THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2009-00618

BETWEEN

ELGEEN ROBERTS-MITCHELL **Claimant**

AND

LINCOLN RICHARDSON **Defendant**

Before the Honorable Mr. Justice V. Kokaram

Appearances:
Ms. E. Nyack for the Claimant
Ms. J. Koorn instructed by Mr. C. Serrano for the Defendant

JUDGMENT-
PROCEDURAL APPLICATION

Introduction:

1. In this claim the Claimant seeks an order inter alia that the last will and testament of the deceased, Valentine Mitchell, dated 7th April 2006 is the only valid and operative will of the deceased. The Defendant in his Defence and Counterclaim asks the Court inter alia to pronounce against the force and validity of the said will and to pronounce in solemn form the will of the deceased dated 14th March 2006.

2. The trial of this matter was fixed to commence on 20th April 2010. However the Defendant filed an application for an extension of time to file two additional

witness statements which came on for hearing at the Pre Trial Review ("PTR") scheduled on 15th April 2010. I dismissed this application with costs to be assessed at the trial and confirmed the trial dates. I was of the view that there was no good explanation for the failure to comply with the Court's previous order for the filing and exchanging of witness statements on or before 22nd February 2010. Any extension of time would have disrupted the management of this case and defeated the principle of trial date certainty. There was no good reason to delay the hearing of the trial having regard to the history of these proceedings. To this end, the procedural backdrop to this application is important in understanding the conclusion that the Defendant's application was unmeritorious.

The proceedings:

3. The claim was filed on 20th February 2009 and was being case managed by Armorer J. During the course of the proceedings, the Claimant filed a procedural appeal against the decision to adjourn a case management conference in her absence. The Court of Appeal heard that appeal on 9th July 2009 and in allowing the appeal urged the parties to "get to the heart of the matter". Kangaloo JA directed some comments to the Defendant in relation to the further hearing of this matter which is relevant to the conduct of these proceedings:

> "…if it is you have caveated because you are saying that they are not entitled to the probate for whatever reason, people's estate need to be dealt with so it ought to be dealt with as expeditiously as possible. There are people who are waiting on the outcome of it, I would assume beneficiaries. And I would assume if it is a will case there was something in the estate of value to somebody. So rather than have it dragged out you all should really get to the real issue."[1]

[1] Transcript of court of appeal proceedings page 10

4. The matter subsequently came on for hearing before me at a Case Management Conference ("CMC") on 26th August 2009, during the Court vacation, when directions were given for standard disclosure and inspection, the filing and service of testamentary scripts, the filing and service of the Claimant's bundle of agreed and unagreed documents and statement of facts and issues to be determined. The Claimant's bundle of documents was ordered to be filed as the core bundle of documents for the convenient use of the parties at the trial. The Claimant complied with the deadlines, save for filing her bundle of documents. The Defendant however filed his affidavit of testamentary scripts and statement of facts and issues out of time. Further the Defendant requested and obtained a further extension of time from the Court to file his list and bundle of documents. This was eventually filed with the Court's permission on 30th October 2009. The delay of course in the Defendant's filing and service of these documents hampered the Claimant in her preparation of the core bundle of documents. It is for that reason the Claimant also needed an extension of time to comply with the Court's order to file her core bundle of documents.

5. At the CMC convened on 8th October 2009 the Court ordered that the parties were to file and exchange their witness statements on or before 14th December 2009. Propositions of law were to be filed and served on 5th January 2010 and a PTR was scheduled for 13th January 2010. The trial was fixed for 19th January 2010. Bearing in mind the comments made by the Court of Appeal the management of the case reflected a degree of urgency to press on with this relatively uncomplicated matter.

