

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2009-04393**

**BETWEEN**

**TALAT TEDDY HOSEIN**

**CLAIMANT**

**AND**

**THE ATTORNEY GENERAL  
OF TRINIDAD AND TOBAGO**

**DEFENDANT**

**Before the Honourable Mr. Justice V. Kokaram**

**Appearances:**

**Ms Bagwadeen for the Claimant**

**Ms Panchoo and Mr. Bhimsingh instructed by Ms Olivierie for the  
Defendant**

**JUDGMENT**

**Introduction**

1. Before the Court is an application filed by the Defendant for relief from sanction for failure to file its witness statements on 16<sup>th</sup> May 2011, pursuant to the Court's order dated 31<sup>st</sup> January 2011. The focus of the parties' submissions has been on whether the Defendant has satisfied the Court that there is a good explanation for its breach of the Court's order. In assessing a party's explanation for failure to comply with the Court's orders or directions, there is a wide spectrum of reasons that can be advanced to explain a party's default. There are cases in that spectrum where a Court can immediately determine whether the party in default has failed to cross the bar. Therefore, on one end of that

spectrum, mere inadvertence, missing files, forgetfulness, workload of attorneys have not been accepted as good reasons. On the other end what constitutes a good explanation engages the Court in a contextual factual enquiry. Indeed, **Clifford Henry v Eldica Sharpe** is a classic example of taking an explanation for the breach of the order in the context of the proceedings. The Court must view the explanation in the round.

2. In this case, shorn of the details of activities set out in the Defendant's affidavit, the simple explanation advanced for the breach of the Court's order, is the late delivery of certified copies of station diary extracts to the instructing attorney. This is an explanation advanced in the context of:

an order for disclosure to be made by the parties since 1<sup>st</sup> April 2011 and inspection on 8<sup>th</sup> April 2011; an admission that the attorney discovered that she did not have complete copies of the station diary extracts one month after the deadline for the inspection of documents, the Claimant being unable to view the diary extracts until the filing of this application; copies of the station diary extracts being already admitted as authentic since the date of disclosure on 1<sup>st</sup> April 2011; no real need to await receipt of certified copies for the filing of the Defendant's witness statements and a chronology of administrative bungling by the police administrators in securing the certification of the station diary extracts.

Examined in that context, what has been offered as a good explanation does not in my opinion cross the bar. The application is dismissed with costs to be assessed.

### **Brief overview of the claim**

3. The Claim<sup>1</sup> arises out of the arrest of the Claimant on 25<sup>th</sup> May 2008 and his subsequent detention and prosecution for criminal offences in relation to a robbery of an ATM of Scotia Bank Limited on the compound of MS Food City Supermarket, Debe. At that time the Claimant was employed as a night watchman and security guard at the said Supermarket. In his statement of case<sup>2</sup> the Claimant alleges that on 20<sup>th</sup> May 2006, he was robbed, abducted and beaten by two unknown men and released. He then made a report to the San Fernando Police Station, Criminal Investigation Division Unit about the said incident. On

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<sup>1</sup> The Claim was filed on 23<sup>rd</sup> November 2009

<sup>2</sup> Filed 23<sup>rd</sup> November 2009

25<sup>th</sup> May 2006, however, he was arrested by three uniformed police officers including those he named as PC Sahadeo and Marlon Singh.<sup>3</sup> The Claimant alleges that he was taken to the San Fernando Police Station where he was beaten with pieces of wood and batons and threatened by the officers. He was then placed in a cell overnight. He was taken to his residence the following day by the officers and his premises allegedly unlawfully searched. During the search he alleged that he was again beaten. The Claimant was subsequently charged for the offences of causing the wasteful employment of the police by knowingly making a false report and breaking and entering and stealing property of Scotia Bank.

