THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-00675

BETWEEN

TIGER TANKS TRINIDAD UNLIMITED	**Claimant**
AND	
CARIBBEAN DOCKYARD AND ENGINEERING SERVICES LIMITED	**Defendant**
AND	
LENNOX PERSAD	**First Third Party**
AND	
LENNOX OFFSHORE SERVICES LIMITED	**Second Third Party**

Before the Honorable Mr. Justice V. Kokaram

Appearances:

Mr. M. Morgan for the Claimant
Mr. F. Hosein for the Defendant
Ms. K. Bharath for the First and Second Third Party

JUDGMENT ON PROCEDURAL APPLICATION-
RELIEF FROM SANCTIONS

1. **Introduction:**

1.1 On or around October 17, 2006 an oil spill occurred from a vessel "the Kelly Mark" moored at the Defendant's premises. At the request of the Defendant the Claimant executed the services of cleaning up the oil spill. The Claimant issued several invoices to the Defendant for the services rendered by the Claimant which remain unpaid. By its claim dated 25th February 2008, the Claimant claims the sum of TT$1,424,833.25 as against the Defendant being the cost of services rendered to clean up the oil spill at the request of the Defendant.

1.2 In its Defence filed on 8th May 2008, the Defendant contends that the Claimant's services were engaged by the Defendant acting for and on behalf of one Lennox Persad ("the First Third Party") and/or Lennox Persad Offshore Services Limited ("the Second Third Party") the owner and/or person in control of the Kelly Mark. The Defendant further alleges that it was made clear by the First Third Party acting on his own behalf and/or on behalf of the Second Third Party to the Defendant that all invoices and bills for work done on the clean up operation were to be made in the name of the First Third Party and be sent to him for payment.

1.3 At the first case management conference convened on 2nd July 2008 before Best J, leave was granted to the Defendant to issue third party proceedings against the First and Second Third Parties. By its third party notice filed on 15th January 2009, the Defendant claims from the first and second third party, a full indemnity against the Claimant's claim on the grounds that on 17th October 2006 the Defendant received instructions from the first third party acting on his own behalf and /or on behalf of the second third party to make contact with the Claimant for the purpose of cleaning the oil spill and that all invoices for work done in the exercise were to be sent to the first third party either in his own behalf or acting on behalf of himself and the second third party.

1.4 The first and second third party however in its Defence filed on 16th March 2009 contends that it was the Defendant who engaged the services of the Claimant and that the Defendant was not acting as the third parties' agent in the cleaning of the oil spill. It is clear that that very narrow issue of fact to be determined in this claim, a simple debt recovery action, is whether the Defendant engaged the services of the Claimant as the agent of the first and second third party and whether the first and second third party agreed to pay the said invoices of the Claimant for services rendered in cleaning the oil spill. From an examination of the pleadings, this issue is to be determined based on the viva voce evidence of the officers of the respective parties as the agreement to clean the oil spill was made orally. Accordingly, at the Case Management conference before this Court on 23rd November 2009 the following order was made:

1. The main action CV2008-0007675 and the third party proceedings shall be heard together pursuant to the following directions:

   (a) The Claimant do file and serve an Application for Budgeted Cost on or before December 4, 2009.

   (b) The parties do file and exchange their respective List of Documents on or before December 31, 2009.

   (c) The Claimant do file and serve a bundle of documents comprising those documents which are agreed and not agreed on or before January 29, 2010.

   (d) The witness Statements to be filed and exchanged on or before February 19, 2010.

2. The Case Management Conference is fixed for 25th February, 2010 at 9.30 am in Court Room POS 24 at the Hall of Justice, Knox Street, Port of Spain.

3. The Trial Window is fixed for March 23, 2010 at 1.00 p.m. in Court Room POS 08 at the Hall of Justice, Knox Street, Port of Spain.

