowley v Anand Ramlogan*** Civ App P215 0f 2014. If the Applicant is unable to get over the hurdle of an earlier application for an extension of time (or relief from sanctions), it is ordinarily unlikely to surmount the hurdle at a later time. I accept that this is the general position and that circumstances could arise that may make such relief at trial, possible. But, as both parties in their submissions have noted, the peculiar facts of each case play no small role in the court's deliberations and determination on these issues. Taking the statement of the law as can best be gleaned from the transcript of the *Hagley case* and if the circumstances of both cases are sufficiently on all fours with each other, then this application would be a case management application at the PTR for an *extension of time* for compliance with a court order. In the circumstances of this case, although not a 'threshold' requirement per se, the defendant need also overcome that said requirement as one of the factors in the discreet application to extend time. For the reasons provided below in relation to the application for *relief from sanctions* findings of the court, save for the paramouncy of the 'good explanation' factor that pertains in the 26.7 deliberations, I conclude that all the requirements have been satisfied by the defendant in the application for an extension of time.

29. Just to be clear, this court concludes that there is a good explanation for the breach (see below); the application for an extension was made promptly – within 2 days; the breach was not intentional – see the conclusions on the mis-diarizing below; there has been general compliance, which includes making the requisite applications prior to this one, on time; it is in the interest of justice to allow the extension so that a case in which much has been invested by both sides and which is on the cusp of trial; it is evident on the limited evidence before this court that the failure to comply was that of the Attorney; that the failure could have been remedied within a reasonable time – it would have been evident to the Claimant based on his accepting the representations found in paras 9 and 10 of Ms Arajuo's affidavit of the 31st May, that compliance was imminent. In any event, it was remedied by the date requested, 17 days later, the 17th June 2019. All the

witness statements were filed as exhibits to the further affidavit of Ms Arajuo of the 17th June; and finally the trial date of late September 2019 could have been met, and readily so.

30. So what is the relevant application before me? Is it an application for relief from sanctions under rule 26.7? Following ***Hagley***, I find it is a PTR case management application for an extension of time. But in the interest of completeness and for the saving of time, for the reasons set out in the paragraphs below, I conclude that in any event even if were an application for *relief from sanctions* pursuant to Part 26.7, the Defendant has met the threshold and other factors for relief.

Relief from sanctions

31. Upon proper construction, rule 29.13(2) appears to contemplate an earlier than trial date application under 26.7 as an option that would have been available to the Defendant in our case. It actually refers to the rule 26.7, as that which amounts to a threshold hurdle for the applicant under 29.13(2). By this, I refer to the following content: "…***unless*** *the party asking for permission has a good* ***reason for not seeking relief under rule 26.7*** ***<u>earlier</u>***" (emphasis mine). The 26.7 application, following part 29.13(2), is anticipated to have been earlier made, for failure to comply with an order or direction of the court. This failure, in the instant case, would be upon the expiration of the time limited for the filing of the witness statements – 29th May 2019. Whatever the nature of the application made after this breach and at trial, it appears the rule assumes you ought to have made an application pursuant to 26.7 prior to the application made at trial and calls upon you to justify the failure to have made such a prior application for relief. Or, alternatively, 29.13 simply does not impose threshold requirements for applications for relief from sanctions for defaults that did not earlier require the 26.7 process in the first place. So, if it was a breach that only required a simple case management application for an extension of time in the first place, then 29.13 would not impose the stated threshold requirement in 29.13(2). Barring the application of that alternative that I have noted above, it would be odd, however, if at this stage the threshold for a successful application for relief at trial day would be less than that of the application you apparently ought to have made prior to the trial day i.e. the very legendary and robust 26.7 application. Be that as it may, the ***Hagley case*** reasoning is otherwise. I must admit; this court is not able to entirely and comfortably reconcile the ***Hagley case*** with the authorities prior to it, both local and from the Privy Council (all cited in the Claimant's submissions) and indeed with some of the authorities since the ***Hagley case***. The Claimant however, in his