4. These charges were subsequently dismissed by Her Worship, Ms Chankar at the San Fernando Magistrates Court for non appearance of the complainant. Arising from this the Claimant claims damages for false imprisonment and/or malicious prosecution, a declaration that he was denied his constitutional right, inter alia, to retain an attorney and monetary compensation for the violation of his constitutional rights.
5. The Defendant in its Defence<sup>4</sup> admits that the Claimant made the report of an alleged abduction. However, the Defendant denies the alleged assault and sets out in its Defence, a grand scheme in which the Claimant was involved in perpetrating the robbery of Scotia Bank's ATM till on the Supermarket's compound. The Defendant alleges that PC Sahadeo conducted investigations into the alleged abduction and the robbery of the till. He, together with other officers involved in the investigation considered that the robbery was an "inside job". The Claimant they surmised had possession of the keys for the ATM. As a security guard he had key intelligence which could be used in a robbery attempt. They considered the circumstances of the alleged kidnapping on the same day to be suspicious. As a result they questioned the Claimant further on 25<sup>th</sup> May 2006 and recorded a statement from him. The Claimant's statement is annexed to the Defence. The statement in effect is a confession by the Claimant which discloses the grand scheme devised between the Claimant and two other men to break into and rob the ATM till. It also involved an agreement by the men to stage a kidnapping and for the Claimant to report this to the police. According to the Defendant, one PC Mc Intosh on 30<sup>th</sup> May 2010 confirmed with the Claimant that the said confession was correct and his former statement made on 20<sup>th</sup> May

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<sup>3</sup> Only two names were supplied by Claimant to the Defendant in its response to a request for further information.

2010 of the alleged abduction was false. The criminal charges were then laid against him as the officer had formed the reasonable and probable belief that the Claimant was guilty of these criminal offences.

6. There was no reply filed by the Claimant. However, the Claimant at the first CMC sought permission to amend the Claim by withdrawing its claim for damages for malicious prosecution. In its subsequent amendment the Claimant also withdrew its claim for relief under the constitution. The Claim was therefore to be confined to one for damages for false imprisonment and assault and battery.<sup>5</sup>

**The Court's order and directions.**

7. On 21<sup>st</sup> January 2011 the Court at the first case management conference ordered and directed as follows:
  - (a) Permission is granted to the Claimant to file and serve an amended Statement of case, if any, to withdraw its claim for damages for malicious prosecution to on or before 4<sup>th</sup> March 2011.
  - (b) Permission is granted to the Defendant to file and serve an amended Defence if any to on or before 18<sup>th</sup> March 2011.
  - (c) The Claimant to file and serve its reply to on or before 25<sup>th</sup> March 2011.
  - (d) Parties to give standard disclosure by filing and serving their list of documents on or by 1<sup>st</sup> April 2011.
  - (e) Inspection to take place on 8<sup>th</sup> April 2011.
  - (f) Claimant to file and serve a core bundle of documents including unagreed/agreed documents on or by 22<sup>nd</sup> April 2011.
  - (g) Parties to file their list of issues of facts and law to be determined on or before 22<sup>nd</sup> April 2011.
  - (h) Witness statements and/or witness summaries to be filed and exchanged on or before 16<sup>th</sup> May 2011.
8. The Claimant applied for an extension of time to file its amended claim which was filed on 14<sup>th</sup> March 2011. The parties filed their respective lists of

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<sup>4</sup> The Defence was filed on 11<sup>th</sup> October 2010 pursuant to permission granted by the Court of Appeal to extend the time for the Defendant to file its Defence. See AG v Telly Talat transcript.

<sup>5</sup> The Claimant filed an amended claim and statement of case on 14<sup>th</sup> March 2011. It was filed out of time. There is an outstanding application for permission to extend the time to file the amended claim.

documents and the Claimant filed its core bundle of documents. The “confession” appears as an agreed document in the Claimant’s core bundle of documents. The un-agreed documents, which were the defendant’s documents comprising inter alia, extracts of copies of entries in the routine and station diary of the san Fernando CID, were not included in the core bundle of documents.

9. I was informed at the pre trial review by attorney for the Claimant that these documents, although disclosed in the Defendant’s list were not made available for inspection. There is no evidence before me of the reason why inspection of those documents was not conducted. However, my order requiring the filing of the core bundle of documents was intended to have parties firstly address their minds to the issue of the admissibility of evidence and secondly to have in a convenient bundle all the documentary evidence for use at the trial which would be referred to by the parties in filing their witness statements and conveniently used during the course of the trial.
10. The pre trial review was scheduled for 23<sup>rd</sup> May 2011 to deal with any procedural applications and the trial window set for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> June 2011. The procedural application filed by the Defendant was its application for relief from sanction. The application was listed for hearing on 23<sup>rd</sup> May 2011. Unfortunately, I succumbed to illness on 22<sup>nd</sup> May 2011 which caused the rescheduling of the pre trial review<sup>6</sup> and the vacating of the trial dates. I indicated to the parties however, that the trial itself could still be accommodated in June 2011 and the trial was rescheduled for June 16th and 30<sup>th</sup>, 2011.

