THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2011-03941

BETWEEN

KAREN TESHEIRA

Claimant

AND

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Interested Party

THE RULES COMMITTEE OF TRINIDAD AND TOBAGO

Interested Party

Before the Honorable Mr. Justice V. Kokaram

Appearances:
Mr. Douglas Mendes S.C. and Mr. Michael De La Bastide for the Claimant instructed by Ms. Nyree Alfonso
Mr. Vasheisht Maharaj and Mr. Gerald Ramdeen led by Mr. Russell Martineau S.C. instructed by Reba Grenado for the Defendant
Mr. Fyard Hosein S.C. led by Mr. Rishi Dass instructed by Ms. Candace Flemming for the Law Association of Trinidad and Tobago
Mr. Gerald Ramdeen led by Mr. Russell Martineau S.C. for the Rules Committee

JUDGMENT

SUMMARY

1. The constitutionality of Rule 26.7 Civil Proceedings Rules 1998 (CPR), which is conveniently referred to as the relief from sanctions provisions, is now squarely under challenge in these proceedings. Rule 26.7 CPR is part of a suite of rules in Part 26 CPR which confers unto the Court the powers of case management, that is to say the power to manage cases so as to achieve the overriding objective of the CPR of dealing with cases justly. To borrow a phrase from Dick Greenslade[1] these rules were meant to be "electric fences" to guide litigants along the path of an efficient and reliable system of justice. "It was not meant to kill cows"[2]. For some litigants however, such as the Claimant in this case they invariably become enmeshed in the electric fence which may lead to the premature death of their case. This constitutional motion throws up the fundamental question as to whether the relief from sanctions provisions is so unfair as to be tarnished with the label of unconstitutionality.

2. The Claimant has been a litigant in the civil litigation system for close up to seven years. She has been pursuing a claim CV 2009-02051 as Executrix of the estate of her deceased husband against the Defendants in those proceedings, in damages for negligence in their medical treatment of the deceased who died on 13th April 2004. Those proceedings commenced under the Rules of Supreme Court (1975) in 2005 and were subsequently "transferred" under the Civil Proceedings Rules (CPR) in June 2009. Since that time she failed to comply with several of the Court's case management orders, directions in particular and of relevance to this motion: the

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[1] A British District Court Judge who has worked on the production of the Woolf Report "Access to Justice" and who presented his report on the review of civil procedure in this jurisdiction the "Judicial Sector Reform Project"

[2] "Any effective system of case management requires sanction. However the purpose of sanction can be likened to that of electric fences – they are not intended to kill cows! The aim is that they should ensure compliance rather than that they should be used. Inevitably such an approach will prove optimistic – sanctions will have to be applied"

filing of a list of documents for the purposes of giving standard disclosure and the filing of her witness statements. Rules 29.13(1) CPR and 28.13 CPR impose automatic sanctions against the Claimant debarring her from relying upon those documents at the trial unless she can make a successful application to the Court for relief from this sanction under the relief from sanctions provisions.

3. The Claimant now challenges the constitutionality of the relief from sanctions provisions contending that those rules are a breach of her fundamental human rights to the protection of the law (section 4(b)) and rights to a fair hearing (section 5(2) (e) and 5(2) (h) of the Constitution). The challenge in this case is limited to the relief from sanction provision Part 26.7 (1) and (3). This therefore focuses the challenge to the threshold test factors set out in Rule 26.7 (1) and (3) and is not a challenge generally to the notion of automatic sanctions in Rule 26.6. Her main contention is that the imposition of the sanction is disproportional to the aim of compliance with procedural rules and that the discretion of the Court to lift the sanction is so hampered by the rules such as to impair and destroy the very essence of the party's right to a fair hearing and access to justice.

4. Subsequent to this motion being filed the Claimant's application for relief from sanction did come up for hearing before me and on 7th December 2011 I exercised my discretion in favour of the Claimant and granted her relief from sanctions. The Defendants have since filed notices of appeals against that decision and those appeals are pending.

5. In spite of the practical effect a dismissal of those appeals may have for the Claimant on these proceedings, her constitutional challenge is timely in the context of the growing debate on the relevance and appropriateness of the relief from sanctions regime in this jurisdiction and its impact on the practice of law and the litigant's access to justice. Our Courts have made several recent pronouncements at the High Court[3] and Appellate[4] levels on the interpretation of the relief from

[3] See Reference to the local cases in **Karen Tesheira v Gulf View Medical** CV2009-02051

sanctions provisions which have been described in academic and legal circles as draconian. The Law Lords of the Privy Council[5] have also weighed in with their views on the proportionality of those rules although the issue of the constitutionality of these rules was not a matter for determination until in these proceedings.

