

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2010-01662

BETWEEN

RAMRAJ DEONANAN

CHANDRA DEONANAN RAMKISSOON

Claimants

AND

MICHAEL HARRIPERSAD

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: 14th March 2011

Appearances:

Mr. Winston Seenath for the Claimant

Mr. Brian Nedd for the Defendant

JUDGMENT

1. The Defendant's application for relief from sanctions dated 11th March 2011 came on for hearing at the Pre Trial Review. The application was dismissed and I made consequential orders dismissing the Defence and Counterclaim and giving judgment for the Claimant on its claim. The details of that order are set out at the end of the judgment.
2. The application for relief from sanctions failed to satisfy the threshold test set out in Rule 26.7 CPR in that it was not made promptly and there was no good explanation for the

Defendant's breach of the Court's order to file his list of documents and witness statement within the time prescribed by the Court's order dated on 10th December 2010. In any event if he was able to satisfy the threshold there were insufficient reasons advanced for the Court to exercise its discretion in his favour taking into account the factors set out in Rule 26.7 (4) CPR. Having no witness statements meant simply that the Defendant could not have advanced any evidence at the trial where the evidential burden lay on him to prove an adverse possessory claim to land. Giving effect to the Overriding Objective therefore it was appropriate to strike out the Defence and Counterclaim and proceed to consider the Claimants' claim. The Claimants having filed their witness statements, I ordered that they stand as their evidence in chief. With no defence and counter claim no cross examination could have been facilitated. I considered the evidence and was satisfied that the Claimants were entitled to the declaratory relief sought on this claim.

3. The end result is a practical demonstration of the use of the wide powers of case management conferred on the Court under parts 25 and 26 CPR and the exercise of its discretion to give effect to the overriding objective under part 1 CPR. The Court is an active referee and in the absence of any evidence from a Defendant such a result is consistent with dealing with the case justly but utilizing its wide case management powers to effect its economical, even handed and proportional disposition.

Relief from Sanctions

4. The Defendant was in breach of two orders made by this Court. First he failed to give standard disclosure by filing and serving his list of documents on or before 24th January 2011 and second he failed to file and exchange his witness statement on or before 28th February 2011. The application for relief was made some two months after the deadline for giving standard disclosure and eleven days after the deadline for filing witness statements. These orders were made at a Case Management Conference where the Court in the exercise of its case management powers gave directions for the further management of the case. The directions were all directed towards the efficient allocation of resources for a trial on 2nd May 2011 or earlier disposition at a Pre Trial Review. I say this for even where a Court sets a trial date that is simply an indication of the fixed date for the claim to come to an end by adjudication. However this does not preclude an earlier disposition by the Court's active

management at a Pre Trial Review or hearing of any other applications that maybe filed by the parties for summary judgment for instance. These directions are not window dressing they are directions made after careful thought has been made for the planning of the event of disposing of a claim by trial or otherwise. Indeed once the parties comply with the Court's directions to prepare for a trial such as giving disclosure and filing witness statements the Pre Trial Review is a perfect opportunity for the Court to give parties a reality check on the issues that are to be determined at a trial. In many cases it is when the evidence is unearthed at the stage of the exchange of witness statements parties may have a better appreciation of their respective cases. Parties whose obligations it is to assist the Court in dealing with a case justly would at that stage make choices which may well include further negotiation, compromise or limiting issues for trial. The directions given for a trial with a "case management event" of a Pre Trial Review¹ preceding it is certainly therefore not a shopping list of sterile directions but purposeful case management for the expeditious and fair disposition of the case.

5. As it transpired the Claimant complied with all the directions set out in the Case Management Conference order. The Defendant failed to get off the mark.
6. In this case, the first requirement to be complied with by the parties was standard disclosure. I would hardly expect any witness statement to be filed by a party unless he disclosed the documents which he intends to rely upon at the trial.
7. The rules themselves provide for an automatic sanction for failure to file a list of documents in giving standard disclosure and in filing witness statements. In the former case, a party who fails to give disclosure by the date specified in the order may not rely upon or produce any document not so disclosed at trial. Rule 28.13 (1) CPR. In the latter, where a party fails to file his witness statement, the witness cannot be called as a witness at the trial unless permission is granted. Rule 29.13 CPR. The Defendant must file for relief from these sanctions and do so promptly.
8. It is now settled law that in this jurisdiction an application for relief from any sanction must be made and in addition to being made promptly must satisfy the three requirements

¹ At a pre trial review the Court can exercise its powers of case management of Rule 25 and 26

identified in Part 26.7 (3) CPR before the exercise by the Court of the discretion identified in Part 26.7(4)3. If any of these four requirements, collectively referred to as “the threshold requirements” are not satisfied relief cannot be obtained. See **Trincan Oil Ltd and others v Chris Martin** C.A. Civil No. 65 of 2009.