6. However, subsequently, due to the failure of the Defendant to disclose the contents of the will, which he contends to be the valid will, to the Claimant, the Claimant was unable to file her witness statements within the time prescribed by the Court. On 23rd November 2009, upon an application made by the Claimant, the Court convened a CMC to deal with this matter. At that hearing, the Court ordered the exchange of the parties' testamentary scripts and granted an extension

of time to file and serve the Claimant's bundle of documents. In light of the Claimant's inability to view the will which was relied upon by the Defendant, the time was extended for both parties to file and serve their respective witness statements to 8th January 2010. This CMC was convened and these directions were given to ensure that the trial date of 19th January 2010 would not have been affected. The extension of time granted was a just and proportional response to the parties' failure to comply with the Court's order and did not compromise the trial date nor the scheduled PTR.

7. At the scheduled PTR on 13th January 2010, it was discovered that the Claimant complied with the Court's direction but the Defendant failed to file any witness statements. The Defendant's attorney at law, inspite of the now well settled learning on the making of applications for relief from sanctions, simply made an oral application to extend the time for the filing of the Defendant's witness statements which would have led to the adjournment of the trial. The Defendant's attorney was content to state that she had encountered personal difficulties as she was the victim of a crime and was not able to draft the witness statements in time. The only saving grace for the Defendant was that the Claimant was somewhat sympathetic to the attorney's plight and agreed to the extension of time and vacating the trial date. The Court was now faced with the prospect of conducting a trial to propound on the force and validity of one of two wills in the absence of any evidence whatsoever from the Defendant, if it chose not to accede to the request of the parties. The safer course was adopted to record the agreement of the parties to extend the time for the filing of the witness statements to 22nd February 2010. The time was also extended for the Defendant to file and serve his propositions of law. However I expressly provided for the sanction on the Defendant, that his witnesses shall not be permitted to give evidence unless they complied with this order. This was done specifically to underscore the importance of complying with the Court's deadline and that it was not to be lightly disregarded in the future. It was meant to signal that no further indulgences would

be readily granted and to impress upon the Defendant the need to maintain the next trial date which was scheduled for 20th 21st and 22nd April 2010.

8. I hasten to add however that the exercise of the Court's discretion which inevitably led to vacating a trial date was one adopted as a very last resort. It was done with the concurrence of the Claimant and to ensure that both parties will have the opportunity to fully ventilate their claims on the sensitive matter of the validity of a will which would impact on third parties or prospective beneficiaries. In this way the Court acted to further the overriding objective. The delicate balance between dealing with a case justly and ensuring discipline in the conduct of litigation under the new rules was recognized by Lord Woolf MR in ***Biguzzi v Rank Leisure Plc*** [1999] 1 WLR 1926 at page 1932D:

> "Under the court's duty to manage cases, delays such as have occurred in this case should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as unimportant.
>
> There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also

involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates."

The grant of an extension of time and marking the Court's displeasure by making an "unless order" was in the circumstances a fair and proportionate response to the Defendant's breach of the Court's timetable.

9. This procedural backdrop to the Defendant's present application for another extension of time reveals firstly an inability of the Defendant's attorneys to meet the Court's deadlines which were being easily disregarded. Secondly the Defendant's delay in meeting these deadlines affected the timely resolution of this dispute. This in the context of the Court of Appeal's earlier observation that the parties should get on with their matter. Third it affected the Claimant in the preparation of her case. Finally it resulted in the wasted resources of the Court which were set aside for the resolution of this dispute.

The Defendant's application for an extension of time/relief from sanction:

10. Against this procedural backdrop, the Defendant eventually filed one witness statement of Cleopatra Yvonne Hosten on 22nd February 2010. However on the same day, the Defendant filed an application seeking an extension of time to file further witness statements and to be granted relief from sanction pursuant to rule 26/7(2) and 27.9(2) and (3). In his affidavit the instructing attorney at law stated that he needed an extension of time until 22nd March 2010 to file two further witness statements.

11. The grounds in support of this application were set out in the affidavit of the Defendant's instructing attorney at law. In essence he contended that he needed to file a witness statement on behalf of two witnesses: Sherry Ann Jackson the daughter of the testator and a stranger whose identity and location was unknown. At the date of hearing the application, the Defendant's attorney at law still had not

prepared any drafts of the proposed witness statements, in spite of instructing attorney's statement in his affidavit that he needed an extension until 22nd March 2010 so to do.

