REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2016-03836**

BETWEEN

THE TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION
THE ATTORNEY GENERAL OF THE REPUBLIC OF TRINIDAD AND TOBAGO ON BEHALF OF THE MINISTRY OF HOUSING AND URBAN DEVELOPMENT
Claimants

AND

JEARLEAN JOHN
First Defendant

HENCKLE LALL
Second Defendant

GRAIG DAVIS
Third Defendant

PETER FORDE
Fourth Defendant

PROJECT SPECIALIST LIMITED
Fifth Defendant

RONALD HEERALAL
Sixth Defendant

POINT LISAS PARK LIMITED
Seventh Defendant

ANTHONY SAMPATH
Eight Defendant

PATRICK SOO TING
Ninth Defendant

EVERIL ROSS
Tenth Defendant

ORAL RULING

Before the Honourable Madame Justice Eleanor Donaldson-Honeywell

Appearances:

Mr. Phillip Q.C., Mr. Anthony Bullock and Ms. Kimberleigh Peterson for the Claimants

Mr. Gerald Ramdeen and Mr. Alvin Pariagsingh for the 1st, 2nd and 3rd Defendants

Mr. Bronock Reid and Ms Sanika Tyson for the 4th and 5th Defendants

Mr. Anil Maraj and Mr. Kingsley Walesby for the 6th and 10th Defendants

Mr. Fyard Hosien leads Mr. Rishi Dass instructed by Luana Boyack and Sasha Bridgemohan for the 7th, 8th & 9th Defendants

Date of Delivery: 17th April 2018

1. The Defendants have applied under the Civil Proceeding Rules, 1998, as amended (CPR) **Part 11.15** to set aside orders I made ex parte on 2nd February and 5th June 2017. Those orders granted extension of time for service of the Claim Form pursuant to **CPR 14 (2)**. The subsection applied because the applications were made within the four (4) period allowed under **CPR 8.13** to serve the claim.

2. As in the UK, no CPR rule imposes threshold conditions on the right to apply to extend service time - under **CPR 8.14(2)** or **CPR 7.6(2) UK**.

3. Also, in Trinidad and Tobago there have been no judgments interpreting **CPR 8.14(2)**. This decision is therefore made in uncharted Trinidad and Tobago jurisprudence waters, i.e. the decision whether to set aside the **CPR 8.14(2)** orders.

4. However, there are many cases on the application of the **UK CPR 7.6(2)**. Those cases, as highlighted by all attorneys in submissions, provide persuasive guidance.

5. This hearing inevitably involves some review in the nature of a re-hearing – **Imperial Cancer Research Fund v Ove Arup & Partners Ltd [2009] EWHC 1453 (TCC), [2009] BLR 458**[1]. I therefore take into account not just what was in evidence

[1] Para. 6

prior to the ex parte orders but also the new information and discoveries from the Defendants in their Affidavits now.

6. There being no threshold rules the decision whether to extend time was and this decision whether to set aside the order is, a matter of the Judge's discretion or 'Judicial Instinct' as suggested by Counsel for the Claimant. I am guided by the UK approach in **Hashtroodi v Hancock [2004] EWCA Civ 652** at [17], [18], [19] as summarised in **Imperial Cancer Research Fund Case**[2] at paragraph 9 (2). Accordingly, my discretion whether to extend time should have been guided by the overriding objective at **CPR 1.1**. I will determine the applications to set aside by reference to those objectives.

7. Accordingly, my main concern in deciding whether to set aside the order is whether the extension of time are in keeping with the objective of dealing with this cases justly. I took into account the points at **CPR 1.1 (2)**.

A. Ensuring that parties are on equal footing

8. I considered a number of subheads to this point the most important of which was equality of entitlement of parties to a fair trial. Fair trial includes rights provided for by law such as here the possible defences under the Limitation Acts and CPR time limits.