9. Even though these are referred to as threshold requirements before exercising the general discretion in 26.7 (4) CPR it is also settled that the threshold requirements themselves involve a degree of discretion or “judgment call” by the Court in determining what is a good reason or what is prompt or whether there has been general compliance.
10. The application was not made promptly in my view for the following reasons:
 - (a) There was a delay of two months after the deadline for filing the list of documents.
 - (b) There was a delay of eleven days after the deadline for filing the witness statements (and eighteen days after the Defendant’s attorney said he visited the Defendant and discovered the difficulty (paragraph 7 of the Defendant’s affidavit)).
 - (c) There is no explanation for either periods of delay in filing the application.
 - (d) The delay of two months comes in the context of the fact that it was the very first direction to be complied with after the last CMC and a direction which only if complied with can the Defendant file his witness statement, provided of course that there are documents in his possession that falls within the obligation of standard disclosure.
 - (e) It is a delay that is made in the context of the Claimant having observed all the time limits. The application is belatedly being made at the Pre Trial Review stage when it is expected that all the directions would have been complied with and the Court will now proceed on a further management of the case to limit the issues arising from witness statements and agreed documents in further preparation for the trial.
 - (f) The trial date was fixed and the pre trial review was set to confirm this date. This should only be done after the witness statements are filed. As observed above, in some cases after the witness statements are filed one may appreciate the inherent weakness in the case and in fact with robust management some may be disposed of without the necessity of a trial. If however cross examination is necessary and the issues of fact remain live issues then the trial date is confirmed. This entire exercise

was rendered futile by the failure of the Defendant to comply with the deadlines and to make a timely approach to the Court to remedy his default and keep the case on track.

11. This Court reminds parties, if they need reminding, that case management is Court driven and parties must comply with the directions of the Court. A failure to follow a step in the management of the case frustrates the entire project management and unnecessarily delays the final determination. Parties indeed are required to help the Court further the overriding objective (r 1.3) which includes allocating proper resources for the fair disposal of the matter. The Court of Appeal² has repeatedly denounced the laissez faire approach to litigation and the late application by this Defendant is reflective of such an attitude which would receive very little sympathy from this Court.
12. I will not deal with the question of whether the failure was intentional as there is very little evidence before me to make such a conclusion save to make the general statement that a person in breach generally intends the consequences of his actions.
13. There is no good explanation for the Defendant's breach of the rules. The main thrust of the excuse proffered for failing to comply was the illness of the Defendant. However that explanation needs to be closely examined with the evidence. First the illness of the Defendant was not a sudden or immediate one which created an emergency in the attorney's preparation of the case. It was a condition which existed long before the claim was filed. The medical report dated 29th October 2009 by Dr. Spann precedes the claim and demonstrated that the Defendant was suffering from a condition known by both the Defendant, and the Attorney at Law since May 2009 when the appearance was filed. Indeed when he applied for an extension of time for filing the Defence and Counterclaim this was the every same reason proffered for the late filing of same. In proper case management by the Defendant of his case his illness must be taken into account. The Defendant must now allocate his resources and create a project plan for his case so that he can meet deadlines for the proper management of the case taking his circumstances into account. No complaint was made to this Court of the

² Andrew Kanhai v Darryl Cyrus and the Attorney General of Trinidad and Tobago C.A.CIV.158/2009; **Trincan**

time lines set at the case management conference as being unduly difficult for the Defendant having regard to his illness which was known to the Defendant's attorney at law.

14. The sick leave certification relied upon is of little assistance as there is no explanation from the Defendant why instructions could not have been obtained over the phone, or at his home or why an application for leave to rely upon a witness summary could not have been made.
15. Moreover, this is a Defence in which the issue of adverse possession is relied upon by the Defendant. It is a fact specific enquiry and I would have found it very strange that the Defendant would feel any degree of confidence in preparing for a trial with only himself as the sole witness. There is absolutely no specific reference to any other witness nor their witness statements. Upon filing his Defence, the Defendant's attorney should have had his instructions of this potential witness list. There is absolutely no reference in the application for any search for any available witness if there were any.
16. Against that backdrop a prudent course would have been to put arrangements in place to visit the Defendant at this home or for the Defendant to pick up the telephone and contact his Attorney at Law and give instructions and most definitely file an application at or near to the date prescribed by the Court for the filing of list of documents and witness statements.
17. The Defendant has not been generally compliant with the rules as he was previously in breach of the timelines for the filing of his Defence.
18. In these circumstances the application fails. I have assessed the cost of the application which was a simple one on the basis of two hours work in the sum of \$1,500.00.
19. The Defendant having failed to comply with the Court's order and there being no list of documents or witness statements the Court is left with two issues for the further management of this claim (a) whether the Defence should be struck out and (b) whether judgment can be entered against the Defendant at this stage of the proceeding at the Pre Trial Review. I answered both questions in the affirmative.

