TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim Nos CV 2012-00997 and CV2017-02598

Between

MONA SOOKRAM

GIRLEY SEOW

NEEMI BATCHER

POLLY KEAST

Claimants

And

VISHNU MUNGAL

Defendant

Before Her Honour Madam Justice Eleanor Donaldson-Honeywell

Appearances

Ms. Nalini Bansee holding for Mr. Ravi Rajcoomar instructed by Ms.Alisa Khan, Attorneys-at-Law for Claimant

Mr. Larry Lalla instructed by Ms Saira Lakhan Attorneys at-Law for the Defendant

Delivered on 19th July 2018

Ruling

A. **Introduction**

1. This Ruling determines an application by Mr. Vishnu Mungal ["the Defendant"] for relief from sanctions, he having failed to file Witness Statements or apply to file Summaries within extended time granted. In addition, the Application seeks an extension of time to file the Witness Statements and permission to file a Witness Summary.

2. The application is the latest step in a case with a long procedural history dating back to 2012. In the Claim, four sisters ["the Claimants"] seek to recover possession of the home where they grew up from the Defendant who was the common law husband of their deceased sister.

3. The Defendant's case, as initially pleaded in his Defence and Counterclaim seeking declarations that he owns the family property, included two main planks. Firstly, he claimed that based on a proper title evaluation his spouse owned the property or at least part of it and as such he is now the owner. Secondly, he claimed that he is entitled to it based on proprietary estoppel and trust. In particular he claims his wife's parents always promised them the property would be hers and that they both invested heavily in the development/maintenance of a bar called Burnley's on the premises.

4. By Order dated May 4, 2018, consented to by the Claimants on the condition that an "unless order" be added, having been permitted a further three weeks to file Witness Statements, the Defendant was unable to meet the deadline date. The order made was as follows:

> "1. *The time is extended for parties to file witness statements to May 31, 2018.*
>
> *2. The time is extended for the parties to file and serve evidential objections to 15th June, 2018.*
>
> *3. In default, unless the witness statements are filed within the extended time the Defendants will not be permitted to file witness statements or call witnesses at trial.*"

5. The effect of the inclusion of the "unless order" was to impose an automatic sanction which would take effect if there was no compliance on the deadline date. This direction was made in circumstances where there is already an automatic sanction imposed by the **Civil Proceedings Rules, 1998, as amended [CPR]** at **Part 29.13(1)** for failure to file Witness Statements or Summaries on time.

6. The date specifically requested by the Defendant as the deadline for filing the Witness Statements was May 31st. However, that day and the day before were

public holidays. The next working day was Friday June 1st but the Witness Statements were not ready for filing. As such on June 1st, 2018, instead of meeting the deadline for filing the Witness Statements counsel for the Defendant filed an application for an extension of time to file the Witness Statements by June 4th, the Monday after the weekend.

7. The Witness Statements for the Defendant, his son and two neighbours were lodged in the Court Registry on June 4th, 2018 without waiting for permission for late filing and exchange to be given.

8. There was a separate application filed on June 4th, 2018 seeking permission to file a witness summary for one Abraham Snyder, on grounds that he could provide crucial evidence on work done by the Defendant in improving the subject property, there being no receipts to prove same in the possession of the Defendant. However, he was working on a project in Tobago. The proposed Witness Summary was in the format of a list of unanswered questions. This application was clearly filed outside the time frame provided for at **CPR 29.6 (6)** which mandates that witness summaries must be served by the deadline for serving witness statements.

9. In keeping with the provisions of **Part 25.1(d)** of the CPR the approach to procedural applications in this matter has been to encourage parties to co-operate with each other in the conduct of the proceedings. Arising from this approach there had been agreement by the parties to prior applications for extensions of time, including prior extensions granted to the Defendant to file the Witness Statements.

10. However, when consulted regarding the Defendant's Application made on April 27th, 2018 the request was made that an "unless order" by included in the directions granting the extension. Thereafter when the deadline date was not met, counsel for the Claimant, when consulted by the Court's Judicial Support Officer, refused to agree to a further extensions of time applied for by the applications dated June 1st and 4th respectively.