1.5 All the parties complied with these directions save for the first and second third party with respect to the filing of the witness statement of Lennox Persad. This witness statement was not filed in compliance with the said order. Accordingly an application was

made by the first and second third party dated 22nd February 2010 for relief from sanctions and an extension of time for compliance with the Court's order with respect to the filing of this witness statement.

1.6 The application came on for hearing on 25th February 2010 at the Case Management Conference. This was convened for the purpose of hearing the application for budgeted costs and considering the witness statements filed by the respective parties prior to the trial scheduled for 23rd March 2010. I dismissed the application primarily for the reason that the first and second third party did not demonstrate a good reason for the breach of the Court's order. The reasons for this decision are set out below.

2. Applications for relief from sanction:

2.1 It is accepted as common ground that the express sanction prescribed by rule 29.13 CPR for failure to serve a witness statement within the time specified by the Court is that the witness may not be called to give evidence. Accordingly a party in breach of its obligation to file its witness statements must apply and obtain relief from this sanction imposed by the rules.[1]

2.2 Rule 26.7 CPR sets out the requirements to be observed in making such an application for "relief from sanction." The requirements of rule 26.7 CPR must be strictly complied with. It is now well settled that the effect of rule 26.7 CPR is to set out a "shopping list" of factors which are to be considered when the Court is considering whether to grant relief from the sanction imposed for non compliance with its orders. Rule 26.7 (1) and (3) sets out a list of pre conditions or a "threshold test" that must be

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[1] See part 26.6 (2) CPR: "***"Court's powers in cases of failure to comply with rules, orders or directions***

26.6 (1) Where the court makes an order or gives directions the court must Whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for an obtains relief from the sanction, and rule 26.8 shall not apply.

met before the Court can exercise a discretion whether it would grant relief having regard to the list of factors set out in rule 26.7 (4) CPR. This has been adequately explained in ***Trincan Oil Limited v Martin***[2] by Jamadar JA:

"*13 The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanction must be made promptly and supported by evidence. Rules 26.7(3) and (4) are distinct. Rule 26.7 (3) prescribed 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 direction 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."*

2.3 The attraction of this interpretation of rule 26.7 CPR is that it fosters and enhances the new ethos of civil litigation of furthering the overriding objective and creates a degree of certainty in the factors that are to be considered by the Court in considering these applications. Barrow JA observed in ***Nevis Lisand Distraction v La Corporate du Navire***[3] that:

"An undoubted advantage that is to be gained from relying on the criteria for granting relief from sanction that CPR 2000 prescribes is certainty. There is no longer need to rely on judge made criteria with the uncertainties that attend varying judicial view points as to what those criteria should be and what emphasis should be given to which of them…the discretion to grant relief under CPR 2000 is distinctly fettered and it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1)."

2.4 In considering the "threshold pre-conditions" resort to the "interests of justice" and the overriding objective is unhelpful. The framers of these rules have considered that

[2] Civil Appeal no 65 of 2009 at paragraph 13
[3] St Christopher and Nevis Civil Appeal no 7 of 2005

the factors set out in rule 26.7 CPR achieves or furthers the overriding objective and there is no reason to second guess the clear expression of these rules. In this regard Jamdar JA in *Trincan* (ibid) usefully stated:

> *"Finally, reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions."*

2.5 There is the view that the application of these rules may work harsh results on litigants. If that is so in my opinion these are but the "growing pains" of parties and their representatives in the new civil litigation culture as they modify and develop the techniques to properly manage their matters within the time frames established in this Court driven process. In ***Andrew Khanhai v Prison Officer Darryl Cyrus***[4] Jamadar JA stated:

"In so far as it was suggested than the approach to the Court of Appeal to applications of this nature is somehow "draconian", we reject that contention completely. We agree however that "the CPR bring with them a new litigation culture-a paradigm shift in the administration of civil justice." Under the CPR, 1998 parties and their attorneys have a duty and responsibility to manage and monitor their matters. The CPR 1998 provides fair and reasonable time lines for the performance of events in civil litigation. These time lines and the rules were agreed to after very wide and sometimes contentious consultation, which included the Law Association of Trinidad and Tobago and all attorneys at law. The CPR 1998 as rules of Court was subject to negative resolution in Parliament. Their passage and approval through all of these checks and balances have ensured that they reflect the democratic will and the values and the aspirations of the society at this time and accord with the rules of law in Trinidad and Tobago. Indeed the implementation of these rules was considered "a red letter day in the history of our jurisprudence. Heralding the start of a new era in dispensing civil justice". In our opinion this interpretation and application of part 26.7 is contextually consistent