submissions filed the 27th June, 2019, refers to the recency and consequent primacy of the case of Carlos Vialva v Narendra Maharaj CA P-153 of 2018 (transcript) as a more weighty authority than that of ***Hagley*** in which the court of appeal confirmed the reasoning in the line of cases commencing with the Privy Council authority of ***Keron Mathews.*** This is largely so. However the discreet question posed by Justice of Appeal jamadar in the ***Vialva case*** and set out in para 13 of the written submissions of the defendant is very general in nature i.e. "*if there is an order with a sanction attached and you come after that date….*" . It does beg the question: what order and what sanction? We know and understand the order. However, we are in this matter dealing with a specific sanction as worded in the rule 29.13(1) and (2). The reasoning in the instant case has to be case and Rule specific. It is also not in dispute that an application for relief from sanctions or an extension of time, can be sought right up to and including the trial date, subject of course, to the caveat set out in rule 29.13(2).

32. To the extent the ***Hagley case*** does **not** set out the prevailing law as contended by the Counsel for the Defendant; the court having entered into all the considerations applicable to the 26.7 application, is unable to discern the failure of the Defendant to meet any of the factors set out in the text of CPR 26.7 either, or any resulting prejudice to the Claimant, in extending the time to allow the witness statements exhibited to the 17th June 2019 supplemental affidavit to stand as filed as of the said date. I have considered the position with respect to the provision of a good explanation for failure to comply with the court order as a threshold factor in the 26.7 application. I acknowledge the long line of authorities both binding and instructive that guide this court in rule 26.7 applications.

33. In the circumstances of this case, not least of which is the stage of these proceedings; the time and cost already invested in this trial process; the fact that all processes are complete and ready for trial, together with the very weighty factor in my view, that the only reasons for the default that appear anywhere on the face of the documents before the court point to that of the lawyer; the show must go on. One thing that is clear to the court; that, nowhere has it been shown that the party/litigant/defendant has been responsible for the delay and default. This in my view, having had command of this matter through the various processes and having a feel for the case management momentum and pendulum of momentum between the respective parties from time to time, is a weighty factor in my deliberations.

34. This matter has been robustly contested to date. There is no evidence to suggest nor has it been expressly contended by the Claimant that the Defendant either does not have an arguable case or has simply sat on its laurels during the course of this saga. The Claimant's contention is simply that the Defendant is in non-compliance with the order of the 2nd May 2019 and the CPR, more specifically rules 29.13 and 26.7. Put even more narrowly, the Claimant's sole contention is that the Defendant does not, by admission (or presumably in any event, in fact) satisfy the threshold requirement under 26.7, of having a *good explanation* for its default. To state the obvious, the court unfortunately does not have the benefit of the definitive nature of a completed process pursuant to rule 29.15 - 'Notice to admit facts'. It is not in dispute that the defendant must have a good explanation to meet the threshold requirement for success on an application for relief under rule 26.7.

35. The requirements for relief from sanctions under rule 26.7 are well and fully argued before the courts of Trinidad and Tobago. The binding and instructive authorities and learning on the rule have been canvassed in this matter also.

DISPOSITION

36. Setting aside the issue of the "good explanation" for the time being; this court concludes that all the requirements and considerations set out in the said ***Ramlogan v Rowley case*** have been met by the Defendant on the evidence and circumstances, inferred and express, before the court (See para 32 above).

37. In relation to both applications – rule 26.7 and the extension of time – the Claimant, by consenting to the earlier applications for the extension of time based on the Defendant's ongoing case-specific overwhelming work load (as opposed to what I would describe as a general workload associated with a thriving practice perhaps) which was identified in the Defendant's affidavits filed in this matter, the Court cannot say that the workload associated with the specific matters that burdened the counsel for the Defendant during a specific time was not of the nature that would require the 'wriggle room' that the defence requested even up to the last application which is before this court[3]. It is another thing for Counsel to consistently accept briefs that can reasonably

[3] See paras 5, 6, and 9 of the affidavit of Ms Arajuo of the 31st May 2019.

be anticipated to consume ones time to the detriment of others. Further, certain matters for which Counsel has been previously retained, once they mushroom as it were, may not be able to be jettisoned by Counsel simply to allow the pursuit of another, such as this case. Such an unanticipated incident of overburden is more in the nature of exigencies of the administrative of justice and officers of the court in this case, I would think. There is no evidence that the very same earlier work load in the matters specifically identified by the Defendant was not that which required the extension of time application before me now. If it were a good reason for the extension earlier, then there is the prospect that it still remains a good reason now unless shown otherwise.