11. In those circumstances my determination, by order made in chambers on June 11, 2018 was that the applications for an extension of time to file the witness statements

and the witness summary were dismissed for failure to apply for relief from sanctions.

12. Thereafter on the same day, June 11, 2018 the Defendant filed the application for relief from sanctions being determined by this Ruling.

B. **Decision**

13. Having considered the Claimants' Affidavit and written submissions promptly filed in opposition to the grant of such relief, as well as oral submissions from both sides at a hearing held on July 2nd 2018, my finding was that, as it relates to both the filing of witness statements and summaries, the Defendant was required but failed to meet the threshold criteria at **CPR 26.7(3)**. Accordingly, there was no need to consider the further criteria governing exercise of my discretion as set out at **CPR 26.7(1) and (4)**.

14. The result of not meeting the threshold criteria where sanction relief is required, would be that no relief could be granted. The Defendant could then have no evidence to proceed with his Defence and Counterclaim. This position is well established in authorities interpreting **CPR 26.7**. In the Court of Appeal's 2009 decision in ***Trincan Oil Ltd and Others v Martin***[1], Jamadar, JA opined that **Rule 26.7** is to be interpreted as follows:

> *"[13] The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an Application for Relief from Sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied."*

[1] CA Civ. No. 65 of 2009

15. This approach was followed in the recent Jamaican Court of Appeal decision **[2017] JMCA Civ 2 Jamaica Public Service Company Ltd v Charles Vernon et al** where Morrison JA in considering their Rule 26.8 which is similar to our **CPR 26.7** underscored that it is only if the threshold requirements are met that other considerations provided for in the CPR must then be taken into account. He said:

> "*In this jurisdiction, a first instance judge faced with an application for relief from sanctions must begin from a point of principle that (a) the orders of the court must be obeyed; (b)* ***all the requirements of rule 26.8 (1) and 26.8(2) must be met; (c) once those requirements have been met****, it is the duty of the judge to have regard to the interest of the administration of justice and ensure that justice is done in accordance with the overriding objective, without resort to needless technicalities, in keeping with the factors set out in rule 26.8(3); (d) a litigant is entitled to have his case heard on the merits and should not lightly be denied that right; and (e) the court must balance the right of the litigant against the need for timely compliance*." [Emphasis added]

16. In 2010 the automatic effect of the sanction where Witness Statements or Summaries are not filed on time was emphasised by the Privy Council in **JCPC No. 0068 of 2010 AG of Trinidad and Tobago v Keron Mathews** at paragraph 15**.** Accordingly in **CV 2013-04300 Lakhpatiya Barran v Balmati Barran et al,** cited by Counsel for the Claimant herein, it was said at paragraph 24 that "*The Court's discretion to grant Relief from Sanctions only arises after the conditions precedent in Rule 26.7(3) CPR have been satisfied. A Court is precluded from granting relief unless all three conditions are satisfied.*"

17. In light of the severity of the implications for the Defendant, I adjourned the hearing before finalising my decision. This was done to allow for specific authorities, if any, to be filed by the parties. The authorities requested were any binding Judgements, more recent than the Judgements cited by the Claimant, allowing me to consider the overriding objectives of the CPR to allow sanction relief despite the Defendant's failure to meet the threshold requirement.

18. Attorneys for the Defendant did not comply with the said direction but instead took the opportunity to file written submissions reiterating oral submissions on other

aspects of the application. However, during the two week period given to the parties for filing additional authorities, I gave further consideration to one aspect of my findings stated at the hearing.

19. My position now is that, as it relates to the witness statements lodged in the Registry on June 4th, the strict approach of not considering anything else if the threshold requirements were not met is not the test to be applied. This is so because by virtue of **CPR 2.8(5)** the deadline for filing the documents was by 4pm on the next working day after the deadline which fell on a holiday i.e. June 1st. On that day an application to extend time was filed.