#### **The application for relief from sanction**

11. The application for relief from sanction is supported by evidence in the form of an affidavit sworn and filed by Kerri Ann Oliverie on 17<sup>th</sup> May 2011. Parties agreed that the application for relief from sanction was made promptly.
12. In the written submissions the Defendant relied upon the authorities of **Trincan Oil Limited v Martin**, CA 65 of 2009, **Trincan Oil Limited v Keith Schnake**, CA 91 of 2009, **AG v Universal Projects** CA 104 of 2009, **Joel Roberts v AG** CA 20 of 2010, **Roger Alexander v Alicia’s House Limited**, CV 2010-03761, **Elgeen Roberts Mitchell v Lincoln Richardson** CV 2009-00618. In its written

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<sup>6</sup> The pre trial review was conducted by teleconference on 3<sup>rd</sup> June 2011, to ensure that a trial could still be accommodated in the month of June 2011.

submissions the Defendants addressed all of the Rule 26.7 factors both the conditions precedent rule 26.7 (3) and the discretionary factors, rule 26.7 (4).

13. The Defendant submitted that the affidavit discloses a good explanation for the breach of the court's order. The main reason offered was that the Defendant's attorney at law was awaiting the receipt of certified copies of the station diaries to annex to the witness statements of their witnesses. Those witness statements themselves were prepared and signed before the deadline date. Counsel explained that the burden on the defaulting party is not to offer a perfect explanation but a reasonable one. There is no need to account for every day but to examine the conduct objectively and ask whether there was a reasonable explanation for the delay. Procedure should not be allowed to trump merit. See **Joel Roberts v AG**. The Claimant relied upon the judgment of Jamadar JA in **Universal Projects** in support of her submission that at all times the Defendant demonstrated that it acted with diligence in meeting the timetable set by the Court. She explained that they had allocated ample time to obtain the certified copies and the Defendant's conduct could not be characterized as laissez faire.
14. In response to the questions of the Court to explain why the Defendant did not file the witness statements without the certified copies as they were already disclosed in the list of documents and explain why the Defendant did not file a notice to extend the time to file the witness statement, Counsel submitted that the certified copies were inextricable linked to the witness statements and that when the documents were received on the deadline date, the attorney felt they were on track and could still meet the deadline.
15. The Claimant submitted that the Defendant's documents were not offered for inspection as it did not form part of the core bundle of documents. The Defendant was aware since before 1<sup>st</sup> April 2011, that the documents were to be certified. What should have been evident to them is that they would have been unable to meet the deadline and they failed to make an application for an extension of time. There was no need for the certified copies if the officers who made the documents were giving the evidence. Certification was therefore not a pre requisite for admissibility.

### **Relevant principles**

16. Parties are now well aware of the applicable principles on an application such as this, as enunciated by the Court of Appeal in **Trincan Oil Limited v Martin**,

**Trincan Oil Limited v Keith Schnake** and **AG v Universal Projects**. The relevant rule 26.7 CPR sets out the guidelines for the exercise of the Court's discretion in granting relief from sanction. The applicant must first satisfy the threshold requirements of 26.7(2) and (3) CPR before the court considers the list of facts in rule 26.7(4) CPR. The Defendant relied on some comments made by Jamadhar JA in **Joel Roberts** (transcript) during the course of arguments in the appeal which related to extensions of time for filing a defence:

“The rules contemplate that you make an effort to get it done within the first 42 day period. The rules also recognize that is not always be possible, and that there is a good reason you can get an extension. And that extension can first be by consent and if not by order or permission of the Court. So the rules contemplate that a whole range of possibilities has been reasonable because the intention is not to allow procedure to trump merit. What the rules do is they bring a measure of discipline into the system and accountability. But they also permit a measure of flexibility.”