[4] Civil Appeal no 158 of 2009

with the test, intent and purpose of the specific rule and the spirit and intent of the CPR 1998."

The CPR is a movement forward in developing civil litigation. Parties are now therefore being asked to meet high standards to achieve this fundamental shift in the way civil litigation is conducted in this country. It is necessary to shake up the old practice of civil litigation and to remove from this new landscape an approach to the CPR with is fettered and crusted by a mentality reminiscent of the days of the Rules of Supreme Court 1975.

3. The new ethos of civil litigation:

3.1 In the recent judgment of ***Trincan Oil Limited v Keith Schanke***[5] the Court of Appeal justified the need to insist on strict compliance with the rules to bring about this change in the culture of litigation. The observations made in that judgment are critical to understanding the roles of attorneys and parties in this new ethos of civil litigation and deserve repeating.

"On the face of it this decision may appear somewhat harsh in its effect and based upon an overly strict interpretation and application of the CPR, 1998. It is therefore worth repeating, though it has been already stated by the Court of Appeal, that at this time in the evolution of the new CPR, 1998 in Trinidad and Tobago this approach is considered necessary if a meaningful shift is to occur in the way civil litigation is practiced here.

The overriding objective may be thought of as describing the purpose and intention of the CPR, 1998 – which is to facilitate dealing with cases justly. However, this concept of dealing with cases justly, in a modern civil litigation system which involves a non-bifurcated docket system and an obligation on individual judicial officers to effectively manage over one thousand cases in a single docket and to deal with all cases effectively and efficiently, demands that generally one considers not simply individual cases but also the integrity and efficiency of the entire civil litigation system. In the Court

[5] Civil Appeal 91 of 2009

of Appeal, though the circumstances are different, the integrity of the entire civil justice system remains an important consideration.

This case is, sadly, not an exceptional one, but is rather only too typical of what the culture of civil litigation in Trinidad and Tobago is and has been for far too long. It is hoped that with a sufficiently sustained insistence on 'strict' compliance with the rules for conducting litigation an overall change in the existing culture will be established. When this change is evident the Rules Committee may consider reviewing the strictures of Part 26.7 given the current approach, but until such time this is the manner in which Part 26.7 CPR, 1998 will be applied. Though the core interpretation of the text, faithful to legislative intent, its language, structure and context is likely to remain unchanged, its application over time can change as circumstances change. The interpretation of the law is also historically and culturally contextual and as such is an unfolding process. In this way the law is responsive to changes in society.

In my opinion, and in the context of these observations, there is also at this time an urgent need for the legal profession to take full responsibility for its members. This responsibility must include doing all that is necessary on its part to help change the prevailing culture in which civil litigation is practiced. This responsibility may include more continuing legal education training and grater efforts at monitoring standards in the profession, but should also embrace conscious programmes of formation and mentoring for junior attorneys-at-law. Finally, it is my hope that in the near future the courts will not be called upon to make decisions such as this one, pr at least that such decisions will truly be the exception.

3.2 In the ***Attorney General of Trinidad and Tobago v Universal Projects Limited*** the Court of Appeal held the party, the State, up to the strict compliance with the Court's orders against a backdrop of a multitude of defaults, omission and choices made on its behalf. The Court of Appeal concluded:

"*What therefore appears from this analysis is that a fundamental underpinning the CPR 1998 is that the rules of court are to be followed and court orders are to*

be complied with. When sanctions are imposed that signals that non compliance has serious consequences and there will be no relief unless the strictures of Part 26.7 CPR 1998 are also complied with. In Trinidad and Tobago at this time this approach to civil litigation is considered vital to the creation of an efficient and effective civil justice system. Until there is real change in the culture in which civil litigation is conducted in Trinidad a Tobago it is unlikely that Part 26.7 will be applied differently. There will always be hard cases. Making exceptions in such cases often creates bad law."