Striking out the Defence

20. The power of the Court to strike out a Defence and Counterclaim at the Pre Trial Review is one of its case management powers conferred by Rule 39.3 CPR. Rule 26.2 (1) (a) CPR empowers the Court to strike out a case if there is failure by the party to comply with an order made by the Court. In this instance the Defendant failed to comply with the Court's order to file its list of documents and its witness statements. The allegations made in the Defence and Counterclaim can no longer be supported by any evidence by the Defendant and there is no value in having a trial of the Defendant's counter claim or his Defence.
21. Additionally save for paragraphs 2, 7, 10 and 12 of the Defence, the Defence amounted to a bare defence. In so far as paragraphs 3, 4, 5, 6, 8, 9, 11 of the Defence are concerned they contain bare denials of the Statement of Case. Where a Defendant is denying an allegation made in a claim he must also proceed to set out the basis on which he is denying if the Defence does not comply with rule 10.5(4) the Court is entitled to treat the allegation in the claim form or statement of case as undisputed or the Defence as containing no reasonable defence to that allegation **M.I.5 Investigations Limited v Centurion Protective Agency Limited** CA Civ 244 /08. See Rule 10.6 (4) CPR. On the face of the Defence the statements of facts made in paragraphs 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 15 of Statement of Case are unchallenged.
22. In so far as paragraphs 2, 7, 10 and 12 of the Defence are concerned it raises the defence of adverse possession and also is the basis for the claim for declaratory relief that the Defence is entitled to possession of the parcel of land. This is largely a fact specific enquiry to determine the acts of possession claimed by the Defendant, with the evidential burden on the Defendant. Indeed the legal burden in the Counterclaim for possession rests on the Defendant. Without any evidence these allegations cannot be proved.
23. The Defence and Counterclaim shall be struck out.

Judgment

24. Should a Court now proceed to trial which was set as part of its case management directions in December 2010? Is that a proper allocation of the Court's resources where in effect there is no defence and counterclaim? The only real issue that must now be resolved is whether the

Claimants are entitled to judgment based on the evidence led in their witness statements and whether the Court in the exercise of its general powers of management under Rule 26 (1) (w) CPR can make any order to enter judgment for the Claimant.

25. There were two consequences of striking out the Defence and Counterclaim. First the claim stands undefended and the Defendant can no longer cross examine the witness. It is simply at the trial for this Court to be satisfied on the evidence led that a declaratory order can be made. As I mentioned earlier the setting of the trial date is the ultimate date for the matter to be disposed of, it does not preclude the Court from disposing of the matter earlier by deploying its active case management powers where it is just to do so.
26. The Court has wide powers of case management and can proceed to make such orders that are consistent with the overriding objective. This is preserved unto the Court by Rule 26.1 (w). It would be saving the parties the expense of a further hearing and it is consistent with dealing with the case efficiently if the claim is determined at this stage. In those circumstances I ordered that the witness statements do stand as evidence in chief. This is an appropriate case management order made pursuant to Rule 29.1 (c)³. There is no need for oral testimony. See also Rule 29.2 (2) CPR.

Conclusion:

27. The Claimants' evidence in the witness statement of Chandra Deonanan Ramkissoon and Ramraj Deonanan dated and filed 28th February 2011 in my view supported the relief claimed and judgment can be entered in their favour. I therefore proceeded to make the following orders:

- (a) The witness statement of Chandra Deonanan Ramkissoon and Ramraj Deonanan dated and filed 28th February 2011 will stand as their evidence in chief.
- (b) The Claimants' indicating to the Court that they shall not pursue its claim for damages for trespass permission is granted to the Claimants' to withdraw their claim for damages with no orders to cost. I have made an order no orders to cost for the

³ Pursuant to 29.1 (c) CPR it is open to the Court to control the evidence by directing the way in which a matter is to be proved, in this case by the witness statement standing as his evidence in chief.

obvious reason that this election has been done on the basis that a default judgment is being entered rather than pursuing it at a trial.

- (c) The Court declares that the Claimants' are the owners and are entitled to possession of all and singular that piece or parcel of land situate at Sewlal Trace, Pepper Village, Fyzabad in the Ward of Siparia in the Island of Trinidad comprising 0.3505 hectares be the same more or less and being a portion of the lands described in the first schedule of deed no. DE200800352535 and bounded on the North partly by a Road Reserve 4.02m wide and partly by an existing Trace on the South by lands now or formerly of C.W. Boyce and the East by Sewlal Trace 4.02m wide and on the West by lands now or formerly C.W. Boyce and shown as parcel C more particularly described in deed no. DE200800352535 dated 24th January 2008 ("the said lands").
- (d) The Defendant whether by himself his servants and or agents or howsoever otherwise are hereby restrained from entering upon the said lands or any portion thereof and or from dumping and or depositing and or throwing any refuse or anything thereupon. The Defendant whether by himself his servants and or agents or howsoever otherwise be restrained from cursing, abusing, harassing, molesting, insulting, using annoying language or interfering with the Claimant on the said lands.
- (e) The Defendant do pay to the Claimants' prescribed costs in the sum of \$10,500.00.

V. Kokaram
Judge