9. Rix LJ in the matter of **Cecil v Bayat [2011] EWCA Civ 135** considered that:
"In my respectful opinion, therefore, the question of an extension for service in the context of the expiry of a limitation period goes beyond a point referred to in the authorities to the effect that after a limitation period plus four months for service a defendant who has not

[2] Para 9 (2)

been served can be entitled to assume that he will not be bothered by litigation. The point is referred to in a passage in Professor Zuckerman's Civil Procedure, 2nd ed, 2008, at 4.145:

> *"If an extension is sought beyond four months after the expiry of the limitation period, the Claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed."*

10. As stated by Rix LJ in Bayat v Cecil, citing Zuckerman 2008, 2nd Ed at [4.134]:
"'In Dagnell v JL Freedman & Co (a firm) [1993] 1 WLR 388 (HL) it was held that the starting point of any consideration of extension of the period for service must be that a defendant has a right to be sued, if at all, by means of a writ (now a claim form) issued within the limitation period and served within the period of its initial validity.'
Lord Browne Wilkinson there had the agreement of the House as a whole. He spoke of the defendant's right based upon the limitation period as a 'fundamental right'."

11. Other matters I considered under the need to ensure parties are on equal footing are:

    a. Whether there was a good reason for applications for the extension taking into account possible limitation defences;
    b. Relative hardships;
    c. Conduct of the parties.

Limitation

12. Paragraph 34 of the Statement of Case indicates 9th November 2012 as the date of a $140 million transaction that is the subject matter of the causes of action herein.

13. Those causes of action include tort allegations of conspiracy against all Defendants, Breach of Contracts against the 1st to 6th Defendants and the Tort of Bribery against the 7th and 10th Defendants.

14. Additionally, there are claims in equity against the 7th, 8th and 9th Defendants, that is, knowing receipt and dishonest assistance.

15. Paragraph 35 of the Statement of Case says the 1st Claimant LAD was not informed as at 9th November 2012 of the transaction details. Though never elaborated upon this sets up a possible claim that transaction was not discovered.

16. Under Section 3 (1) of the **Limitation of Certain Actions Act, Chap. 7:09** (the "Act")– the limitation period for all the torts and contracts claims versus all 10 Defendants is four (4) years from the date the cause of when accrued that is, 9th November 2016. This is so unless as alleged by the Claimant Section 14 (1) applies. Then the period is four (4) years from the discovery of the fraud, concealment or mistake or four (4) years from when it could with reasonable diligence be discovered.

17. According to the Defendant under S.65 (a) of the **Trustee Ordinance, Chap. 8 No. 3** - the limitation period for the equitable claims is four (4) years and Section 14 does not apply.

18. The Claimant counters that there is no limitation period vis a vis the 7th, 8th and 9th Defendants regarding these claims based on their interpretation of the facts/law. It is not for me not to decide who is correct but it is clear the 7th, 8th and 9th Defendants would be deprived of the right to raise this possibly as a limitation defence if the orders are not set aside. There was however, very strong merit in the submission of Counsel for the Defendants that his clients were 'constructive

trustees'. They were therefore entitled based on the analysis in **Central Bank of Nigeria v Williams [2012] EWCA Civ 415** to the four year limitation defence. More importantly, however, all the Defendants fall under the Limitation Act since all were subject to Tort claims. Thus the possible limitation defence that is certainly a relevant factor as to whether extension of time for service was just, is that the four year period expired and Section 14 is not applicable.

19. That limitation defence may be raised because the Claim was filed within days of the four year limitation period. The extensions of time for service beyond four months arguably took the claim outside the limitation period.

20. All that the Defendants are required to establish, to show that limitation is a relevant factor in considering "good reasons" given for extension herein, is that they could possibly have raised limitation defences. It is my finding that this was established in their Affidavits.

Good Reason

21. According to Counsel for the 7th, 8th and 9th Defendants the starting point in deciding what is a good reason where limitation may be affected is the threshold conditions at 8.14(3) – i.e. difficulties in serving the Defendants. However, as pointed out by Counsel for Claimant that is not necessarily so. He cites **Collier v Williams [2006] EWCA Civ 20** at TAB7 of the 6th and 10th Defendants' submissions:

"***There is a clear difference between the two sub-rules***. *CPR 7.6(3) is subject to pre-conditions: relief cannot be granted if the conditions are not satisfied.* ***Under CPR 7.6(2), there are no pre-conditions, so that relief can be granted under that rule even if the court is not satisfied that the Claimant has taken all reasonable steps to serve and has acted promptly***. *The decision in Hashtroodi's case highlights the importance of the reason why the claim form was not (if it was not) served within the four months period.*