20. As such, although the Defendant did not act as required to meet the extended time, he did take a step which protected him from the effect of the automatic sanction. Useful guidance in this regard is provided in **Zuckerman on Civil Procedure, Third edition, at 11.103** as follows : " *A party in default may pre-empt the sanction by seeking an extension of time for performing the required procedural step before the deadline for compliance with the unless order has expired (i.e. before the sanction has taken effect.)*

21. The test to be applied, to the Witness Statements in relation to which the extension of time was sought before the automatic sanction took effect, is therefore that set out by Kokaram J in a June 2017 Ruling delivered in **Claim No. CV2016-02213Wayne Greaves v Joseph Wilson et al**. Citing prior authorities he set out the test at paragraph 11 and 12 of his Ruling, as follows:

"11. ***Roland James v The Attorney General of Trinidad and Tobago Civ App No. 44 of 2014*** *laid down the factors which should be considered in determining whether to grant an extension of time on an application. Mendonca JA had this to say:*

> *"In my judgment on an application for an extension of time,* ***the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered****. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The*

Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.

In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. ***In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction****. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.*

Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. *However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time."*

12. In ***Dr. Keith Rowley v Anand Ramlogan Civ App No. P215 of 2014****, delivered on the same day of Roland James, Rajnauth-Lee J.A noted at paragraph 13:*

"13. In the above cases, the Court of Appeal was disposed to the view, and 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 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." [Emphasis added]

22. In light of the foregoing, I have treated with the June 11 application as it relates to both the Witness Statements dealt with in the prior June 1 application and the Witness Summaries dealt with in the June 4 application [the two sets of late documents] by firstly considering the threshold requirements at **CPR 26.7(3).** Thereafter, it is only in relation to the Witness Statements covered by the June 1 Application that I go further to consider the other criteria at **CPR. 26.7(1) and(4)**and the overriding objectives of the CPR.

23. As hereinafter explained, I have concluded that although the **CPR 26.7(3)** requirements were not met it will be in the interests of the CPRs overriding objective of dealing justly with the case to grant the Defendant the extension of time to file his witness statements.

24. As it relates to the June 4, 2018 attempt to seek permission to file witness summaries after the sanction for failing to make such an application took effect, my decision is made within the constraints of CPR 26.7(3). My finding that the threshold requirements were not met is therefore fatal to that aspect of the June 11, 2018 application. Accordingly, I will not grant permission for the Defendant to file the Witness Summary of questions to Mr. Snyder.

C. **Procedural History**

25. The decisions herein on the Application filed by the Defendant were made in the context of, inter alia, the aforementioned long procedural history of the matter

commencing with the filing of the claim on March 12, 2012. Following the filing of the Defendant's pleadings the case was managed by the docketed Judge, Madam Justice Jones as she then was, in a manner that resulted in substantial headway towards stream lining the issues and encouraging settlement.

26. This approach was evident in the fact that parties both cooperated with each other by not pursuing certain Applications filed in 2012. An application to remove the 3rd and 4th Defendants and an application by the Claimants to have the Counterclaim as to cohabitational relationship status of the Defendant struck out were dropped.

27. Issues regarding the titles to the property were determined by Advice on Title prepared by independent Counsel Joanne Julien on the directions of the Court. That advice, filed in March 2013, clarified the issues largely in a way that was consistent with the Claimants' case. The Defendant and the estate of his deceased spouse were entitled not to the entire property but to a small part share of it by virtue of Title.

28. The Title issue having been addressed, there remained only the Defendant's claim to an equitable interest. The possibilities for success of that aspect of the Claim appear to me to have been questionable based on the pleadings. While the Defendant claimed to have spent around $500,000, his pleading neither revealed particulars of spending nor indicated that receipts, copies of loan documents, a valuation of his work and so on were available. As such Trial would involve the word of his witnesses against the Claimants. There was scope for settlement. From April 2013 the parties started working on getting an agreed valuation of the property to inform a global settlement.

29. On November 21, 2013 the matter was placed in the suspense docket by the presiding Judge as the parties continued to work towards valuation and eventual settlement. However, the matter was not resolved. Four years later a Case Management Conference was convened before me on March 20, 2017.

30. According to Ms. Lakhan, the Defendant's Attorney in her April 27, 2018 Affidavit filed in support of one of many applications filed since then, it was the Claimants who caused the four year delay. However, Lead counsel for the Defendant, Mr. Lalla admitted during the hearing of the instant application that the Defendant also

failed to take steps in the Counterclaim for some time. Parties explained that settlement talks had stalled because due to certain technicalities valuators could not agree to provide a valuation of the property.