In that case the Court of Appeal dealt with an application for relief from sanctions for failing to file a defence within time. The CPR clearly provide for extensions of time for the filing of a defence by consent to a maximum limit of three months and any further extensions of time must be obtained from the Court. To that extent the CPR do permit a measure of flexibility. With respect to witness statements, however, parties can agree to vary the timetable set by the Court so long as a consent application is filed before the date for compliance and the parties certify that it will not affect the trial date. See rule 27.9 CPR. The degree of flexibility in the rules in relation to the filing of witness statements is therefore much more limited than the rules considered by the Court of Appeal in **Joel Roberts**. The reference therefore by Jamadar JA to the deadline date for filing a defence as being a marker is therefore understandable, considering that the rules contemplate an opportunity to obtain an extension of time upwards to three months by agreement without making an application. No such luxury is guaranteed in the rules for witness statements. Indeed, in this case the delivery of witness statements on time was critical to keeping a pre trial review appointment to consider the witness statements of both parties and deal with any interlocutory applications. In this way the trial dates are preserved to deal exclusively with hearing the evidence and submissions of the parties. If this timetable is scuttled, due to the late filing of witness statements, the discipline and efficiency which is promoted by the CPR in the management of litigation is compromised. The Defendant missing the deadline for filing its witness statements meant that the Court will now have to deal with a relief from sanction application at the pre

trial review. It will also have to deal with voluminous documents now being revealed for the first time.

17. The main issue to be determined from an examination of this evidence is whether the applicant has disclosed a good reason for the breach. I should mention at this stage that as a matter of good practice, parties should arm themselves with a notice seeking an extension of time before a deadline expires. When one examines rules 26.1 (d), 27.9 (2) and 11.5(3) CPR, the Court's jurisdiction to extend the time and vary the court's timetable can be invoked by filing a notice of application. The requirement to file an affidavit is not mandatory as it is in an application for relief from sanctions.

**"Good explanation for the breach"**

18. The Court must be satisfied that there is a good explanation for the breach. I accept it must not be a perfect explanation. Life is not perfect. However, against the backdrop of the new culture of civil litigation, deadlines set by the Court with implied or express sanctions must be taken seriously. What would constitute a good explanation for not meeting that deadline of course is a fact sensitive enquiry. The Court is concerned to examine the conduct of the attorney and the party and to determine objectively, examining the conduct holistically whether there is a good explanation. The decided cases are of limited use in assisting a court and parties in determining what will constitute a "good explanation". However, they do demonstrate that there is a spectrum of reasons which clearly qualify on the one end and which clearly do not on the other. So that inadvertence, misplacing of files, mistaken dates are not good explanations. However, ultimately the default must be placed in the proper context for the Court to properly assess the explanation.
19. In this case I am not satisfied that there is a good explanation for the breach of the order to file the witness statements on 16<sup>th</sup> May 2011. The evidence demonstrates administrative bungling on the part of the police service which gave me the impression that the officers did not treat this matter with the urgency it deserves. Taken in its context, what the explanation amounts to, is that the attorney could not obtain certified copies of the diary extracts from its client even though the client was aware of the request almost one month in advance. The explanation for the failure is a mixed bag of administrative failures, lack of urgency and a laissez faire attitude of the officers in a matter



where the officers' reputations are at stake. The explanation offered is in my view unacceptable.

20. The chronology is as follows. More than 2 months after the case management order was made on 1<sup>st</sup> April 2010, the Defendant's instructing attorney was first made aware that the station diary had to be certified for use in Court. However, at that stage the Defendant had already filed its list of documents referring to the said documents which should have been made available for inspection pursuant to the order of the Court by 8<sup>th</sup> April 2011. One month thereafter on 4<sup>th</sup> May Sergeant Harripersad informed the attorney that the photocopies of the station diaries in the possession of the attorney were incomplete. In spite of the attorney's request of Sergeant Harripersad that the station diaries be sent to her for copying by 10<sup>th</sup> May 2011 she had still not received it. Instructing attorney had herself to go to the San Fernando police station to obtain it. She received it two days after. She then discovered that the officer who sent the station diaries omitted to send the diary with the majority of the information.
21. On Friday 13<sup>th</sup>, for some a superstitious day, the diary had still not been delivered. The explanation offered to the attorney was that the police vehicle transporting the diary broke down. On the deadline date, 16<sup>th</sup> May 2011, this diary had still not been delivered. Instructing attorney had to call again for the diary. It is only then she received the explanation that the vehicle transporting the station diary broke down on 13<sup>th</sup> May 2011. If this is true, why was nothing communicated to the instructing attorney at law on 13<sup>th</sup> May 2011? Why must the officer sit and wait for instructing attorney to call again on the deadline date to remind him to send the diary? As it turned out, this diary contained 60 pages of material to be copied. It is unacceptable for the officers in charge to have delayed in making these copies available.
22. Furthermore, I cannot understand this fixation to annex the certified copies to all the witness statements. Documentary evidence is usually annexed to a witness statement. But equally witness statements can make reference to the documents contained in a core bundle of documents. That after all was the purpose for ordering the filing of a core bundle. As counsel for the Defendant pointed out pursuant to rule 28.18 CPR, once the documents have been disclosed and there is no objection by the defendant, the document is deemed to be authentic. The copies could therefore have been annexed. The documents were already disclosed. The witness statement could simply refer to the documents in the core

bundle of documents. To wait for certified copies to annex it to the witness statement is therefore not a good excuse.

