

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-02212

BETWEEN

MARAJ GOLD LIMITED

Claimant

AND

SPORTS OUTLET (TRINCITY) LIMITED

First Defendant

HUGH LEONG POI

Second Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Tuesday 2nd May 2017

Appearances:

Mr. Kiel Talaksingh instructed by Ms. Desirée E. Sankar for the Claimant

Ms. Kandace Bharath for the First Defendant and Second Defendant

REASONS

1. By an application dated 10th March 2017, the Claimant applied for an extension of time for filing and serving its list of documents pursuant to Part 26.1 (1) (d) and (w) and Part 27.9 of the Civil Proceeding Rules, 1998 as amended (CPR).
2. The application was dealt with at the second Case Management Conference (CMC) on 2nd May 2017. At that hearing the Court granted the Claimant relief from sanctions and extended the time for compliance with the Court's order.
3. At the first CMC the Court had made the following order:
 - a) The Claimant do file and serve and Amended Statement of Case on or before the 6th February 2017;
 - b) The Claimant do file and serve and Amended Reply if any on or before 6th February 2017;

- c) **The parties do give standard disclosure by filing and serving their List and copies of documents on or before the 6th March 2017;**
- d) The Parties to have an all Parties Conference on the 9th March 2017 at the office of the Claimant's Attorney-at-Law at 2:00pm; and
- e) The Second Case Management Conference is scheduled for the 16th March 2017 at 11:15am in Court Room POS 22, Hall of Justice, Knox Street, Port of Spain.

The reason directions were given for filing lists and copies of documents was to cater for not only the obligations of standard disclosure pursuant to Rule 28.4 and 28.7 CPR but also inspection of documents pursuant to Rule 28.6 CPR.

Parties' Compliance with the Court's order

4. While both parties filed their amended pleadings pursuant to the case management order, neither party complied with the Court's timetable with respect to disclosure; and both parties requested time to comply with the deadlines. Before the second CMC was convened, both parties filed applications for an extension of time to comply with the deadlines for standard disclosure. The Claimant filed two applications on 10th March 2017 and 4th April 2017 and the Defendant filed one dated and filed 6th March 2017. The Court dealt with the applications of the parties on 6th March 2017 and 4th April 2017 in Chambers without a hearing to facilitate a productive second session in the second CMC. It was at the second CMC however that the parties drew to the Court's attention that the Claimant's second application dated and filed 10th March 2017 was not yet dealt with and which became the subject of the Defendant's objection.
5. The Court had by the second CMC already granted an extension of time to the Claimant to file its bundle of documents which would be the subject of disclosure to the 4th April 2017. Similarly the Court granted an extension of time to the Defendant, in chambers without a hearing, for their filing of their list and copies of documents to 21st April 2017. At the second CMC the parties had therefore complied with the Court's new orders with respect to disclosure save for the Claimant filing of its list of documents which was the subject of its application of 10th March 2017.

6. The Court was further advised that the parties did not have their “All Parties Conference” due to scheduling difficulties between both attorneys. This was disappointing especially after the Court took the time to ensure that this event took place before the second CMC. An “All Parties Conference” is a meeting between the parties and their respective attorneys convened on a “without prejudice basis”. At such a conference the parties are engaged in three (3) important tasks:
 - a) Discussing options for settlement.
 - b) Exchanging information/documentation that will allow for parties to better understand their respective cases.
 - c) Arriving at an agreement on matters of procedure and case plans which will allow for the more efficient management of the proceedings. Case plans such as an agreement on documentation that will be used at the trial identifying the documents that will be agreed between the parties as to their admissibility and on the terms as to their use at trial. Other case plans can include interim relief or identifying discrete issues for determination by the trial judge.
7. To achieve these tasks it is important that clients are present and participate in the process. However, the main difference between the All Parties Conference and a mediation or judicial settlement conference is that the attorneys still have control over the process even though it is conciliatory and not combative in nature. That said, it is entirely up to the attorneys to design an appropriate All Parties Conference which will achieve the objectives stated above. For those trained in mediation, their skills may be brought to bear to effect a settlement. Once engaged however the All Parties Conference is an important part of the proceedings and had that opportunity been utilised it is highly unlikely the Defendant would have objected to the Claimant’s application.
8. In previous judgments this Court had encouraged the notion of “procedural consensus” to have parties actively engaged in moving matters forward consistent with the overriding objective and discouraging procedural objections which are merely tactical manoeuvres to gain an unfair advantage in the litigation.¹ In this case where clearly both parties had filed their applications

¹ **Karen Tesheira v Gulf View Medical** CV2009-02051.

