**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-03800**

**BETWEEN**

**MARGARET OTTLEY**
**(trading as Sanko-Fa HP)**

**Claimant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Defendant**

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

**Date of Delivery: Monday 9th October 2017**

**Appearances:**
**Ms. Samantha S. Lawson for the Claimant**
**Mr. Duncan Byam instructed by Mr. Brent James for the Defendant**

## JUDGMENT

1. The Defendant's application for an extension of time to file and serve its notice of application to set aside the Court's Order dated 27th June 2017 was dismissed for the reasons set out in this judgment.

## The Application

2. The grounds of the Defendant's application were set out as follows:

    i. On the 27th June 2017 the Defendant's attorneys at law through inadvertence did not attend the hearing fixed for the 27th June 2017.

    ii. On the 7th July 2017 the Defendant's instructing attorney at law received information that the Honourable Court ordered that: the Defendant's Defence be struck out; there be judgment for the Claimant against the Defendant for the sum

of $1,680,914.00 and prescribed costs to be quantified by the Court in default of agreement; this Order is made subject to the Defendant's right to set aside the Order pursuant to Rule 11.17 of the Civil Proceeding Rules 1998 (as amended);

iii. On the said date 7th July, the Defendant's instructing attorney at law requested that the Court Schedule Section of the Chief State Solicitor's Department inform whenever any order from the Court is received;

iv. On the 21st July 2017 the Defendant's instructing attorney at law was informed that the section had been in receipt of the Order of the Honourable Court dated 27th June 2017. However same had been received by the Chief State Solicitor's Department since the 12th July 2017 unbeknown to the Defendant's instructing attorney at law."

3. In the affidavit in support of the application[1], the Defendant deposed that when he enquired of one of the Defendant's Court Clerks as to why he was not alerted of the order at an earlier date, he was informed and verily believed that when the order was received on 12th July 2017, it would have been sent to the attention of the Head of the Department then to the Department's Registry after which it was passed to the Court Schedule Section. He was also informed by the Defendant's Court Clerk and verily believed that though it was unclear to the Clerk when the order was received by her section, she saw that there were some Orders in the dip of the Head of Section who was on vacation leave from the 17th July 2017 and upon inspection of the dip, the Clerk saw the Order which prompted her to inform the Defendant.

4. In its affidavit in opposition[2], the Claimant opposed the Defendant's application on the following grounds:

i. It discloses no basis or no proper basis for bringing an application for further case management.

ii. It discloses no basis or no proper basis for invoking the Court's jurisdiction after the matter was dealt with and a final order granted;

iii. A Part 26 application was outside the Court order that was made subject to a

[1] Affidavit of Brent James filed on 24th July 2017.
[2] Affidavit of Samantha S. Lawson filed on 2nd October 2017.

Part 11.17 application only and would amount to a significant addition/amendment or alteration to the said final order;

iv. The Court order became final after the time provided for making the Part 11.17 application lapsed; and

v. The Application nonetheless discloses no evidence to justify the grant of an extension of time.

5. The Claimant contended that the Defendant was required to file an application under Part 11.17 on or before 19th July, 2017 seven (7) days after being served with the Court's Order on 12th July, 2017. The Claimant further contended that the Defendant admitted to having knowledge of the Court's order since 7th July, 2017 but opted to wait for the service of the Order before making his application.

6. The Defendant's application to set aside the Order dated 27th June 2017 was made out of time, that is the deadline for the Defendant to make the application expired on 19th July 2017 which is seven (7) days after the Defendant received notice of the order.

7. The Court has the power to set aside its orders which were made in the absence of one party. The party who was not present when that order was made can pursuant to Rule 11.17 CPR apply to set aside the order. In fact, I specifically mentioned this rule in my order making it clear of the preferred process to apply to set aside the order if the absent party so choses. Rule 11.17 CPR provides:

"**Application to set aside order made in the absence of a party** 11.17

(1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made within 7 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence showing—

(a) A good reason for failing to attend the hearing; and

(b) That it is likely that had the applicant attended some other order might have been made."

8. It is accepted that the Defendant did not file the application within seven (7) days after the date the other was served on the applicant. The first issue to be determined therefore is whether the Court can extend the time to hear such an application notwithstanding that the time to do so has expired. I am of the view that even though Rule 11.17(2) states that the application **must** be made within seven (7) days after the date the order was served on the applicant, the Court still retains a discretion to extend the time to comply.[3] See Rule 26.1(d) CPR. Moreover, such an application would not be an application for a relief from sanctions as there is no express sanction for failing to make a Rule 11.17 CPR application within time. The Defendant must therefore first satisfy the Court that the time to make a Rule 11.17 application should be extended considering the "**Roland James**[4] **factors**".