We would agree that ***the CPR 7.6(3) requirements are relevant to the exercise of the discretion given by CPR 7.6(2). But the fact that the pre-conditions stated in CPR 7.6(3)(b) and (c) are not satisfied is not necessarily determinative of the outcome*** *of an application under CPR 7.6(2). That is clear from the passages set out at para 87 above.* ***When deciding whether to grant an extension of time under CPR 7.6(2), the court is required to consider how good a reason there was for the failure to serve in time*** *(assuming that the application is dealt with after the end of the four months period): the stronger the reason, the more likely the court will be to extend time; and the weaker the reason, the less likely. This involves making a judgment about the reason why service has not been affected within the four months period.* ***It is a more subtle exercise that that required under CPR 7.6(3)*** *which provides that unless all reasonable steps have been taken, the court cannot extend time."*[emphasis added]

22. I accept that although difficulties in service is relevant where limitation is invoked, there can be other "good reasons" that will justify an extension. In **Bayat v Cecil** para 108 states:

"Finally on the question of an extension of time for service, but of prime importance, there is the way in which the judge considered the limitation aspect of the case. In [166] the judge directed himself correctly, as it seems to me, about the need to take limitation into account. However, in considering whether good reason had been shown, at 179, he failed to take limitation into account at all. He concluded that good reason had been shown, without reminding himself about the limitation position or explaining how the Claimants' submission of "good reason" surmounted that difficulty…As Stanley Burnton LJ says (at 54), the primary question is whether, if an extension of time is granted, the defendant will or may be deprived of a limitation defence. That is plainly shown by Battersby and Dagnell always to have been the attitude of the courts, on the highest authority. It is therefore for the Claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service for reasons for which he does not bear responsibility, or that he could not have known about

the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show a good or sufficiently good reason in a limitation case."

23. In the present case it was the Claimants' choice to wait until a late stage to initiate their proceedings and to seek to extend time for service in the face of an arguable limitation period. The Claimants' Affidavits explain that their reason for applying for extensions were:
    a. Norwich Pharmacal Orders granted by the court on 23rd November, 2016 had not been complied with fully.
    b. The information already received from compliance could result in the need for substantial amendments to the Claim filed on 2nd November, 2016.
    c. The secrecy that non-service would afford was required to avoid dissipation of funds by the Defendants.

24. These reasons do not in my view, having had the benefit of evidence from the Defendants and submissions, provide sufficient basis for depriving them of the opportunity to raise possible limitation defences. As suggested by the Defendants, a more appropriate course would have been to serve the Defendants within the period for service and utilise other procedural mechanisms to address any concerns they may have had with regard to potential asset dissipation.

25. This is so firstly because there was insufficient factual basis in the Claimant's Affidavits to explain a number of things e.g. why the claim was filed days before the end of the potential limitation period; why the Claimant did not apply for Norwich orders and do investigations before filing the claim; why the reasons stated could take precedence over possible limitation defences.

26. Secondly, all that the Claimants intended to achieve by extending the time for service, secretly, could have been achieved more fairly by applying other parts of

the CPR e.g. by serving the Claim in time and later amending it and by applying for Mareva Injunction to prevent dissipation of funds.

27. Thirdly, there is persuasive authority that waiting for future developments, as in this case awaiting receipt of Norwich information, is not a good reason.

28. According to Birkett J in **Battersby v Anglo-American Oil Co Ltd [1945] KB 23**:
"The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served."

29. There is no prior case in which it was held that awaiting Norwich Pharmacal compliance is a good reason. However, in Dagnell, awaiting the conclusion of ancillary litigation, a **Beddoe** application, was held not to be a good reason.

30. Fourthly, it is now clear to the Court that some aspects of the reasons given were not factual. It was not correct that substantial amendments would have to be made based on Norwich information already received. In fact no substantive amendments were made regarding the 1st to 9th Defendants, so they could have been served prior to 9th November, 2016.

Relative Hardship

31. The hardship to the Defendants if I don't set aside the orders will outweigh that to the Claimant if I do.

32. If orders are not set aside the Defendants will lose the opportunity to raise a strong limitation objection. The Claimant will be able to block any alleged limitation defence by saying that they filed the Claim within time.