12. In her oral submissions, Attorney at law for the Defendant admitted that the fault in failing to file the statements lay on her shoulders as she was the victim of a robbery on 4th February 2010. The affidavit does not say however why the witness statement was not at least prepared in draft form before or after 4th February 2010 or before the deadline of 22nd February 2010.

13. The Defendant further relies on the fact that Sherry Ann Jackson was unable to locate and provide certain documents and to give "proper instructions" to prepare the witness statements as she "not long ago" gave birth to twins and this has "restricted her". This is a very vague and unhelpful statement. Firstly there is no date for the birth of the twins nor any explanation as to what would have prevented the witness from giving instructions prior to the birth. Secondly, the Defendant's list of documents was filed on 30th October 2009. There was no application to file a further list. One must therefore regard the 30th October 2009 as a complete list of all the relevant documents to be used at the trial by the Defendant. In that context the inability of Sherry Ann Jackson to obtain documents and give proper instructions seem to be a very poor excuse to explain a delay in filing her witness statement between 13th January 2010 and 22nd February 2010.

14. The Defendant's attorney at law at the hearing also referred to two medical reports, which was obtained recently and did not form part of the application before the Court. The Court inspected these reports and it did not add anything to explain why witness statements were not filed or even drafted for Ms Jackson between 13th January 2010 and 22nd February 2010.

15. The affidavit also refers to an agreement with counsel for the Claimant to extend the time for filing the witness statements. It was clear however, from the Claimant's submissions that no such agreement existed.

16. Taken in its proper context therefore this was an application for an extension of time by the Defendant for filing further witness statements where:

(a) An "unless order" was made by the Court for the failure to file and exchange the Defendant's witness statements.

(b) It was an application for a third extension of time to file witness statements

(c) Acceding to the application would have resulted in vacating the trial date on yet another occasion.

(d) The application was made in the context of the Defendant's prior default in complying with the Court's deadlines generally.

(e) The application was based upon vague, inconsistent and unreliable evidence. The affidavit itself suggested the Defendant's ability to file its witness statements on 22nd March 2010. However when the matter came on for hearing on 14th April 2010, the statements were not even prepared in draft form, the identity of a "ghost witness" was still outstanding, and having left matters obviously for the last minute attorneys for the Defendant was now faced with the additional difficulty of the illness of Ms Jackson. Had they acted with alacrity and urgency since 13th January 2010, the witness' medical complications which arose in March 2010, would not have posed any difficulty in having the statements filed on time in February 2010.

(f) The administration of justice demands that trial date certainty should not be compromised unless there are compelling and exceptional reasons.

(g) The trial was being managed against the backdrop of litigation which would have an impact on third parties and the parties should get on with the matter.

17. It is in those circumstances the Court could not exercise its discretion in favor of the defendant.

Relief from sanction:

18. The Defendant's application was made pursuant to Rule 26.7 CPR seeking relief form sanctions. Rule 26.7 CPR sets out the requirements to be observed in making such an application for "relief from sanction." Parties are now well aware of the requirements of rule 26.7 CPR and the strict nature of the Court's application of those rules. See ***Trincan Oil Limited v Schnake***. In ***Tiger Tanks Limited v Lennox Persad*** I observed that "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 the 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…The laissez faire approach of the past can therefore no longer be tolerated….If a laissez faire or indolent 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"

19. It is now well settled that the effect of rule 26.7 CPR is to set out a list 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 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.

20. Applying that test, although the application was made promptly, the application must fail as, for the reasons outlined above there was no good reason for the breach and the Defendant was guilty of failing to comply with previous deadlines set by the Court. 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.