23. This perhaps is the additional difficulty of the Defendant. The certified copies were never the subject of inspection pursuant to the Court's order for inspection. Indeed it did not form part of the core bundle of documents. What has in fact happened, is that the Defendant at the last moment, made voluminous exhibits available for inspection by annexing it to their witness statement days before the trial and long after the deadline for inspection. If indeed the Defendant placed so much emphasis on having these copies certified as being the authentic record, then according to their reasoning, it is that document which should be made available for inspection.
24. However, there is yet an additional difficulty. It is on 4<sup>th</sup> May 2011 long after the deadline for inspection had passed that the client reveals that the copies of the station diary which was disclosed in the list of documents, were incomplete. It is anyone's guess had those photocopies been made available to the Claimant at the time required for inspection, whether it would have been of any use to the Claimant in preparing their case at all. In any event, the certified copies not being made available for inspection, the Claimant was deprived of the opportunity of dealing with the contents in his witness statements.
25. Remarkably it is disclosed that the Defendant's witness statements were prepared before the deadline date but they were never filed. The excuse that the certified copies are inextricably linked to the witness statement is difficult to understand. I have reviewed all three witness statements. Their evidence on the main issues to be determined can stand on their own without reference to the diaries or without them proffering them into evidence. Section 22(1) of the Evidence Act permits certified copies of these documents to be admissible as evidence. The main issue to be determined is whether there was reasonable and probable cause to arrest the claimant and whether he was assaulted or beaten. These witnesses are only valuable as witness of fact in so far as what they had observed and the conclusions they drew in demonstrating that there was reasonable cause to arrest the Claimant and that no one assaulted or beat him. They all speak with first hand information in relation to those material issues and there is no vital link with the station diary extracts. Furthermore, none of these witnesses purport to be the maker of the station diary extracts nor have they laid any foundation for the use of these diaries. They merely refer to the documents

generally without more. There is no inextricable link to the physical document by these witnesses of fact on the material issues to be determined.

26. What really occurred here is a breakdown in the proper preparation for disclosure and inspection. In **Disclosure**, Paul Matthews 2<sup>nd</sup> ed paragraph 12.07 the duty of the attorney and client in the disclosure process is described as follows:

“The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client. The best way for the solicitor to fulfill his own duty and to ensure that his client’s duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance –or even potential relevance- for himself, so either the client must send all the files to the solicitor or the solicitor must visit the client to review the files and take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable. It is sometimes very difficult to remove original documents from the place where they are kept so the solicitor may have to be satisfied in some cases with copies in the first instance, but he must satisfy himself of the accuracy and completeness of these copies.” See also paragraphs 12.08-12.09 and Blackstone’s Civil Practice 2011 paragraph 48.15.

27. The station diaries should have been obtained a long time in advance of the deadline for disclosure and inspection to ensure that the duties of attorney and client at the disclosure stage are fulfilled. To discover that copies of documents included in a list of document are incomplete after the deadline for disclosure and inspection is a failure of this duty. This case demonstrates indeed, how that failure can trigger a chain of events which ultimately results in the order of the Court being breached.

### **Discretionary factors**

28. Even if I accept the explanation as a good one, the Court is faced with the fact that these voluminous documents are now being produced for the first time for inspection and did not form part of the core bundle of documents. The party ought to have in the first place, taken this obligation seriously and provide the information required by the Court in the hands of their attorney in a timely manner. Correspondingly the attorney should have obtained the original documents at the disclosure stage. Although the failure can be remedied in a

reasonable time, it would place the Claimant in a difficult position to now face these additional documents long after he has filed his own witness statement. He has not had the opportunity to deal with this in his own witness statements and in the interest of the administration of justice, additional directions may have to be given for the filing of supplemental witness statements. I am not guaranteed that even the rescheduled trial date can be kept.

**Conclusion:**

- 28.** For the reasons expressed above, I will dismiss the application. The Defendant will pay the Claimant's costs to be assessed in default of agreement.

8<sup>th</sup> June 2011.

Vasheist Kokaram  
Judge