**Extension of time- The "Roland James factors"**

9. In exercising its discretion in granting or refusing an application for an extension of time, the Court is guided by the factors set out pursuant to Rule 26.7 CPR without the mandatory threshold requirement which would have been applicable in an application for relief from sanctions. The Rule 26.7 factors is not a rigid checklist but serves as a guide to the Court to give effect to the overriding objective of the CPR.[5]

10. In **Roland James v The Attorney General of Trinidad and Tobago** Civ App No. 44 of 2014, the Court of Appeal laid down the factors which should be considered in determining whether to grant an extension of time. Mendonca J.A had this to say:

> "In my judgment on an application for an extension of time, the factors outlined in rule

[3] Rule 26.1(d) of the CPR provides that:

> **"26.1** (1) The court (including where appropriate the Court of Appeal) may—
>
> *(d)* Extend or shorten the time for compliance with any rule, practice direction or order or direction of the court."

[4] **Roland James v The Attorney General of Trinidad and Tobago** Civ App No. 44 of 2014.

[5] The overriding objective of the CPR is to deal with cases justly. Dealing with cases justly includes:

> "(a) ensuring, so far as is practicable, that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with cases in ways which are proportionate to—
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously; and
> (e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case. Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time."[6]

11. In **Dr. Keith Rowley v Anand Ramlogan** Civ App No. P215 of 2014, delivered on the same day of **Roland James**, Rajnauth-Lee J.A noted at paragraph 13:

"13. In the above cases, the Court of Appeal was disposed to the view, and I agree, that the trial judge's approach in applications to extend time should not be restrictive. In such applications, there are several factors which the trial judge should take into account, that is to say, the Rule 26.7 factors (without the mandatory threshold requirements), the overriding objective and the question of prejudice. These factors, however, are not to be regarded as

[6] **Roland James v The Attorney General of Trinidad and Tobago** Civ App No. 44 of 2014 page 10 paragraphs 22-24.

"hurdles to be cleared" in the determination of an application to extend time. They are factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for extension of time. The trial judge has to balance the various factors and will attach such weight to each having regard to the circumstances of the case. Of course, not all the factors will be relevant to every case and the list of factors is not exhaustive. All the circumstances must be considered. In addition, I wish to observe that this approach should not be considered as unnecessarily burdening the trial judge. In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors."

12. These principles were further highlighted in the recent Court of Appeal decision in **Jimdar Caterers Limited v The Board of Inland Revenue** Civil Appeal No. P256 of 2016 where Mendonca J.A made the following observation at paragraph 34:

"…Although the **Rowley** and **Roland James** cases were concerned with applications for an extensions of time for a defence and a witness statement, the principles developed by them are not applicable to only those applications but are of wider application and apply, with possibly few exceptions only, to cases where the Court has a general discretion to extend time under the CPR. The principles have been developed applying the relevant rules in the CPR."

13. Therefore, in exercising its discretion, the Court takes into account the circumstances of the relevant case and considers the features of promptitude, intentionality, good explanations, compliance, administration of justice, blameworthiness, remedying the breach, trial date certainty and prejudice. Justice des Vignes (as he then was) neatly summarized the principle in **Crown Pointe Beach Hotel Limited v Fariza Shaama Seecharan** CV2013-03309 as follows:

"The correct approach to be adopted is as follows:

i. Consider the Rule 26.7 factors without the mandatory threshold requirements as well as the overriding objective of the CPR [Rule 1.1 (2)]. However, these factors are not an exhaustive list and the Court is required to consider all the relevant circumstances of the case;
ii. Consider the prejudice likely to be suffered by either party in order to determine

where the greater risk of prejudice would lie if the extension of time is granted or refused; and

iii. Weigh up the material considerations that favour the granting the extension as against those which favour its refusal to give effect to the overriding objective of dealing with cases justly."[7]

**The Discretionary Factors**

14. The Court was not minded to exercise its discretion in favour of an extension of time for the following reasons:

**Promptitude**

15. The question of promptitude is relative and depends on the facts of each case. In this case the Defendant acted twelve (12) days after the order was served on it and three (3) days after the Defendant's Court Schedule Section of the Chief State's Solicitor's Department was in receipt of the order. The Defendant's application for an extension of time was made on 24th July 2017. I am not satisfied with the arrangements put in place for the receipt of the order and in this case, the attorney was well aware since 7th July 2017 of the terms of the order. There is no acceptable excuse for the failure of the attorney to obtain the order from the Court's JSO or even the Claimant's attorney at law. This Court routinely issues orders by email to the parties and to sit back and wait for a copy to be served and then say it acted promptly is not acceptable. The application was not made promptly.