to extend time to comply with the Court's orders; where the Claimant's disclosure included many more documents than the Defendant; where the Claimant had actually filed and served its bundle of documents that will be used at the trial within the time extended; where its list of documents was already disclosed to the Defendant in its application of 10th March 2017; where the Claimant granted the Defendant extensions of time to file their pleadings; for the Defendant to suddenly object to the list in these circumstances is pedantic and inconsistent with the ethos of procedural consensus. It is not even altogether clear what practical effect such an objection would have had on the litigation. The documents on which the Claimant wished to rely was already disclosed pursuant to the Court's order on 4th April 2017. I imagine that the argument would be made by the Defendant that if the accompanying "list of documents" was not filed pursuant to Rule 28.7 CPR then the Claimant had not complied with its disclosure obligations and ought not to rely on the documents disclosed to the Defendant at the trial (Rule 28.13). Therefore, if it cannot rely on any documents (documents which were already disclosed to the Defendant) in a claim such as this one, it has no case. I do not think that the CPR was promulgated to foster such an adversarial approach to the resolution of disputes.

9. The parties are reminded of their obligation to help the Court to further the overriding objective. As Brooke LJ observed in paragraph 36 **Hannigan v Hannigan** [2000] 2 FCR 650, [2000] All ER (D) 693, CA:

“Moreover the judge was quite correct when he said that the Civil Procedure Rules were drawn to ensure that civil litigation was brought up to a higher degree of efficiency. But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed when the quirky petition was served on them. The interests of the administration of justice would have been much better served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very early days of the new rules and Mrs. Hannigan's solicitor had corrected them all quickly and agreed to indemnify both parties for all the expense unnecessarily caused by

his incompetence. CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by squabbles about technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties.”

10. Procedural wrangling on simple applications like these are unnecessary and represent a disproportionate and inefficient use of the party’s resources. It also highlights in my view how important All Parties Conferences are in working out the joint and respective case plans for the more efficient use of the Court’s resources in resolving the parties’ disputes.

The application

11. The grounds of the Claimant’s application were as follows:

- a) Counsel for the Claimant, Mr. Talaksingh was out of the jurisdiction for the week of the 27th February 2017 to the 3rd March 2017 and was therefore unable to finalise and settle the Claimant’s List of Documents.
- b) The Defendant’s Attorney-at-Law has also filed an application requesting an extension of time for the filing of its List of Documents to the 21st April 2017, based upon the death of the Second Defendant’s mother.
- c) A request was sent to the Defendant’s Attorney-at-Law, Ms. Kandace Bharath by letter dated 7th March 2017 requesting an extension of time to the 17th March 2017 to file the Claimant’s List of Documents with copies of documents attached. This letter was sent to the Defendant’s Attorney- at-Law by electronic mail.
- d) The Claimant’s Attorney- at- Law followed up with the Defendant’s Attorney-at Law by telephone conversation on the 8th March 2017. The Defendant’s Attorney-at-Law has not yet indicated whether or not she can consent to the application having regard to the fact that she needs to take instructions on this matter. The Claimant’s Attorney-at-Law has decided to file this application out of an abundance of caution to ensure that this issue is dealt with promptly.
- e) Having regard to the fact that the Defendant’s Attorney-at-Law has also filed for an application to extend time for the filing of its List of Documents, no prejudice

should result from the granting of the Claimant's application. In any event the exchange of the List of Documents between the Claimant and the Defendants is required for the production of the agreed and unagreed List of Documents.

- f) Given that there is likelihood that the next CMC has already been rescheduled, the application of the Claimant will not affect the fresh time table of the Court.

12. Counsel for the Defendant objected to the Claimant's application stating that:

- a) The nature of the application was for relief from sanctions and
- b) The application and the affidavit in support of the application² did not set out nor satisfy the threshold required for a "relief from sanctions" application mainly on the ground that there was no good explanation for the breach. The Defendant relied upon the authority of **Crown Point Beach Hotel Limited v Fariza Shaama Seecharan** CV2013-03309.

13. The Court granted the Claimant permission to amend its application to seek relief from sanctions and dealt with the application as an application for relief from sanctions and not an extension of time simpliciter. After hearing the parties, the Court stated³:

- The Court heard both parties on the Application filed on 10th March 2017 and finds that the application was made promptly in the circumstances and there was a good explanation for failing to comply with the order of the Court dated 31st March 2017. The Court relied on the context of the correspondence and the management of this case by the Court and the Judgments that demonstrate that a good explanation does not require there to be a perfect explanation and extends time to 10th March 2017 and the List of Documents filed on 10th March 2017 do stand.
- Parties to file and exchange Witness Statements on or before 3rd July 2017. No Witness to give evidence unless they have complied with this direction.