6. It is not a secret that these relief from sanctions provisions are unpopular with the legal fraternity. The Law Association of Trinidad and Tobago intervened in these proceedings to strongly advocate for a revision of the rules to keep faith to recommendations made by the Advisory Committee to the Rules Committee (1998) to amend the relief from sanctions provisions. In erudite arguments presented to this Court, the Claimant and the Law Association of Trinidad and Tobago have advocated that access to justice is a fundamental principle of the protection of the law and indeed the rule of law. Fundamental to this principle of access to justice is the "gold standard" of a fair and just legal system with a trial on the merits. Accordingly, recognizing that legitimate constraints may be imposed upon fundamental rights, such fetters or restrictions must be proportionate to the object to be achieved and ought not to destroy the very essence of the right. The legitimate aim being to achieve "the gold standard" the relief from sanctions provisions must pursue the objective of putting the litigant back on track. It ought not to pursue an objective which results in the litigant being unceremoniously thrown out the court's door. Accordingly any discretion conferred by the rules on Judges to grant relief must be real, it must be meaningful, it must give due consideration to the context of each case weighing and balancing a multitude of factors that necessarily engage the courts discretion to do justice in each case. To do otherwise would be to treat all cases alike without regard to the proportionate effects and results on the outcome of the matter. Such a system therefore instead of providing certainty promotes arbitrariness and unfairness.

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[4] See **Trincan v Martin** Civil Appeal 65 of 2009; **Trincan Oil v Schnake** Civil Appeal 91 of 2009; **AG v Universal Projects**, Civil Appeal 104 of 2009.

[5] See **AG vs Universal Projects** Civil Appeal 104 of 2009 and **Keron Matthews vs. AG** Civil Appeal 23 of 2010

7. The Judicial Sector Report's recommendations on the imposition of automatic sanctions and a threshold test were adopted by the Rules Committee. The report sought to introduce an indigenous approach to civil litigation. Mr. Greenslade prepared his report against the backdrop of his examination of the Trinidadian culture and the pandemic of delay costs and uncertainty. He advocated a new approach of the introduction of sanctions which replaced the procedure of applying for unless orders which was being used too frequently in unmeritorious claims and was another reason for delay in the system of justice. It was a recommendation which had at its heart the element of predictability and consistency in the delivery of justice.

8. The new approach to sanctions was that first the sanction should be appropriate to the offence and should apply automatically without the innocent party having to expend time and effort to enforce an order or direction of the court. The onus will then be on the defaulter to seek relief at his expense. The appropriate sanctions will be included in the rules themselves or by the direction of the court. The report did take into account a system of automatic sanctions which were final but preferred a system of applying for relief. The notion of creating a threshold test was recommended against this backdrop. For creating a robust approach to case management and creating a streamlined, efficient and predictable system of justice.

9. Interestingly this approach was not dissimilar to Lord Woolf's in his Access to Justice Report:

    "Chapter 6 Sanctions

    1. When considering the problems facing civil justice today I argued in chapter 3 of my interim report that the existing rules of court were being flouted on a vast scale. Timetables are not adhered to and other orders are not complied with if it does not suit the parties to do so. Orders for costs which do not apply immediately have proved to be an ineffective sanction and do nothing to deter parties from ignoring the court's directions.

3. I would stress four important principles.

(a) The primary object of sanctions is prevention, not punishment.

(b) It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he has not disclosed.

(c) All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.

(d) The onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.

7. I recognize the difficulties involved in the application of sanctions. Recent attempts at strengthening the court's powers to deal with delays and defaults of the parties have not met with complete success. The provisions in Order 17, rule 11(9) of the County Court Rules for the automatic striking out of cases if no request is made for a hearing date within a fixed time have been the subject of a number of appeals to the Court of Appeal. This was partly because of a lack of clarity as to how the rule should operate. But the vast majority of cases were struck out under the rule because of a failure by practitioners to appreciate its effect or to comply with its requirements. The experience with the rule shows up the advantage of effective case management throughout a case; even the most severe sanction does not change practitioners' behaviour when it is delivered without an adequate warning, while effective management should avoid a situation to which Order 17, rule 11(9) applies arising.