**Intentionality**

16. The Defendant admitted that it had knowledge of the Order since 7th July 2017 and therefore was aware that the Order was subjected to the Defendant's right to set it aside pursuant to Rule 11.17 CPR. Yet the Defendant opted to await the actual receipt of the Order to enforce its right under Rule 11.17 which by that time had elapsed. Therefore, the Defendant's failure to comply with the Order was intentional.

**Good Explanation**

17. The reasons advanced by the Defendant for failing to file the application after the seven (7)

[7] **Crown Pointe Beach Hotel Limited v Fariza Shaama Seecharan** CV 2013-03309, paragraph 20.

days elapsed were not satisfactory. The Defendant was aware of the Order since the 7th July 2017 and if it chose to await the actual receipt of the Order before drafting its application, it should have enquired about receiving the said Order in a more efficient manner, mindful of the strict deadline under which Rule 11.17(2) CPR operates. Instead, by way of explanation, the Defendant shifts the delay to its own department. That is not a satisfactory explanation and certainly does not amount to a circumstance beyond its control.

**General Compliance**

18. There has not been general compliance by the Defendant in this matter. The Defendant has filed a number of applications to extend time in this matter namely on 16th December, 2016, 29th May 2017 and 13th June 2017.

**The interests of the administration of justice.**

19. In taking into account the administration of justice, one has to consider the expeditious resolution of the case together with the ability of the Defendant to properly defend itself. The Defendant through its own inadvertence failed to attend the hearing on 27th June, 2017 when the Order was made against it and from the Defendant's supplemental affidavit filed on 6th October, 2017, it can be noted that it was highly unlikely that the Defendant would have been prepared for the said hearing since it was in any event seeking another extension of time to file its affidavits in response. Additionally, from its supplemental affidavit, the Defendant further deposes that they were informed by the Senior Legal Officer from the Ministry of Sport and Youth Affairs that a new Permanent Secretary assumed office of the said Ministry on 2nd October, 2017 and is yet to become apprised of the facts in the instant matter before she can depose of same. The Defendant's failure to assist this Court in an expeditious resolution of this claim would not be rectified by the grant of the extension of time as the Defendant was simply not prepared to defend itself.

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

20. Both the party and the Attorneys are at fault in these proceedings. The party was in receipt of the Order since the 12th July, 2017 but failed to inform the attorneys of the said order until the 21st July, 2017. Additionally, the Attorneys failed to obtain of the said order in light of their knowledge of same since 7th July, 2017. The parties did not show any interest in meeting the

deadline set by Rule 11.17(2) of the CPR.

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

21. This is a moot point for the Court to consider since the application was made and before the Court to consider.

**Prejudice**

22. The Defendant has failed to provide any good reasons as to why the Court should grant an extension of time and it would be unfair to the Claimant, who has complied with the Orders of the Court who is now in possession of a final Court order to have same varied or amended due to the Defendant's own failure to comply with the Court's orders.

**Setting aside the order**

23. Even if this Court did extend the time to make the application, the test to be applied to set aside the order is, pursuant to Rule 11.17 CPR, that:

    a) The Applicant has shown there is a good reason for failing to attend the hearing; **and**

    b) It is likely that had the applicant attended the hearing some other order might have been made.