3.3 The laissez faire approach of the past can therefore no longer be tolerated. This must be impressed upon parties themselves where they have decided to use litigation as their means to resolve their disputes rather than an alternative dispute resolution mechanism. In choosing this forum they must be alive to their obligations and the strict standards that have been set by our Courts. Parties must take litigation seriously and for this reason the CPR is littered with provisions where the party's active involvement is mandatory such as the signing of certificates of truth on statements of case, certifying budgeted costs applications and attending case management conferences. Parties have a real stake in this process and cannot sit idly by while deadlines are to be complied with thinking that it is the hands of his/her attorney. The party equally has his/her responsibility to the Court to comply with its orders. If a laissez faire or indifferent approach is evident he/she should not be surprised if a Court is not sympathetic to the consequences of the breach. The creation of a new ethos in the culture of civil litigation applies with equal force for the litigants themselves. Barrow J underscored this point in ***Kenton Collinston St Bernard v AG of Grenada***[6]:

"The excuse that chambers have been unable to contact the client contains the hidden premises that it is the duty of chambers to contact the client but there is no duty on the client to contact chambers. That premises is false. When a litigant is going to be or has become unreachable at his previous address or by previous methods the litigant has duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer. The client

needs at all times to be involved with the litigation. This truth was ignored under the old rules and practice. The new rules fits that truth as a centerpiece…"

3.4 Parties must therefore understand that they must act and make responsible choices in the conduct of their litigation under the CPR. They must appreciate the high standards that are being set by the Court to change the existing culture. Where parties put themselves at the risk of non compliance with the Court's orders through ill advised choices they will have no one other to blame than themselves when the court refuses relief from sanctions imposed.

4. The first and second third party's application

4.1 The grounds of the first and second third party's application are as follows:

(a) The First Third Party was contacted on or about 10th February, 2010 and informed that his witness statement was finalised and ready for execution and that he was required to attend the offices of Devesh Maharaj & Associates for the execution of same before 19th February, 2010 as same was due to be filed and served on this date.

(b) The First Third Party did not attend the office of Devesh Maharaj & Associates and there was great difficulty in contacting him and when contact was established we were advised that he was ill and it was not possible for him to attend the offices of Devesh Maharaj & Associates to execute the said witness statement.

(c) Due to the above the signed witness statement of the First Third Party was only executed on the 22nd February, 2010.

(d) The First Third Party's evidence is critical to the resolution of the issues before the Court in these proceedings.

4.2 The application was supported by the affidavit of Candice Bharath, instructing attorney at law for the first and second third party. Paragraphs 6 to 12 of that affidavit states as follows:

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[6] Civil Case no 9984 of 2994 Grenada unreported

(a) Arrangements were made with the First Third Party on or about the 10th February, 2010 to attend the offices of Devesh Maharaj & Associates to execute same before the 19th February, 2010. The First Third Party indicated that he went to Mayaro every Thursday as per his doctors orders to relax as much as possible. He further indicated that as such he was going to be in Mayaro for the Carnival weekend and would return to his residence in Westmoorings on the 17th February, 2010 in order to attend the office of Devesh Maharaj and Associates before the 19th February, 2010 in order to execute the said witness statement.

(b) However up to the 19th February, 2010 when I contacted the First Third Party, he indicated that he would attend the office of Devesh Maharaj & Associates to execute the said witness statement on the morning of the 19th February, 2010.

(c) When the First Third Party did not attend the office of Devesh Maharaj & Associates on the morning of the 19th February, 2010 numerous calls were made to contact numbers of the First Third Party but same were left unanswered and all messages left on his voice mail requesting that he urgently contact me were not returned.