14. There must of course be some limited right to apply for relief from a sanction. In my view the onus should be on the party in default to seek relief, not on the other party to apply to enforce the sanction. The application should be made before the date of expiry of the specific requirement. It is important that the conditions for relief should be set out clearly in the rules. I recommend, broadly following the test in **Rastin v British Steel** [1994] 1 WLR 732, that relief should not be granted unless the court is satisfied that the breach was not intentional,

that there has been substantial compliance with other directions and that there is a good explanation. The court will need to consider whether the failure was due to the default of the client, whether the default had been or could be remedied within a reasonable period, whether the trial date, or next milestone date, could still be met if relief were granted, and whether granting relief would cause more prejudice to the respondent than refusal would to the applicant…...”

Lord Woolf also recognized the need to be consistent and predictable:

> **“15.** To a large extent the effectiveness of sanctions will revolve around judicial attitudes. There is no doubt that some judges at first instance, especially Masters and district judges, will need to develop a more robust approach to the task of managing cases and ensuring that their orders are not flouted. They must, in particular, be resistant to applications to extend a set timetable, save in exceptional circumstances. ….So far as appeals are concerned, procedural decisions must not be overturned lightly but only when judges have misdirected themselves as to the facts or the law or made errors of principle. This is not simply a matter of limiting appeals. It goes to a change of culture, in which judges can make orders confident that parties will not feel that they can ignore orders or that they can escape unscathed by appealing. As Steyn LJ said in **AB v John Wyeth & Brother Ltd** (1993) 4 Med LR 1, 6, "the judge invariably has a much better perspective ... of the needs of efficient case management than the Court of Appeal can ever achieve". He was speaking particularly of group actions, but I believe that the point is true of all cases. “

10. From a review of these advocates for reform it is revealed that:

    (a) Sanctions are an integral part of case management.

    (b) They are properly to be applied as an aid to positive case management, the purpose of which is not to destroy cases but to resolve them. Greenslade recognized this when he said that it was an electric fence to guide the litigation forward not to kill cows.

(c) A conscious decision was made for the threshold test to be implemented in the application for relief

(d) Its objective was to underscore the serious nature of the courts orders and to restore respect for compliance in a system where delays were intolerable.

11. This approach was not approved by the Advisory Committee which recommended that there ought to be no threshold but a consideration of all the factors similar to the UK Part 3. The Rules Committee however did not accept many of the recommendations of the Advisory Committee including its proposals on the relief from sanctions. However a Monitoring Committee was established and from the evidence before the Court the rules are to be reviewed shortly.

12. In several rulings our Court of Appeal has pointed out the rationale for these rules as a legitimate aim in dealing with cases justly.

> "The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and will adapt their behaviour accordingly, thus effecting the desired change in culture.
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> Simply put, in the context of compliance with rules, orders and directions, the *'laissez–faire'* approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated."

13. In **Trincan v Schnake**:

> "54. 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 practised here.

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56. 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."

14. "In none of the above instances is there any denial of access to justice. There is however regulation that is perfectly constitutional and proportionate in the context of Trinidad and Tobago. In all of these examples, the people of Trinidad and Tobago through their Parliament in the case of statutes of limitation and the Rules Committee in the case of procedural rules (subject to negative resolution by Parliament), determined and decided what is appropriate for Trinidad and Tobago. It is therefore vitally important for the local courts to robustly dialogue about, develop and pay due regard to their local jurisprudence in the context of procedural law.

44 In our opinion the aims of the CPR, 1998 are legitimate, as are those articulated by the Court of Appeal in relation to Part 26.7. And, the means employed to achieve these aims are proportionate (given the appropriateness of the relevant criteria) in the context of both aims and existing culture. There is no arbitrariness. However we

assess it, questions about the assignment of weight to competing values and of their balance in the context of any legislative or procedural scheme, are necessarily driven by local needs and circumstances. Indeed, in Part 26.7 these considerations are intentional, rational and have been introduced and interpreted in this way for good reason in Trinidad and Tobago."