**(A) No good reason**

24. I have considerable difficulty in accepting that there was a good reason proffered by Defendant for failing to attend the hearing on 27th June, 2017. The Defendant's reasons for failing to attend the hearing were narrated in its affidavit[8] in support of its Notice of Application pursuant to Rule 11.17 CPR and it is worth repeating:

    "*4. On the morning of the 27th June I attended court before the Honourable Mr. Justice Kokaram in respect of the matter of CV2017-00876 Inez Charles Sargeant v The Attorney General of Trinidad and Tobago. In addition to the instant matter which was scheduled for 10:00am in POS 22, I was also required to attend Court at 9:30am before the Honourable Mr. Justice Frank Seepersad in POS 25 in the matter of Devant Maharaj v The Minister of National Security, the Honourable Edmund Dillon. Due to size of the files in the first two*

[8] Filed on 24th July, 2017

*matters I left the file in respect of the instant matter in the office and had to return to collect same.*

*5. I then returned to Court and proceeded to 2nd Floor of the Hall of Justice. I checked the Listing outside of POS 22 and noted that the instant was listed for hearing in POS 22. I then inquired of a gentleman whom I verily believe is an estate corporal attached to the Court if the matters on before the Honourable Mr. Justice Kokaram in POS 22 were still being heard in the said court. He confirmed and I verily believed that the Honourable Court was sitting in both POS 04 and POS22 this morning. I then noted that there was no notice indicating that the matters listed to be heard POS 22 were now heard in POS 04. I then proceeded to sit opposite the estate corporal's desk and wait until the matter was called. Shortly thereafter I observed a woman of African descent exit the elevator. I also observed that the estate corporal appeared to know the woman and addressed her as 'Margaret'. This observation caused me to form the opinion that that woman was the Claimant in the instant.*

*6. Counsel for the Defendant then arrived and asked if the matter had been called and I indicated that it had not. Counsel then indicated and I verily believed that he had another matter to attend to and would return shortly. I then saw an orderly approaching and I asked him if the matters listed in POS 22 were still being heard in that court room. He informed me and I verily believed that the matters so listed were to be heard in the said court to the best of his knowledge.*

*7. At around 10:20am Counsel returned and inquired of me if I was sure that the matter was being heard in POS 22 and not POS04. I then indicated that I thought the matters listed on the notice would be heard in POS 22. Counsel then informed me and I verily believed that he had gone to POS 04 and observed that a trial was in progress before the Honourable Court. We then proceeded to courtroom POS 04 and observed that a trial was in progress."*

25. Thereafter, the Defendant supposedly left, without enquiring from the Court's Judicial Support Officer (JSO) if the matters were being heard in POS 04. Even after observing that a trial was taking place in the said POS 04, the Defendant made no attempt at that time to confirm if their matter was already heard or was going to be heard in that Courtroom. This I found to be an

unsatisfactory reason for their failing to attend the hearing. More so, it is unacceptable as the Claimant's attorney waited and attended the Court at POS 04 and the application was dealt with after calling the matter several times. If the Claimant's attorney could have attended POS 04 to hear the matter there is no excuse likewise of the Defendant's attorney. Additionally, the Defendant's attorney refers to a male orderly. This Court's orderly is female and in any event, if the Court is sitting in POS 04 there is no explanation why the Attorney did not wait in POS 04 or announce his appearance or make an enquiry from the Court's JSO sitting in Court as to the status of the matter.

**(B) No different order**

26. Additionally, I would not have made a different order. There would have been again no affidavits filed by the Defendant in response to the Claimant's application to strike out the Defence and for summary judgment. Such evidence was critical notably to respond to a summary judgment application. Additionally the main issue raised by the Defendant was that the Permanent Secretary did not have the authority to enter into the contract with the Claimant. This, however, does not on its face invalidate the contract between the Claimant and the Permanent Secretary having authority to act for the Ministry. See section 85 of the Constitution of Trinidad and Tobago.[9] In **Carltona Limited v Commissioner of Works and Others** [1943] 2 All E.R. 560 Lord Greene M.R. noted at p. 563:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them… It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter…
>
> The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department.

[9] Section 85 of the Constitution of Trinidad and Tobago provides

> 85. (l) Where any Minister has been assigned responsibility for any department of government, he shall exercise general direction and control over that department; and, subject to such direction and control, the department shall be under the supervision of a Permanent Secretary whose office shall be a public office.
> (2) For the purposes of this section— (a) two or more government departments may be placed under the supervision of one Permanent Secretary; or (b) two or more Permanent Secretaries may supervise any department of government assigned to a Minister.

Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible."

27. **R v Department of Health** [2005] EWCA Civ 154 explained the famous "Carltona Principle" emphasizing that it establishes that the acts of a duly authorized civil servant is in law the act of his/her minister.

28. There was therefore no merit in the application to set aside the Order and the application was dismissed.

**Conclusion**

29. In light of the aforementioned considerations, the application was dismissed.

**Vasheist Kokaram**
**Judge**