38. I am very guarded with this reasoning for it must not be construed in any manner other than in relation to this specific matter and this court's experience with the case management process in this specific case and the specific legal representatives in this case. However, on the-albeit limited evidence before the court, there is no sufficient reason to suggest that the conditions that claimant presumably accepted as justifying the earlier extensions, no longer exists. In fact the affidavit in support of the application before me suggests that it indeed was the prevailing cause of the delay and breach. Other than the strictures of the rule in 26.7 as elucidated in the learning thereto and brought to the attention of the court in the submissions, there is nothing factually that guides the court to an immoveable position on whether the explanation provided is a good one or not.

39. The case of <u>Elroy Julien v Tricia Brown</u> CA P-176/2019 has been referred to this court on this issue. The transcript of the proceedings was supplied. I find it very instructive, particularly page 25-26 thereof. This deals more squarely with **the other limb** of the default of the defendant.

40. **The other limb:** Attorney at law for the Defendant indicated that the deadline date was diarized incorrectly as the 31st and not the 29th. The Attorney for the Defendant indicated in the affidavit in support of this application that the Defendant had requested yet another extension of time to the 17th June 2019 to file the witness statements. She indicated that the statements had already been obtained from the witnesses and that her Junior Counsel had contacted Junior Counsel on the other side to request the further extension to the 17th June. In the end, it was not forthcoming. The Defendant worked toward that 31st May deadline for the filing of the application for an

extension of time. That mis-diarized deadline of the 31st was in fact met for the purposes of formalizing and filing the application for an extension of time to file the witness statements of the defendant[4]. The 29th was a Monday; the 30th was a public holiday and the 31st the last day of the month. It followed a 'long' weekend[5]. I do not find that the mis-diarizing was an *inexcusable oversight* or one that *connotes real or substantial default* on the part of the defence. It is not conclusive on its own to refer to a fact specific case that appears to be on all fours with this case on this point to say that the mis-diarizing in this case is an inexcusable oversight or not.

41. On the evidence before this court, and for the reasons provided above, the court concludes on a balance of probabilities, that **(i)** that there is no evidence of conduct of the Defendant - the named party - that amounts to inexcusable oversight or one that connotes real or substantial default on the part of the said defendant; **(ii)** the conduct of the Defendant's Counsel does not amount to inexcusable oversight or one that connotes real or substantial default on the part of the defence; **(iii)** In relation to *"(ii)"* above, the same reasons/explanation that prevailed at the time of the earlier consent to the extensions of time granted to the Defendant and that indeed formed the basis of the need for those several extensions, persisted and now form the *good explanation* for the non- compliance with the courts order for the filing of the witness statements by the 29th May, 2019. All the requirements for the grant of either the 26.7 application and /or the extension of time have been sufficiently satisfied to permit the order below.

42. For the reasons provided above **IT IS HEREBY ORDERED** that:

    i. That the time for the Defendant to file the witness statements be extended to the 17th June 2019;
    ii. The witness statements exhibited to the Supplemental Affidavit of Elena Araujo filed June 17th 2019 be deemed the Defendant's filed witness statements, and filed on time;
    iii. That the Defendant is granted relief from sanctions for failing to have filed the said witness statements by the deadline set by the court.
    iv. That the Defendant do pay the assessed costs of this application certified fit for Senior and Junior counsel.

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[4] See the paras 10,11, 12 of the affidavit of Ms Araujo, filed on the 31st May 2019.

[5] The Trinidad public holiday culture, regrettably, would render the Monday (29th) something of a non-day.

v. That the Claimant do prepare and file the trial bundle in accordance with the CPR1998 (as amended and consolidated);

vi. That the trial date stands as fixed.

DAVID C. HARRIS

HIGH COURT JUDGE

AUGUST 23, 2019