15. In the most recent installment by our local court of appeal in **Reed Monza v Pricewaterhouse Coopers Ltd** CA2001-15 the Court recognized the contextual nature of the discretion set by the threshold :

> "It is now accepted in this jurisdiction that an applicant seeking relief from sanction must satisfy all the requirements set out in rule 26.7(1) (2) and (3) before the Court could consider exercising its discretion to grant relief…The type of analysis involved in determining whether there is a good explanation for the breach and whether the applicant has been generally compliant are essentially judgment calls to be made by the judge in the exercise of his/her discretion. It therefore cannot be said that rule 26.7(1) (2) and (3) is to be applied in a manner to deprive the court of its discretion; a wide discretion which is readily apparent from the structure of the relief from sanctions provisions."

16. No doubt there are hard cases where the application of the relief from sanctions rules is concerned and Judges have not been unsympathetic to the plight the errant party has found his or herself in. However the underpinning in the Court's determination as to whether a litigant deserves to be pulled over the threshold, or out of the electric fence, in applying for relief has always been an exercise in granting access to justice. Ironically that was the name of the report which was the foundation for these rules that advocated both a system of sanctions and a procedure to apply for relief from them. Who is the person deserving of relief? The rules setting out the threshold spell it out in terms. It is a person who pays due regard to and is compliant with the orders of the Court. He acts promptly, he has good reasons for failing to comply, he is generally compliant and he did not intend to

flout the Court's order. It is reminiscent of some of the main considerations previously considered by the Court where there is a breach of an "unless order".

17. Reframed in the constitutional debate protection of the law means a guarantee to the individual of his right to substantive procedural justice or fairness. See **Ong Au Chuan v Public Prosecutor** 1981 A.C 648. It is now accepted that it is for the courts' to work out the content of the fundamental rights guaranteed under the Constitution. This has been authoritatively stated by Wooding CJ in **Collymore v AG** C.A Civ.3/1966. The authorities submitted to the Court by the parties all accept that the fundamental right is not absolute in nature and that legitimate restrictions are permissible. See **Surratt v AG**[8] **, Bell v DPP**[9] In **Fayed v. United Kingdom** (1994) 18 E.H.R.R. 393, 429-430, para. 65, the court said:[10]

> "'(a) The right of access to the courts secured by article 6(1) is not absolute but may be subject to limitations, these are permitted by implication since the "right of access" by its very nature calls for regulation by the state, regulation which may vary in time and in place according to the need and resources of the community and individuals." [*Belgian Linguistic Case (No. 2)* (1968) 1 E.H.R.R. 252, 281, para. 5]
> (b) In laying down such regulation, the contracting states enjoy a certain margin of appreciation, but the final decision as to the observance of the Convention's requirements rests with the court. It must be satisfied that, the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.
> (c) Furthermore, a limitation will not be compatible with article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim

[8] **Surratt v AG** C.A. Civ 64/2004
[9] **Bell v DPP** [1985] AC 937
[10] Approved in **Tinnelly Sons Ltd. v. United Kingdom** (1998) 27 E.H.R.R. 249, 271, para. 74

sought to be achieved.' [*Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329, 393 para. 194]."

18. The thin approach as advocated by Senior Counsel for the Respondent was simply rules must be obeyed. This avoids a discussion on the content of the rule of law. However I gather that it must be axiomatic that procedural fairness and substantive justice should rest at the heart of the rule of law.

19. Characterizing rules as draconian is one thing but to label them as unconstitutional is quite another. I wholeheartedly agree that access to justice cannot equate to a system of justice that is unfair and arbitrary or a system which eliminates the exercise of judicial discretion in the determination of rights. The enquiry in these constitutional proceedings however is to examine whether the rules under challenge have deprived the Claimant of substantial justice and whether in fact these rules are, far from giving access to justice are now barriers to justice.

20. In my view the rules under challenge are not unconstitutional for the following reasons:

    (a) The rule is not "ultra vires" the Supreme Court of Judicature Act. These rules guide the process and pace of litigation. They fit snugly within the ambit of the jurisdiction of the Rules Committee as conferred by section 78 (1) (a) and (f) of the SCJ Act.

    (b) The cases referred to me are all working examples of the rule that access to justice is a fundamental right. The rules must be examined against their object and purpose and stretched against the template of fundamental fairness.

    (c) The right to access to justice is neither unfettered nor absolute. Reasonable limitations are justifiable. The litigant is entitled to procedural fairness; to a system that is fair not perfect. Limiting access to the Court is not something

new nor is it oppressive. The threshold test for example in Judicial Review cases for instance provides a working example of the court's ability to filter cases before it enters the system of litigation. Many of the cases referred to by the Respondents in fact deal with restrictions which entirely negate the litigants ability to access the Court.