Extension of Time:

21. This application was filed on 22nd February 2010 the last day for compliance with the Court's order to file witness statements. If it is that the express sanction imposed by the Court in its order and by the rules had not yet been imposed on the date of filing this application, it can be viewed quite properly as an application for an extension of time simpliciter pursuant to rule 26.1 (1) (d) CPR. The Court has the discretion to extend the time for compliance with its order. In doing so the court is required to exercise its discretion to further the overriding objective.

22. The authorities of ***Keith v CPM Filed Marketing Limited*** (2000) the Times 29 August 2000, ***Circuit Systems Limited v Zuken Redac (UK) Limited*** [2001] BLR 253 and ***Price v Price*** [2003] 3 AER 911 explains that the principle that a party seeking an extension of time for complying with an unless order before the time for complying has elapsed the list of factors set out in Part 26.7 for relief form sanction is a convenient list of factors that should be considered in deciding whether to grant an extension of time. This appears to have been the position adopted in ***Sawyers v Clark Walker*** [2002] 3 AER 490. Jamadar JA in ***Khanhai*** also opined that this may be the case when dealing with applications for an extension of time. The rational for this approach is explained by Brooke LJ in ***Sawyers:***

[2] Civil Appeal no 65 of 2009 at paragraph 13

"The court's general power to extend the time for compliance with a rule (even if an application for extension is made after the time for compliance had expired) is contained in CPR r 3.1(2)(a), and in deciding how to exercise that power the court must of course take into account the overriding objective in CPR r 1.1. The question then arises whether the Civil Procedure Rules give any further guidance to judges as to how they should exercise their discretion when making orders under CPR r 3.1(2)(a), or whether, uncharacteristically, the way is left wide open for the creation of judge-made check-lists of the type recently deplored by this court in the judgment of Jonathan Parker LJ (with whom Pill and Tuckey LJJ agreed) in ***Audergon v La Baguette Ltd*** [2002] EWCA Civ.10 at [107]:

"Inherent in such an approach, as it seems to me, is the danger that a body of satellite authority may be built up…leading in effect to the rewriting of the relevant rule through the medium of judicial decision. This would seem to me to be just the kind of undesirable consequence which the CPR were designed to avoid."

23. In fulfilling the overriding objective the Court must exercise its discretion to essentially take into account what is fair and just in the context of the case ensuring that parties are on an equal footing, saving expense, observing the principle of proportionality, dealing with the matter expeditiously and allotting to it an appropriate share of the court's resources. Part 1 sets out some of the consideration in dealing with a case justly. The "shopping list" of factors set out in rule 26.7 (3) and (4) CPR can in my opinion be utilized to assist the Court in determining what is fair and just in any given case when exercising the discretion to extend time for compliance with the Court's order. This is consistent with the philosophy that the CPR was introduced to create certainty and predictability in civil litigation and to prevent satellite litigation on what considerations should be taken into account in exercising a discretion. The better approach therefore may be that in regular applications for extensions of time to refer to this list of factors in rule

26.7 (3) and (4) CPR and weigh them in the balance. The failure to comply with one factor is not necessarily fatal but it must be considered in the round. If this approach is adopted I am still of the view that an extension of time in this case does not give effect to the overriding objective and the refusal of the Defendant's application is consistent with dealing with the case justly.

24. I say so for the following reasons:

(a) The Defendant failed to provide a credible or good explanation for his breach. The Defendant's explanation that the attorney was unable to prepare the witness statement of Ms Jackson due to her mental distress is unacceptable. Not even a draft was prepared by instructing attorney at law who had conduct of this case. There is absolutely no explanation why instructing attorney at law could not have taken instructions and prepared a draft and stepped in to fill the breach of counsel if she was unable to do the task. The excuse for counsel's inability to prepare the witness statement was in itself unhelpful and a weak excuse. The Defendant's attorneys waited for the very last moment to get on with the matter only to discover that Ms Jackson was ill (a fact which was disclosed in the medical reports and not in the application). There is absolutely no credible explanation for the delay in preparing and finalizing this statement between January and February 2010 when the alleged crime was committed at the Attorney office.