31. On June 26, 2017, there being no indication that the parties would further consider settlement, directions were given for Trial which was scheduled for November 14th and 15th, 2018. In the interim the parties were expected to complete other steps towards trial in a manner that would allow for a Pre Trial Review ["PTR"]to be held on March 12, 2018. These steps were intended to allow for continual reassessment of the parties' positions based on documents disclosed, evidence filed and attempts made to agree on undisputed facts and on what issues remain undetermined. Had parties followed these directions, by March 2018 at the PTR there would be scope for further consideration of settlement options and/or strategic Trial preparation.

32. A statement of agreed facts and issues was due on November 17, 2017. However, the record reveals a statement filed with facts and issues proposed only by the Claimants. The Claimants' evidence in opposition to relief from sanctions herein is that counsel for the Defendants was unresponsive to requests to agree on these matters. Accordingly, in order to meet the deadline she filed the unilateral statement of fact and issues. Other steps not completed for this reason, according to the Claimants, included the disclosure of documents process.

33. Additionally, there was neither exchange of evidence in the form of written witness statements nor filing of evidential objections because three applications for extensions of time were made by the Defendant. No indication was given by the Defendant of the need to file witness summaries. The reasons for needing extensions to file witness statements were set out in Affidavits of the Defendant's Attorney, Ms Lackhan. These reasons differed for each application as follows:

    (i) In a January 12, 2018 Application the reason was that the Defendant was out of the jurisdiction for a month for vacation and a medical check-up and was due to return in mid-January. By consent, time was extended to March 30, 2018 to file and exchange witness statements. The Claimants complied by filing three days before the deadline.

(ii) In an April 4, 2018 Application the reason was that Counsel had a personal difficulty which was explained to counsel for the Claimants. By consent, time was extended to April 27, 2018

(iii) In an April 27, 2018 Application the reasons were that two witnesses live outside the jurisdiction and Ms. Lakhan is unable to take instructions from them at odd hours. Three other witnesses are elderly and unable to email instructions. Thus several meetings with them are required. According to Ms. Lakhan as stated in her affidavit, the witness statements were then drafted but not completed. She further stated that there was need to go abroad to take instructions from one elderly witness. By consent, time was extended to May 31st, 2018 with an "unless order" included.

(iv) As aforementioned the Defendant did not meet the deadline but instead filed a fourth application for more time to file witness statement on June 1, 2018 and an application for an extended time to seek permission to file witness summaries on June 4, 2018.

34. All save for the last two applications filed on June 1st and 4th were consented to by the Claimants. In refusing to agree to a further extension, the Claimants reiterated that the last time they agreed to an extension back in April it was on the condition that an "unless order" be stipulated.

35. From the June 1st, 2018 default by the Defendant, the matter that was on track since 2013 towards settlement and since June 2017 was scheduled for Trial, entered a tail spin of satellite litigation, including a pending Appeal and what appears to be a retaliatory procedural application filed on July 11th by the Defendant seeking to strike out the Claimants' witness statement. This all followed on the failure of the Defendant to meet the case management deadlines.

36. It is improbable that the case can be heard at Trial as planned. The elderly parties, save for the second Claimant now deceased, having waited over eight years for closure in this matter, will inevitably be forced to wait several more months or years. The duration of time that the matter has proceeded pending Trial and will continue unresolved, is unusually long in the context of the modern CPR approach.

37. As such during the oral hearing, parties were asked to consider a consensual approach to ensuring that the Trial date and unnecessary legal costs could be saved. The matter was stood down during the hearing for this to be considered. However, on resumption Counsel for the Claimants reported that her instructions were to proceed with her objection to the Application.

D. **The Rules**

38. **Rule 29.13 (1) of the Civil Proceedings Rules 1998 (the "CPR"** provides as follows:

> *"If a Witness Statement or Witness Summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."*

39. There is an express sanction provided for in the CPR and therefore where a party has not met the deadline and the deadline has passed they must apply to obtain relief from the sanction. If the party recognizes that they cannot meet the deadline and decides to act before it has passed, the provision requiring an application for relief from sanctions may not become applicable. Instead the Court may be approached to extend the time pursuant to general case management powers at **CPR 26(1) (d)**.