(d) The new rules were designed to bring about a paradigm shift in the practice of civil litigation not to a system of anarchy or oppression. It promotes a system that is predictable, proportionate, economical, fair and just in its results. The hallmarks of the new system are encapsulated in the overriding objective - the desire to deal with cases justly and the considerations that are taken into account in determining what is just. The rules must balance also the rights of the compliant party who has fully complied with the Court's deadlines and has consistently respected the Court's orders.

(e) The imposition of an automatic sanction of a party's inability to call a witness or to rely on a document for failure to comply with a court's order for the filing of a witness statement or list of documents pursues the legitimate aim of an efficient and predictable system of justice. Against the backdrop of the litigation culture of this jurisdiction as analyzed by Mr. Greenslade and taken into account by the Rules Committee it was a necessary rule to promote the more efficient use of the party's and court's resources, economical case management and trial date certainty. It reduced the delay and cost in procedural applications to enforce compliance with rules. The culture of compliance was built within the rules and forms an important feature of our local civil litigation landscape. The threshold test is an indigenous response to our problems of delay and costs of the judicial system.

(f) The rules give full access to the complainant, to the litigant that pays due regard to the Court's orders, that co-operates with the Court's management of a case to move it forward.

(g) In analyzing the Claimant's and the Law Association of Trinidad and Tobago's arguments I have asked the question- what formula would satisfy the test of proportionality as advocated by Senior Counsel? If the Claimant's claim has been derailed and there should be a fair process to return her back on track, what would be the fair formulation of such a rule? Is it a consideration of all the factors in 26.7(3) and (4) as is done in the UK? Should the discretionary factors in the threshold be expanded? But even if we follow this logic, what is fair for one may be unfair for others. We are right back to Wooding CJ definition of these fundamental rights, they are not absolute and one man's freedom of movement is another man's trespass. Indeed one man's access to the court is another man's barrier. The analysis is therefore flawed, I can't agree with the proposition that if you pass through the hoops there is no denial of justice but if you stumble and cannot pass the test, there is fundamental injustice amounting to a breach of the protection of the law.

(h) The Claimant and the Law Association of Trinidad and Tobago do not attack the notion of applying for relief. They appreciate the need for a procedural system whereby defaulters must justify their breach of the Courts order. In focusing their complaint to the threshold test the real complaint is not that it is unconstitutional but that the rule is too harsh. I was almost seduced at one stage to think that the threshold test eradicated all hope for the litigant to "get back into the system". But is that an accurate statement or mere hyperbole? What is insurmountable about the threshold test? If the defaulter has the information he simply puts the evidence before the Court. It may be that the Court has not been accepting certain excuses as "good reasons" but that does not make the rule requiring a good reason an unconstitutional fetter to the litigants' access to justice. In fact there is no real prohibition by our Courts to revisit the general excuses of attorneys for failing to comply with deadlines to determine if a good reason exists. It is as Justice of Appeal Kangaloo pointed out a contextual question.

(i) The threshold test is the exercise of a Court's discretion after making certain factual assessments based on the circumstances of the case. The establishing of clear guidelines for the exercise of the court's discretion is consistent with the concept of creating a predictable and reliable system of justice. At the expense of leaving a court's discretion to be adjudged by the size of one's foot, here is a system laying down clear and certain criteria not only for the court to consider but for litigants to have fore knowledge of the exact nature of the test. The rationale therefore was to reduce the arbitrariness of the Court's discretion.

(j) It is indeed strange for this litigant to challenge the constitutionality of provisions which as it has happened in this case when applied resulted in a favourable outcome. Indeed in this case I have already exercised my discretion in both the threshold and other factors in favour of the litigant in granting relief. Another Court may disagree with me, but this was an exercise of my discretion in case managing the matter onwards to a trial in the month of April or May 2012. It represented a discretion exercised within the context of the case being managed with a view to give effect to the overriding objective. To have this constitutional challenge linger after my exercise of my discretion, no doubt due to the pending appeal against my decision, in granting relief really underscores the point of the Respondent that the real complaint here is about applicability of the rule. The litigant argument for a proportional approach to compliance under the rules simply advocates for a better chance to get back in the lane for more generous consideration. That is simply a matter for either the sitting judge who is exercising his discretion or the Rules Committee it really does not justify putting the tarnish of unconstitutionality on these rules.