33. I don't agree with the point made by Queen's Counsel for the Claimant that no limitation defence possibility was lost since the Claimants would have served the claim if I didn't grant the extension. If so that would mean they never had genuine reason for needing the extension. It would mean they knew there was no reason not to serve the Claims and were just trying out on the Court to get an unnecessary extension. There is no evidence to support that that was their intention. Instead at struck paragraph 19 of their Affidavit they say no limitation was in jeopardy, especially because S.14 of the Act applies.

34. I agree with Counsel for the Defendants that inherent in the point made by Counsel for the Claimant is a contention that the Claimant was lulled into a false sense of security by the ex parte orders if not for which they would have served in time. There is merit in the Defendants' response at pages 4 to 6 of their note in Reply. They refer to **Hoddinott v Persimmon Homes (Wessex) Ltd [2008 1 WLR 806** where it was questioned whether an extension order gave the Claimant a "false sense of security that service of other claim form during the extended time for service would be good service and whether that fact was a fact that should be taken into account in the Claimant's favour." At paragraph [19] the District Court held that "A Claimant who makes an application without notice runs the risk that the order may be subsequently set aside". The false sense of security point was ruled irrelevant by the Court of Appeal at paragraph [49] in **Hoddiinot**.

35. The hardship to the Claimant if orders are set aside will be possible liability to pay costs of these applications. They will however be entitled to refile the claims **– CPR**

8.13(6). Since the Claimants say the correct limitation period is under S.14 of the Act theywill have a full opportunity to support that in a new claim.

36. In the case of **City & General (Holborn) Ltd v Royal and Sun Alliance plc [2010] EWCA Civ 911, 131 Con LR 1**., cited with approval in **Bayat v Cecil**, Longmore LJ stated:

"It is well-settled that when debatable issues of limitation arise, it is inappropriate to attempt to decide them on an interlocutory application for an extension of time for service of a claim form. If the Claimants' argument that the claims are not time-barred is correct, they can always begin a fresh action in which, if a time-bar is asserted, it can be adjudicated upon. It is enough for a defendant to show that he might be deprived of a defence of limitation if time for service of a claim form is extended; if he can show that, an extension should not be granted or, if granted without notice, such extension should be set aside, see Hashtroodi v Hancock [2004] 1 WLR 3206 (paragraph 18) and Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806 (paragraph 52)."

Conduct

37. The conduct of the Claimant was also considered as I sought to ensure parties are on equal footing. I don't agree with the allegations of abuse of process by deliberately misusing **CPR 8.14,** but it seems the Claimant filed the claim before they were ready so as to beat the limitation deadline.

38. They knew they had more steps to take i.e. filing the Norwich Applications and perfecting the claim but chose not to serve the claim and keep it secret by way of ex parte application. That was a risky strategic litigation decision. They would have known an ex parte order could be set aside **– Zuckerman's Civil Procedure, 3rd ed, 2013 at [5.105].**

39. The Claimants also made certain omissions e.g. not including the warning that an application to set aside could be made when they served the orders and failing to serve the Defendants with the ex parte application and affidavits. I have not seen enough evidence that these were deliberate actions in abuse of process, but rather they may have been inadvertent.

40. Finally, the Claimant failed to disclose material to the court to fully give a picture of how the Defendants could be prejudiced by the extension and that the reasons e.g. need for secrecy were not genuine. It was left to the Defendants in filing these Notices of Application to put before the court relevant information such as "LAMB 3". This is an exhibit to Affidavits for the 7th, 8th and 9th Defendants filed on 25th July, 2017 showing that there was some public knowledge of the matter.

41. Significantly, there was no disclosure in the Claimant's affidavits as to potential limitation period expiration dates to be taken into account whether under S.3 or S.14 of the Act. In opposing the current applications to set aside they contend that S.14 applies but still have not disclosed in an affidavit the date when they say the torts/fraud were discovered.

B. Saving Expense

42. A more efficient cost effective way to deal with this matter is to set aside the orders; then the Claimant can refile the claim. This can be done within a short time, usually within days at a minimal filing cost.