40. The governing rule on relief from sanctions, **CPR 26.7** provides:

> *"(1) An Application for Relief from any Sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
>
> *(2) An Application for Relief must be supported by evidence.*
>
> ***(3) The court may grant Relief only if it is satisfied that: –***
>
> ***(a) The failure to comply was not intentional;***
>
> ***(b) There is a good explanation for the breach; and***

(c) The party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(4) In considering whether to grant relief, the court must have regard to: –

(a) The interests of the Administration of Justice;

(b) Whether the failure to comply was due to the party or his attorney;

(c) Whether the failure to comply has been or can be remedied within a reasonable time; and

(d) Whether the trial date or any likely trial date can still be met if Relief is granted.

(5) The court may not Order the respondent to pay the Applicant's Costs in relation to any Application for Relief unless exceptional circumstances are shown."

E. **The applications and supporting/opposing evidence**

41. The application filed on June 1st seeking extended time to file witness statements was based on grounds that five elderly witnesses were unable to meet with the Defendant's Attorneys to file the Witness Statement on June 1st. They couldn't come to the office because one witness was in Tobago and the others had no transport. However, only their signatures were required as the statements were prepared. Counsel was unable to meet the witnesses on the Wednesday 30th and Thursday 31st holidays. This application was dismissed on June 11, 2018.

42. The Application filed on the 4th June, 2018 seeking permission to file a witness summary was based on the ground that the Defendant's Attorneys were unable to meet with the Defendant's contractor, Mr. Snyder to obtain information to prove

that thousands of dollars were spent to develop and refurbish Burnley's Bar. Although the Application was filed after the deadline, there was no express request for an extension of time. This Application was also dismissed for failure to apply for relief from sanctions.

43. The application for relief from sanctions and for time to be extended for the filing of witness statements and the application for witness summaries was then filed on June 11, 2018. The grounds therein included a statement at paragraph 2 that was incorrect, namely that the order extending time to May 31st had not been served on Ms. Lakhan's office until after the deadline passed. It is clear from the record, as highlighted by Counsel for the Claimants in her Affidavit, that both sides received emailed copies of the order as soon as it was granted on May 4th, 2018.

44. The further grounds of the application for relief from sanctions and extended time focuses mainly on the fact that June 1st followed on two public holidays during which the Attorneys did not obtain signatures to the statements. Unlike prior applications grounded on witnesses being abroad, this time it was said that most of the witnesses are elderly and from Sangre Grande. They were not prepared to attend the San Fernando Offices of Ms. Lakhan. Nothing further was said concerning the witness summary of questions to Mr. Snyder in relation to which permission was required for late filing.

45. There was a statement by Ms Lakhan that the matter has a history of prior extensions of time granted to both parties. No particulars were provided. In response instructing Attorney for the Claimants denied that she had applied for any extensions save for one consent application regarding the filing of a further list of documents.

46. The application for relief from sanctions was made on the basis that according to the Defendant, Trial and the Court's schedule would not be affected if the Defendant is allowed the extensions requested. The Claimants would not, according to the Defendant, have been prejudiced by the delay of two weekend days to receive the Defendant's witness statements.

47. However, at the oral hearing of this application it was made clear that Attorneys for the Claimants did not accept service of the Witness Statements filed without permission on June 4th. Accordingly, far longer than two weekend days have thus far elapsed without the Claimants having sight of the Defendant's evidence. The filing of evidential objections and the Pre-trial Review have not occurred on schedule due to the Defendant's default. The parties having waited more than a year since Trial directions were given and with a few days remaining in the Court term, it is unlikely that all aspects of this matter will be addressed so as to meet the November 2018 Trial Date.

F. **Consideration of relevant factors**

(i) CPR 26.7(3) Threshold Factors applied to the two sets of late documents

a. *Was the failure unintentional*?