(d) It was however, on the afternoon of the 19th February, 2010 that the First Third Party contacted me and informed me that he had taken ill and was still in Mayaro and was not in any condition to return to Port of Spain that afternoon and would inform me when he returned. By this time it was too late and thus impractical for us to send our clerk to Mayaro to have the said witness statement executed and return to Port of Spain for filing of same as by this time the Civil Registry would have been closed.

(e) I was contacted by the First Third Party on the 21st February, 2010 and was told that he would return from Mayaro on the morning of the 22nd February, 2010 and would attend the office of Devesh Maharaj & Associates at this time.

(f) The First Third Party visited the office of Devesh Maharaj & Associates on the morning of 22nd February, 2010 where he executed a copy of the said witness statement. A true copy of the witness statement of the First Third Party is hereto annexed and marked "K.B.1".

(g) The First Third Party is 73 years of age and suffered a right side stroke in or about 2006, the consequence of which left the left side of his body almost paralysed. This was further complicated by the fact that in or about September, 2009 the First Third Party unwent major lower back surgery from which he is still recovering.

4.3 The witness statement annexed to the application discloses the first third party's residential address as 9 Marine Villas Westmoorings.

4.4 In considering the "threshold pre-conditions" it was common ground that the application was made promptly. No submissions were made to the effect that the party was not generally complaint with all other relevant rules, practice directions orders and directions. In my oral ruling I stated that the default may not be considered to be intentional. The main issue for determination was whether the evidence disclosed "a good explanation for the breach".

5. Submission of the parties.

5.1 In summary attorney for the first and second third party submitted:

- The First Third Party is 73 years old; he has not been in attendance in the case management conferences in this matter and indicated he could not do so because he is ill.
- He had major back surgery late last year and he is generally just an elderly man.
- He goes to Mayaro under doctor orders to relax and try to get rest and not to get stressed out.
- When she spoke to the party a week before his statement was due he said he will be in Mayaro and be back on Wednesday.

- It was only on Friday afternoon she got though to him despite numerous attempts to get to him.

5.2 The Defendant objected to the application. Briefly the grounds of counsel's objections were as follows:

- There is no medical evidence to support the statements made in the affidavit as to the state of health of the first third party.
- There is no sufficient explanation as to why this statement could not have been signed earlier. This is crucial evidence and he should have been more diligent.
- The party has not met the strict parameters set by the Court of Appeal.
- The first third party is not taking this matter seriously.

4.2 Perhaps not unusually in the context of this dispute, the Claimant supported this application. Counsel's submissions in support of the application were:

- The absence of the medical certificate must be viewed in light of an affidavit being filed by the instructing attorney at law on which we should rely
- There was an intervening weekend before the deadline date, the Carnival weekend, which the Court should take judicial notice that time stops in Trinidad
- There is an intention to return to Westmorrings on Ash Wednesday. The severity of ***Trincan*** would not be uppermost in his mind.
- He thought he could sign the witness statement on Friday. But was only able to do it on the following Monday.
- He is only one day late.

6. Whether there was a good explanation for the breach:

6.1 This is a simple trial. The issues are not complex. It is a simple debt recovery claim arising from an alleged oral agreement. It is common ground that the trial will last no more than a few hours where the inquiry will centre on the nature of the conversations held between the officers of the respective parties. A brief examination of the pleadings and the witness statements filed in this matter confirms the narrow issue of fact to be decided is whether the Defendant told the Claimant that it was acting on behalf or on the

instructions of the first and second third party and that they were responsible for paying for the services of cleaning the oil spill.

6.2 Attorney at law for the first and second third party stated in her submissions that the witness statement were ready by Wednesday 10th February 2010 well before the deadline date of Friday 19th February 2010. This being a critical witness one would expect the litigant to have this statement signed and filed with dispatch before the deadline date. Indeed, parties are reminded that deadlines set by the Court "on or before" mean that compliance can be met prior to the deadline date. Those who wait for the last minute of the deadline would be courting disaster.