43. The matter going forward will be less crowded with irrelevant material thereby giving both sides more precise focus in the restarted litigation, starting with the inevitable limitation points being raised. Both sides will win in terms of procedural efficiency and fairness.

C. Dealing with the case in a way that is proportionate to the amount of money involved; importance of the case & complexity

44. The Claimants, in submissions, have highlighted the substantial nature of the case at hand and the serious wrongs alleged. The substantive case involves approximately TT$50,000 in bribery and approximately TT$750,000,000 in sale of land proceeds, allegedly at a price far greater than open market value. They argue that public interest in this case and the involvement of the state should be weighed heavily in the exercise of my discretion.

45. However, as submitted by counsel for the 6th to 10th Defendants, these factors weigh equally as heavily against denial of a limitation defence. In **Bayat v Cecil**, the Court of Appeal in considering an alleged loss in the sum of US$400,000,000, plus interest and costs, held at [55]:

"It is of course relevant that the effect of a refusal to extend time for service of the claim form will deprive the claimant of what may be a good claim. But the stronger the claim, the more important is the defendant's limitation defence, which should not be circumvented by an extension of time for serving a claim form save in exceptional circumstances."

46. Further at [98] the court considered:

"It cannot be that only the very biggest and most complex litigation should get this exceptional treatment. That would stand access to justice on its head."

47. Reply submissions by the Defendants highlighted the local Court of Appeal decision of **AG of Trinidad and Tobago v Universal Projects Limited C.A.CIV.104/2009**. That case involved a default judgment against the state relating to a claim for approximately TT$31,000,000. In the application to set aside, the Court of Appeal considered at [113]-[114]:

"Though the sum payable in this case is a large one, that ought not to change the approach of the courts to matters such as this one, where consistently is has been held that the strict requirements of Part 26.7 must be satisfied…

Underlying Senior Counsel for the Appellant's submission has been a subtle invitation to the court to treat with the State differently because of its 'special circumstances'."

48. The court then highlighted several provisions of the CPR which do provide the State with procedural allowances and then stated at [115]-[116]:

"It is therefore difficult to see any justification as to why the court should intervene and supplement the CPR, 1998 to accommodate the State because of its special circumstances in a case such as this…

The overriding objective of the CPR,1998 to deal with cases justly, must also mean to deal with them justly in accordance with the rules of the court."

This dicta is equally applicable to the present circumstances. The CPR does not make any special allowance in rule 8.13, nor in 8.14 for the State. Therefore, despite the suggestion by Counsel for the Claimants that the involvement of the State gives rise to a higher degree of public importance, this special circumstance does not obviate the requirement for compliance with the rules of the CPR, particularly in the face of the Defendants' possible limitation defence. See also **Zuckerman's Civil Procedure, 3rd ed, 2013** at **[5.101] – [5.102]**.

D. Allotting appropriate share of Court's resources, while taking into account the need to allot resources to other cases

49. My court staff took weeks to arrange this file. Usually one Assistant JSO can organise a file effectively. In this case both JSO and JRC had to help with the assistance of the Judge.

50. The file contained all the Affidavits each with thick Norwich applications attached. These all had to be scanned by the Registry. This will be done again if the matter proceeds through appeal stages, taking time that could be dedicated to other cases.

51. Refiling a new claim will in no way prejudice the Claimant or the public interest but will allow for more efficient use of court resources and a case that can be effectively managed with irrelevant issues removed.

DECISION

52. The Court hereby orders as follows:
    a. Orders granted in respect of the *ex parte* applications of the Claimant's dated 2nd February 2017 and 5th June 2017 are set aside.

    b. Costs of applications dated 14th July 2017, 19th July 2017, 10th July 2017, 25th July 2017 and 28th July 2017 filed by the Defendants to be assessed by the Registrar if not agreed by the Claimants to the Defendants.

    c. The Claimants' claims made against the first to tenth Defendants contained in their Amended Claim Form and Amended Statement of Case filed in these proceedings on 28th June 2017 are struck out with costs to be paid by the Claimants to the Defendants to be assessed if not agreed in light of the cost budget application filed on 2nd November 2017 not having been determined.

d. Liberty to apply.

……..

Judge

The Honourable Madam Justice E. Donaldson- Honeywell