48. At the hearing I expressed my finding that the failure to meet the fourth extended deadline for filing witness statements was intentional. It was not that I found that the Defendant had no intention of ever filing witness statements; I found that the approach to doing so was in a manner that showed intentional disregard for the timelines set. None of the reasons given in the Defendant's Attorney's supporting affidavit convinced me that there was an intentional stance on their part towards meeting the deadlines.

49. Instead, every action over the period of more than a year since directions were given, including the three prior extension applications, evinced somewhat of a cavalier, lax approach. It was also my finding that the Defendant applied for the May 31st deadline and was fully aware at least several weeks before the deadline passed that it was a holiday. Waiting until the last day and the day after the weekend to file applications for extensions was intentional.

50. There was no affidavit filed by the Defendant himself and he failed to attend Court for the hearing of his application for relief. There was no clear explanation as to whether he was one of the persons referred to by his Attorney who lived in Sangre Grande but did not want to travel to San Fernando to sign the Statement. However, no other explanation having been given specifically in relation to the Defendant himself, it is my finding that his failure to meet the deadline was intentional.

51. It would also have been his responsibility to provide evidence in support of his claim that he spent substantial amounts of money on developing Burnley's Bar. Thus, there being no other explanation, he must have intentionally waited over a year until the last minute to try to get a statement from Mr. Snyder. Thus the failure to seek permission to file a witness summary of unanswered questions before the deadline passed, was also intentional.

b. *Is there a good explanation for the breach?*

52. There was no good reason for the breach.

53. Firstly, as it relates to the Witness Statements, when taken in the context of directions having been given since June last year, being unprepared to visit Attorney's office in San Fernando is not a good reason. Greater efforts could have been made to have the statements taken to the Defendant and his witnesses if they were unwell or immobile. No evidence was given other than age as to why they were unprepared. The Claimants are also elderly. However, Mona Sookram prepared and filed a Witness Statement in time and attended Court for the hearing of the Defendant's application.

54. Secondly, as it relates to the failure to apply on time to file a witness summary no reason was given in support of the application for relief from sanctions. I take notice however of the fact that previously on June 4th Ms. Lakhan filed an Application indicating that the reason for not getting answers to questions from Mr. Snyder was that he was working on a project in Tobago. Taking into consideration the availability of modern communication methods such as landline telephone, cell phones, skype and email it is not clear why, even with assistance, Mr. Snyder could not communicate with the Defendant and his Attorneys. There could also have been travel to Tobago, at minimal cost and time, to take a statement from Mr. Snyder.

c. *Has the Defendant generally complied with all other relevant rules, orders and directions?*

55. There were no particulars of compliance in the Defendant's Affidavit in support of the application for relief from sanctions. The Affidavit in opposition set out a history of the Defendant's non-compliance, including failure of his Attorneys to

cooperate to agree facts and issues. In all the circumstances, I am not satisfied on a balance of probabilities that the Defendant generally complied with rules and directions relevant to this matter.

56. The Defendant having failed to meet the threshold requirements for relief from sanctions as it relates to the filing of the Witness Summary of Mr. Snyder there is no need to consider the other factors as it relates to that application, which is dismissed. The other factors are relevant however, to the application for relief from sanctions regarding the Witness Statements lodged in the Registry on June 4th.

(ii) CPR26.7(1) and (4) factors applied to the Witness Statements covered by the June 1 application

d. *Promptitude in applying for relief/extensions*

57. I determined this factor in favour of the Defendant. It is clear that best efforts were made to seek the Court's directions, by making the June 1st and 4th Applications promptly on the deadline day and the day following the weekend thereafter. It is of no moment that perhaps due to inadvertence no application was made for relief from sanctions. That was quickly remedied by applying for relief on June 11th.

e. *The interests of the administration of Justice*

58. At the oral hearing I stated my view that a lax approach to meeting CPR requirements and complying with Court directions is not in the interests of the administration of justice. It would be unfortunate if even one litigant, in this case Mona Sookram left Court with the impression that despite the seismic shift from the laissez-faire approach intended by the CPR, such a lax approach would be condoned to her detriment.