² Affidavit of Desiree E. Sankar, filed on 10th March 2017.

³ Order dated 2nd May 2017.

- Claimant to pay to the Defendants the cost of the Application filed on 10th March 2017 to be assessed in default of agreement.
- Pre Trial Review is fixed for 20th July 2017 at 1:30pm in Courtroom POS22 Hall of Justice Knox Street, Port of Spain.

Relief from Sanctions

14. Part 26.7 of the CPR lays the threshold requirement and the factors a Court must consider in granting relief from sanctions. It provides:

- “(1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
- (2) An application for relief must be supported by evidence.
- (3) The court may grant relief only if it is satisfied that—
- (a) the failure to comply was not intentional;
 - (b) there is a good explanation for the breach; and
 - (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
- (4) In considering whether to grant relief, the court must have regard to—
- (a) the interests of the administration of justice;
 - (b) whether the failure to comply was due to the party or his attorney;
 - (c) whether the failure to comply has been or can be remedied within a reasonable time; and
 - (d) whether the trial date or any likely trial date can still be met if relief is granted.”

15. In **Trincan Oil Limited v Martin** Civil Appeal No. 65 of 2009 Jamadar JA explained the mechanism for the grant of relief from sanctions as follows:

“13. The rule is properly to be understood as follows. Rules 26.7(1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7(3) and (4) are distinct. Rule 27.3 prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these conditions are satisfied. Rule 26.7(4) states four factors that the court must have regard to in considering whether to

exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7(3) are not satisfied.”

16. The Court considered both the threshold requirement and the discretionary factors in granting the application as set out below.

The Threshold:

17. In considering the threshold requirements the Court was satisfied that the application was prompt, the breach was not intentional, there was good explanation for the breach and there was general compliance.

Promptitude

18. The issue of promptitude is “fact driven and contextual” and is to be determined in the “circumstances of each case”.⁴ In this case the Application was made four (4) days after the deadline for the filing of the list of documents and was therefore considered to be prompt. Further, Counsel for the Defendant also informed the Court that she did not consider promptitude to be an issue in her objections to the Application.

Intentionality

19. In **Trincan Oil Ltd v Keith Schnake** Civil Appeal 91 of 2009 Jamadar JA explained the issue of intentionality as follows at paragraph 41:

“In my opinion, to establish intentionality for the purposes of Part 26.7(3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the compliance. However, where as in this case, there is an explanation given for the failure to comply with a rule which, though it may not be a ‘good explanation’, if it is nevertheless as one that is consistent with an intention to appeal, then the requirements of Part 26.7(3)(a) will more than likely be satisfied.”

20. From the reasons advanced by the Claimant, there is nothing to suggest that the failure to comply by the Claimant was intentional.

⁴ Paragraph 13 of **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No 79 of 2011.

Good explanation for the breach

21. The Court was guided by the decisions of **Reed Monza (Trinidad) Limited v Pricewaterhouse Coopers Limited** CA 2011-15 and **Rawti Roopnarine v Harripersad Kissoo** Civil Appeal No. 52 of 2012 which provided that the reasons advanced for the delay need not be perfect, the reasons need only be good and acceptable. In **Reed Monza**, Kangaloo J.A expressed it as follows at page 13:

“It is always a judgment call as to whether the reason advanced for the delay in an application seeking relief from sanctions is good enough. In this regard each case must be considered in its own context. ... I want to make it abundantly clear that I am by no means lowering the standard set by previous decisions of the Court of Appeal with respect to the adequacy of the reasons which must be advanced by a person applying for relief from sanctions. In the context of this case the Appellants have advanced a good reason, albeit one that is not perfect, which it goes without saying, it need not be.”

22. In **Rawti**, Mendonca J.A had this to say at paragraph 33:

“33. An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in *Regis*, supra, what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection.”

23. One of the main explanations provided by the Claimant was that Counsel was out of the jurisdiction for the week of the 27th February 2017 to the 3rd March 2017 and was therefore unable to finalise and settle the Claimant’s List of Documents. At the first CMC the Court had engaged the parties in having them meet to resolve the claim. It was important for the exercise that parties exchanged documentation. The Defendant actually filed their list and copies of documents on the 21st April 2017. The Defendant needed an extra 35 days to file and disclose only one (1) document which was the lease agreement between the parties dated 6th November 2008. The Claimant had provided their copies of documents comprising eight (8) documents

including a bundle of receipts well before the Defendant on the 4th April 2017. The only issue outstanding was the formal list of documents for the Claimant pursuant to Rule 28.7(2) CPR.