6.3 The reasons advanced by the first third party for failing to execute this witness statement at any time between Wednesday 10th February to Friday 19th February 2010 is that (a) he was 73 years of age and suffered a right side stroke in 2006 leaving his left side almost paralyzed; (b) in September 2009 he underwent major surgery to his lower back; (c) although he knew that the witness statement was prepared on Wednesday 10th February he stated to his attorney that he was going to Mayaro for the Carnival weekend (presumably from Westmoorings, his residence, passing his attorney's Port of Spain office, en route to Mayaro) (b) he would return to Westmoorings on 17th February 2010. (c) He would execute the statement before the 19th February 2010 (d) on the afternoon of 19th February 2010 he contacted his attorney and advised that he "*had taken ill and was still in Mayaro and not in any condition to return to Port of Spain that afternoon and would inform me when he returned*". This contact was made by the party despite numerous calls made to him which went unanswered on the morning of 19th February 2010 by his attorney at law.

6.4 I agree with attorney for the Defendant that this party has not demonstrated the degree of diligence that is required under the new ethos of civil litigation as espoused in the recent cases examined above. I do not accept that the reasons set out amount to a good explanation for his breach.

Medical Condition:

6.5 There is absolutely no medical evidence to support any of the statements in relation to the health of first third party. Further the statement that "he went to Mayaro every Thursday as per his doctor's orders to relax as much as possible" is vague and unsatisfactory. Is this therapy linked to his stroke, or to his surgery or to his general well being as an "elderly man" as attorney for the first third party describes him? We do not know. Quite apart from the double hearsay aspect of this evidence, I cannot accept at face value doctor's orders to go to Mayaro every Thursday to relax without supporting evidence. Even if I accept this evidence, it only demonstrates that his orders were to go to Mayaro on Thursday and there is no impediment to him executing the witness statement between 10th and 19th February 2010.

6.6 There is no evidence to support any debilitating effect of the stroke in 2006 and the back surgery in 2009. In any event it is apparent that whatever effects there were it did not affect him from travelling freely from Westmoorings to Mayaro every Thursday. Even if he had suffered a stroke in 2006, it did not prevent the First Third Party from being directly involved in conversations in relation to the cleaning of the oil spill and indeed in his taking action in the arrest of the Kelly Mark as gleaned from his witness statement.

6.7 There is no medical evidence as to the "illness" that kept the First Third Party from returning from Mayaro on 19th February. The Court cannot be asked to speculate as to the nature of an "illness" that would keep him in Mayaro.

Inadequate arrangements

6.8 Even if his medical condition and therapy is accepted at face value, the arrangements put in place by the party were entirely unsatisfactory. There is no explanation why he felt the need to spend the "Carnival weekend" in Mayaro without having first signed the statement. There is no explanation why the First Third Party made the decision that he will attend the office of his attorney on the 19th even though he intended on returning to Westmoorings (again passing his attorneys Port of Spain offices) on the 17th February 2010.

6.9 There is no explanation why the First Third Party did not contact his attorneys on the 17th 18th or the morning of the 19th to indicate his difficulty. On the 18th his lawyers, obviously concerned, contacted him and he indicated he would attend at their office on 19th February. He does not tell his lawyers he is still in Mayaro and there is no explanation why he would still be there on Thursday 18th. He in effect spent almost a week in Mayaro without accounting to his lawyers for his whereabouts or seeing to his pressing obligation of signing his witness statement.

6.10. His attorneys did not see it fit to put arrangements in place before 19th February 2010 to execute the statement at Mayaro or arrange to make an application to use his witness summary or a faxed copy of his executed statement. It was not good enough to leave this for the last minute. See **Bruce Milne v Trinidad Dock**[7] where Gobin J also exhorted parties to ensure that arrangements are not left for the lat minute to sign witness statements. In ***Asha Charan v Omar Mohammed,***[8] the Court dismissed an application for relief from sanctions for failing to file a witness statement within the Court's deadline. Rajnauth-Lee J opined that the settling of a witness statement one week before the deadline date by the instructing attorney at law "had a familiar ring to it." In the present case, which is a simple debt recovery action, the order made for the filing of witness statements was made on 25th November 2009 giving the parties almost three months to prepare their witness statements.