59. The introduction of automatic sanctions was intended as an antidote to prior maladies of delay in civil proceedings. The concern that there not be a return to the pre CPR litigation landscape has been addressed in many Judgments. In a Ruling, cited by Counsel for the Claimants, delivered on August 17, 2017 in **CV2015-04245 Tri-Star Caribbean Inc. v Republic Bank Ltd at para 30** Rampersad J voiced the concern that "*any order in favour of the defendant's application may seem to be*

a license to return to the olden and often maligned days of failure to adhere to time-lines – a return to the 'cancerous laissez-faire approach' referred to by Des Vignes J in Soodhoo v Epitome CV 2007-01678"

60. Similarly, it is my view that, as unpalatable as the results of a sanction may be, upholding its automatic effect in appropriate circumstances is necessary to prevent a slip back to pre CPR inefficiencies that caused great hardship to litigants and their Attorneys.

61. As it relates to the failure to file Witness Statements herein, the position as stated before is that the Defendant staved off the automatic effect of sanctions by applying for an extension of time on June 1, 2018. In all the circumstances of this case however, I maintain the view that the Defendant's delay in filing witness statements is not in the interests of the administration of justice.

f. *Whether failure to comply was due to the party or his attorney*

62. I have underscored earlier in this Ruling, the actions and omissions of the Defendant and his Attorneys based on which I hold the view that both are responsible for the failure to comply.

g. *Whether the failure can be remedied within a reasonable time*

63. An attempt was made by the Defendant to remedy the failure within reasonable time.

h. *Whether the trial date can still be met if relief is granted.*

64. In light of pending appeals, satellite litigation, the intervening Court Vacation and procedural steps still to be completed it is unlikely that the November Trial Date can be met. However, in light of the length of time parties have been before the Court efforts will be made, if required, to schedule new Trial Dates that are not too far off from the original dates.

(iii) <u>Lack of Prejudice/ Overriding objective applied to the Witness Statements covered by the June 1 application</u>

65. The contention of Attorneys for the Defendant is that there would have been no prejudice to the Claimants occasioned by waiting just a few days more to receive the Witness Statements which were lodged after the weekend on June 4th.

66. On the other hand the Defendant's access to justice would be gravely prejudiced by failure to present any evidence. Although the parties had, during case management, agreed on his cohabitational status, Counsel for the Defendant suggests that if he is unable to present evidence, even his claim to inherit part of the property from his spouse will be in jeopardy[2]. That would be an unjust result since parties had also agreed to preparation of advice on title, which revealed that the Defendant's spouse was entitled to a share in the property.

67. It is for these reasons that efforts were made to have the Claimants consent once more to this final extension of time for the Witness Statements. As underscored by Mendonça JA in **Roland James v AG** cited above, when considering an application for extended time "*the Court should take into account the prejudice to both sides in granting or refusing the application*".

68. Having weighed all considerations, it is my view that in keeping with the overriding objective of the CPR to deal with cases justly, the Defendant having waited eight years to resolve his matter should not be prevented from relying on the Witness Statements lodged on June 4, 2018. The exchange of Witness Statements will allow for Trial on the merits but will also provide an informed basis for possible resolution of the matter, even at this late stage, by accessing an Alternate Dispute Resolution method such as mediation.

G. **Order**

69. It is Hereby ordered that:

    (i) Time is extended for the Defendant to file and exchange his Witness Statements by July 20, 2018.

[2] This may not be a definite outcome as parallel proceedings in FH0116/2012 Vishnu Mungal v Ambica Batchar (Deceased) transferred to the Civil Division as CV2017-02598 to determine whether Mr. Mungal was her cohabitational spouse remain pending having been stayed to await the outcome of this case.

(ii) An extension of time is granted to the parties to file evidential objections by October 5th, 2018 and responses thereto (if any) by October 20, 2018. Evidential objections will be determined in Chambers.

(iii) The Defendant's Application for relief from sanctions pursuant to Rule 26.7 of the CPR and an extension of time to file Witness Summaries is dismissed.

(iv) The Defendant is to pay to the Claimants the costs of this Application for extensions of time and relief from sanctions, in an amount to be assessed if not agreed.

Delivered on 19th July 2018

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Eleanor Joye Donaldson-Honeywell

Judge.

Assisted by Christie Borely JRC I