24. Normally the personal inconvenience of Counsel is not accepted as a good explanation but what is a “good reason” is a judgment call which falls for determination in the context of the case including the history of the proceedings. As Justice des Vignes (as he then was) noted in **Crown Pointe Beach Hotel Limited v Fariza Shaama Seecharan** CV2013-03309 at paragraph 31:

“What is required is a “good explanation” for the breach and not an infallible one and a good explanation does not mean the complete absence of fault.”

25. While the Court observed that the Claimant still had three (3) days to attempt to meet the deadline provided for by the Court, the explanation proffered by the Claimant was accepted as a good explanation albeit not a perfect explanation in the context of this case. Counsel could be forgiven in this case that his application was indeed made before the Defendant’s filed their list and bundle of documents and that he had already taken the position of not objecting to the Defendant’s application. In these circumstances where the Defendant was the beneficiary of the Claimant’s concessions it is easy to understand the Claimant’s expectation that his five (5) day delay beyond the deadline date would not have been met with such ferocious objection.

General Compliance

26. There has been general compliance of the orders and directions of the Court by the Claimant in the course of these proceedings. The Claimant has also been accommodating to the Defendant’s requests for extension of time in a few instances whereby the Defendant required an extension of time to put in its Defence and also an extension of time to file its own List of Documents whereby the Claimant was minded to grant an extension of two (2) weeks to the Defendant.⁵

⁵ Email Correspondence dated the 4th and 6th March 2017 of the Affidavit of Wendell Louis filed on 6th March 2017.

Discretionary Factors:

27. In considering the other factors set out in Rule 26.7(4) CPR the Court was of the view that its discretion should be exercised in favour of granting the extension of time.

The interests of the administration of Justice

28. In **Dr. Keith Rowley v Anand Ramlogan** Civil Appeal No. P215 of 2014, Rajnauth-Lee J.A noted that “The interests of the administration of justice involve the consideration of the needs and interests of the parties before the court as well as other court users.”⁶ In this case, the interests of the administration of justice as between the parties favoured the grant of relief from sanctions since it rectifies a procedural anomaly when the Claimant had already disclosed its full bundle of documents pursuant to the Order on the 13th April 2017. The Claimant only needed the formal Part 28 list to accompany the bundle of documents. This would place the parties on equal footing by allowing the Claimant and the Defendant to deal with disclosed documents assisting both parties in putting forward their cases. Therefore, given the circumstances surrounding the case, it would have been unfair to deny the Claimant relief from sanctions.

Whether the failure to comply was due to the party or his attorney.

29. There was no indication that the failure to comply was due to the Claimant. Rather, it was the unfortunate circumstance of Counsel for the Claimant being outside of the jurisdiction that caused the delay in the finalizing of the List of the Documents for the Claimant.

Whether the failure to comply has been or can be remedied within a reasonable time.

30. The Claimant sought to remedy its failure to comply with the Order within a reasonable time frame being four (4) days after the deadline for filing the list of documents. The list that was actually disclosed to the Defendant a long time ago on 10th March 2017 was allowed to stand.

Whether the trial date or any likely trial date can still be met if relief is granted.

31. The trial date for this matter has not been fixed. As it now appeared from the adversarial approach adopted by the Defendant that a settlement is unlikely the Court placed the parties in

⁶ **Dr. Keith Rowley v Anand Ramlogan** Civil Appeal No. P215 of 2014, paragraph 34.

readiness for their trial. The Pre Trial review was fixed for the 20th July 2017 and this date would not have been affected by the granting of the relief from sanctions.

Prejudice

32. At the second CMC, Counsel for the Defendant stated that the issue of prejudice was not in issue in relation to the Defendant's objection to the Claimant's Application. The Court was mindful that the Defendant also filed an Application on the 6th March 2017 seeking an extension of time to file its List of Documents to 21st April 2017. This extension of time was granted by Order dated 9th March 2017. The Defendant's case would not have been prejudiced by granting a relief from sanctions to the Claimant since not only did they also file an application for extension of time to file their own list of documents, they would have had access to the Claimant's bundle of documents which was filed on the 4th April 2017.
33. However, if the relief from sanctions was not granted to the Claimant, the Claimant's case would have been unreasonably prejudiced since the Claimant would have been precluded from using the documents pursuant to Rule 28.13(1) CPR.⁷

CONCLUSION

34. For these reasons, the application for relief from sanctions was granted and the list of documents long disclosed to the Defendant was allowed to stand four (4) days beyond the deadline date.

Vasheist Kokaram
Judge

⁷ Rule 28.13(1) CPR provides:

“**28.13** (1) A party who fails to give disclosure by the date specified in the order may not rely on or produce any document not so disclosed at the trial.”