(k) The culture of compliance has not been at the expense of the litigant. In other words access to justice as an integral feature of the rule of law viewed contextually has not been sacrificed at the altar of economy in the CPR. First

in setting a time for compliance the parties determine what is reasonable themselves and this invariably becomes the order of the Court. The parties are then free to vary these timetables pursuant to rule 27.9. The parties are also free to apply to extend the time for compliance with the order in which case the courts wide discretion is invoked. Arguably in such cases the entire gamut of factors spelt out under rules 26.7 (3) and (4) fall for consideration. See also Rule 26, 29.4, 29.6, 29.13,2915, 27.9. In this structure as you move along in the case managed system the duty to comply increases. Understandably so as the idea is to ensure that the trial date or final disposition materializes in the short term.

(l) Even in a case of default the matter is not entirely lost, the litigant is not altogether driven out of court. He/she still retains the right to cross examine witnesses in the appropriate cases.[11]

(m) In each of the hypothetical cases advanced by the Law Association of Trinidad and Tobago I do not see the difference between the breach of the rule and the litigants' access to justice. There is nothing wrong or unconstitutional in setting a predictable and consistent bar. The gold standard is compliance. In each case if relief is not granted regardless of the sum claimed or the nature of the dispute the fact is that the litigant may not be able to prosecute his or her claim. That I accept has disastrous consequences to all regardless of the size or nature of the claim. However to telegraph to them before they access the civil litigation system that they are to comply with deadlines and act promptly fulfills a legitimate aim in the system of justice: a reduction of delay and as a consequence a reduction in costs which would have been attendant on protracted litigation.

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[11] **John Rahael v TNT News** H.C. 59/2005 provides a working example that all is not lost.

(n) In my analysis I have consciously avoided the side debate as to the infusion of a Strasbourg jurisprudence into the veins of our body of constitutional law. Taking those factors into account the Claimant still does not demonstrate the unconstitutionality of the rule. As a maturing society and an emerging democracy, some 50 years old in the application and working out of the fundamental rights of our written Constitution we must allow the roots of our indigenous constitutional interpretation to grow. Inevitably it will be fertilized by a global jurisprudence however it is not to replace the source of its sustenance which is an application of our rights with a knowledge of our mores and societal demands. It is the duty of the Court to set the bar through its function of constitutional interpretation to set the framework for the workings of our democratic rights. The fundamental rights are broadly stated by our framers and deliberately so as the content of rights will change and evolve over time. Whether this is a process of internal reflection or outward influence by modern trends should make no difference so long as the starting and end point of constitutional interpretation remain with and give effect to the constitutional manifestos that is our bill of rights and our vision of our democratic society.

Conclusion

21. Let me commend the parties for the considerable assistance given to this Court in dealing with this controversial rule. May I also pay special mention to the Law Association of Trinidad and Tobago for firstly rightly intervening in this matter and for its attractive and comprehensive submissions. The level of advocacy speaks volumes for the development of our local jurisprudence. No doubt robust but respectful representations for the amendment of this rule may continue to be made. The Court is not unsympathetic to the plight of the litigant as is expressed by senior members of both the bench and bar when defaulters find themselves enmeshed in the electric fence. The judiciary and the bar are indeed two wheels of a chariot and we are both concerned with the efficient and fair administration of justice and the

litigants' access to justice. The Rules Committee has shown in its recent amendments its ability to review the workings of the rules and make alterations without sacrificing the integrity and the philosophy of the rules. We have always said that hard cases make bad law, however the frequency with which hard cases manifest themselves would be a matter for the Monitoring Committee.

22. A proportionate response is also to be recommended to the demand to alter the rules. Part 26 had evolved carefully after reviewing the system and no doubt there will be a place and time to revisit Part 26. However it is not an unconstitutional rule. It is not driving anyone from the judgment seat. It is not debarring any one from accessing justice. As was forcefully advocated by Senior Counsel for the State, the litigant has accessed the Court, she was sitting with the judge in his room chatting about the case, If she "missteps" she must apply promptly, show a good reason and show that she has been a general compliant litigant, lest she deprives herself of the opportunity of continuing in court through no fault of the other side who has complied fully.

23. Until the rule is amended it must be applied. It is meant to deter those who do not pay deference to the establishment of a predictable system of justice. It is the Court's electric fence, not meant to "kill cows" and will be applied by the Court, sensitive to the desire to ensure access to justice and to deal with cases justly.

Dated this 16th May 2012

Vasheist Kokaram
Judge