(b) The Defendant had already obtained an extension of time on two prior occasions. The first because the Claimant had not filed its bundle due to the failure of the Defendant to allow for the inspection of their will. The second based on an oral application which was conceded to by the Claimant. The Defendant must have known on January 2010 when the extension was granted with an "unless order" that they had to now press on with the matter with urgency. However there is nothing in the affidavit to demonstrate that they took this extension of time seriously. The attitude smacks of the laissez faire approach attendant on this litigation which ought not to be condoned.

(c) The fact that the Defendant has not yet identified a second witness really is unacceptable at this stage of the proceedings.

(d) Even if the medical reports which were not properly in evidence before the Court are taken into account, they were of no assistance to the Defendant as it failed to explain why the statements could not have been prepared or filed before March 2010. The attorney's simple response was that it was really her fault.

(e) The pre trial review was rendered ineffective in preparing for 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 due the Defendants default the witness statement were not yet exchanged.

(f) The Defendant already had filed one witness statement and to carry on with the trial will not be unjust, as the Defendant would have an opportunity to lead his evidence.

(g) There was absolutely no material on affidavit indicating the usefulness of the witness, Ms Jackson and her "ghost" witness. Indeed the Defendant would logically have no idea herself as she admitted she was unable to take proper instructions.

(h) An extension of time would not have put the parties on an equal footing. This state of affairs is prejudicial both to the Claimant and to the administration of justice. Under the CPR delay is the enemy of justice. Lord Woolf MR in ***Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** [1998] 1 WLR 1426 at 1436E reminded litigants that:

> "Litigants and their legal advisers must therefore recognize that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice…" These last references are relevant to cases in

this court although in a slightly different way. Our listing system enables trial dates not only to be allocated at the outset of a case but also for the date which is the earliest practicable for the parties (a feature which is not as widely known as it ought to be). Delay which leads to a trial date being vacated may therefore mean the case has to be relisted as if it were a new case, although if it is a short case the delay may not be very great, and thus it will occupy a space which would have been allocated to another case which in turn will not be heard as early as it might have been, although the delay will be small. In addition another party or other parties who are or were ready for trial will thereby be prejudiced. Satellite litigation of the kind mentioned by Lord Woolf MR in ***Arbuthnot Latham*** can also affect other litigants in this court if the application is long enough that it has to be heard on a Friday. Thus this application would have tied up the court's resources for a day in the midst of the Michaelmass term had I not directed that it should be heard in the week when I was on call as a vacation judge. Racal emphasized that it did not wish the trial in January to be vacated; it was time that this long outstanding case was brought to a conclusion. That is a factor which requires to be taken into account."

Similar sentiments have been expressed by Jamadar JA as to the prejudicial effect delay has on the administration of justice. The concept of fairness must work equally for both sides.

(i) The failure was that of the attorney in this case which is no longer a good excuse.

These considerations reflect the Court giving effect to the overriding objective having regard to the factors set out in rule 26.7(3) and (4) CPR. The refusal to grant the extension of time was therefore a proportionate response to the breach against the backdrop of the management of the proceedings and the evidence submitted to the Court.

Conclusion

25. In all the circumstances there was no merit in the Defendant's application. The Defendant's application was dismissed with costs to be assessed at the date of the trial.

26. In refusing the application I am mindful that the CPR is designed to ensure access to justice to litigants. However the right to access to justice is not unlimited and, in a court driven system, must be conducted within the mandate of the court's directions and the rules themselves. The twin evils of delay and the high cost of litigation that bedeviled the pre CPR civil litigation landscape must not reappear by permitting parties and attorneys to slip back to a laissez fair approach to litigation. The culture is changing and there are now concerted efforts by attorneys to meet deadlines and make proper applications for extensions of time or for relief from sanctions in a timely manner. Those who prefer to practice in the past will find their future under the CPR to be short and problematic.

Dated this 15th April 2010

Vasheist Kokaram
Judge