<u>The excuse of Carnival</u>

6.11 I do not agree with Attorney for the Claimant that in this country time stops for Carnival. For those of us serious about civil litigation in this new culture ushered by the new rules, time plods on and parties must get on with their business. They must understand that the choice they have taken to litigate means they must now allocate their resources and re prioritise their domestic affairs to give precedence to the litigation and

[7] CV 2007-03438
[8] CV 2008-00683

the timetable set by the Court in managing their case towards a trial. While parties may be tempted to partake in the revelry of Carnival or the effective "time off" occasioned by the festivities they must understand the serious obligations they assume when they approach the Court under the CPR to access justice. The choice to relax for the "carnival weekend" in Mayaro was a risk that this party assumed rather than acting responsibly by electing to execute his statement before heading off to Mayaro. In this way he would have complied with his obligations under the CPR first and then fulfilled any domestic arrangements. It could not be the other way around. Even if he was under doctor's orders, prioritising your obligations to the Court meant in this context arranging for your attorney to come to Mayaro to execute the statement before the deadline or keeping your attorney abreast of your availability. Modern technology of email and faxes still operate during the Carnival weekend.

6.12 For these reasons the first third party has not demonstrated a good reason for the breach. I would not consider the failure to be intentional. The party was certainly lax, negligent, inattentive and failed to pay due regard to the importance of the time table. But to describe the action as intentional I would require some deliberate act to flout the Court's order. Although I must say that the nonchalant attitude of a party to the Court's order skirts the borders of intentional default.

6.13 It is not necessary for the Court to therefore consider the factors set out in rule 26.7 (4) CPR as the "threshold pre conditions" are cumulative and the failure to comply with one condition is fatal. However, there are three aspects of the Court's discretion under Part 26.7 (4) CPR that deserves mention.

7. The administration of justice

7.1 The Court must manage hundreds of cases in a single docket. On a given day the Court's resources are allocated to deal with several matters at varying stages of preparation. The Case Management Conference scheduled on 25th February 2010 in this case was set for the purposes of dealing with an application for budgeted costs and examine the witness statements prior to the trial. It is important in the orderly

management of a trial that the witness statements are reviewed prior to the trial so that any issues as to admissibility are dealt with at the pre trial stage rather than at the day of the trial. In this case that opportunity was lost as the First Third Party's witness statement was not filed in time and the trial date of 23rd March 2010 loomed around the corner.

7.2 To grant relief from sanction would necessitate reconvening another hearing prior to the trial to deal with any evidential issues arising from the statement. Parties are also given the opportunity to reconsider their respective positions in light of the proposed evidence. This would not have been a proper allocation of the Court's scarce resources and the trial date remained fixed for 23rd March 2010.

Whether the trial date can still be met

7.3 If the application had been granted, the Court would have to consider vacating the trial date and use that date as the next case management conference or pre trial review. That would have been the proper allocation of the Court's resources rather than intrude on the dates and times already allocated for the several trials, CMCs and PTRs in the Court's docket. The philosophy of trial date certainty would however be defeated if the trial date is vacated.

Whether the failure was due to the party to his attorney at law

7.4 The failure was that of the party in this case. For the reasons set out above he simply did not take this case seriously enough to put the proper arrangements in place to have his statement signed. There is also no explanation why the witness statement was only prepared by the attorney on 10th February 2010 when the Court's order was made on 22nd November 2009.

8. Conclusion

In all the circumstances the Court was not satisfied that there was a good explanation for the breach and the application was dismissed. Costs were assessed in the sum of $1500.00 to be paid by the First Third Party and the trial remained fixed for 23rd March 2010.

Dated: February 25, 2010

Vasheist Kokaram
Judge