REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-03062**

BETWEEN

DENNIS TAYLOR

Claimant

AND

JEROME HENRY
HORACE HENRY

Defendants

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 13 February, 2019

Appearances:

Ms. Deborah Moore-Miggins, Attorney at Law for the Claimant.

Ms. Samantha S. Lawson, Attorney at Law for the Defendants.

REASONS

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1. The principles which guide the Court in granting relief from sanctions pursuant to Rule 26.7 Civil Proceeding Rules 1998 as amended (CPR) [1] are well settled. The applicant must first

[1] Rule 26.7 CPR 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.

satisfy a threshold requirement of promptitude, intentionality, general compliance and good explanation for the breach before the Rule 26.7(4) CPR factors can be taken into account. The debate as to whether the relief from sanctions regime is inflexible and unjust has long been settled[2]. The regime is not inflexible, nor has it removed judicial discretion, nor are the rules to be applied mechanistically without an appreciation of the context of the particular case being case managed by the Judge[3] to give effect to the overriding objective. The main purpose of the regime as a systemic device as explained by Jamadar J.A in **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011, is to create a culture of compliance, responsibility, diligence and discipline in the approach to civil litigation. In so far as the Court's exercise of this discretion in applying Rule 26.7 forms part of the Court's overall case management powers, the idea of procedural justice has not been jettisoned by this regime of compliance. See **Karen Tesheria v Gulf View Medical Centre and others** CV2009-02051 and **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011. The Court always will give effect to the overriding objective and must give due regard to important pillars of procedural justice of voice, trust, accountability and neutrality. Indeed, context is everything and in certain relational disputes where the dispute affects relationships or are based upon relationships, a Court must be conscious to case manage therapeutically.

2. In **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011 it was noted:

> "46. Nothing is further from the truth than to assert that Part 26.7 somehow removes judicial discretion. Such a suggestion is rather disingenuous. In fact, as has been indicated above, at every level of consideration in Part 26.7 there is the necessity for the exercise of judicial evaluation, analysis and discretion. The fact of a threshold does not remove judicial discretion or force judges to 'mechanistically apply rules to shut litigants out'. All that a threshold does is to structure the weighing and balancing of values and consequently the exercise of judicial discretion. This structuring (weighing and balancing) of values is a normative act designed to assign to values their appropriate place at this

[2] **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011
[3] Pursuant to Parts 25 and 26 CPR

time in the scheme of Part 26.7. It is purposeful. It does not negate the exercise of judicial discretion, though it does regulate it.

47. What is prompt, whether there is intentionality or good explanation or general compliance, all involve the engagement of the judge in the judicial process of sifting, weighing and evaluating fact and circumstance before arriving at a decision. These judicial functions all constitute the exercise of judicial discretion.

48. Judicial discretion implies a power to choose, decide and determine according to one's own judgment. It is a power to be exercised, not arbitrarily or according to the subjective whims of a judicial officer, but, in accordance with the will of the law. From this general proposition it follows that there are many aspects of judicial discretion. However, what is common to all is choice."

3. They further went on to say:

"52. Part 26.7 is therefore full of opportunities for the exercise of judicial discretion. However this discretion is regulated by the structure of the rule in order to reduce subjectivity, prioritize values and to achieve a specific aim with reasonable predictability and equality.

53. In addition, as the Court of Appeal has been at pains to explain, context and circumstance are the primary factors in the analysis and evaluation of the Part 26.7 requirements. Thus, what may be considered a good explanation may vary not only in the evaluation under each limb in the circumstances of each case, but also with the stage of the proceedings; for example what may be a good explanation when the filing of an application occurs early in the process may not be so later on or after judgment and on an appeal. So also in relation to whether the application for relief is prompt or whether there is intentionality or general compliance. These are all matters for the discretion of the judge. It is therefore an unfortunate mistake to assume that a judge who is called to apply Part 26.7 is somehow reduced to a mere automaton."

4. Questions of promptness, good reason, intention and general compliance are all contextual questions. In determining these matters the Court must always be alive to the context of the

application, the factors and circumstances of the given case, the requirement of proper case management, the overriding objective and a Court's therapeutic approach to managing relational disputes.

5. The land dispute in this claim[4] clearly created acrimony amongst family members, between the family of the deceased and her husband. An injunction was granted in August 2018 and it was first case managed by the Court in October 2018. After lengthy discussions with the parties in exploring practical solutions to resolve the claim as well as the procedural steps required to deal justly with the case, the case was placed on a "fast track". The Court dispensed with the need for a CMC and gave directions for a Pre-trial Review (PTR) in February 2019 with a trial on 28th February 2019 and 1st March 2019[5]. In doing so, the Court recognised the volatility of the relationships, the need to ventilate the concerns of the parties and the need to find peace through a swift and just resolution.

6. At the PTR, save for the Claimant filing and serving a Reply and Defence to Counterclaim, the parties were ready for trial armed with over seventeen witnesses[6]. Both parties worked diligently in keeping pace with the short deadlines to meet the trial window. Both parties filed

[4] Amended Fixed date claim and Amended Statement of Case filed 1st November 2018 and Amended Defence and Counterclaim filed 30th November 2018

[5] By order dated 3rd October 2018 the Court ordered:

1. Defence and counter claim to be filed and served on or before 30th November 2018;
2. Parties to give standard disclosure by filing lists of documents and copies on or before 21st December 2018;
3. Testimony script to be filed and served on or before 21st December 2018;
4. Parties to file and serve their statement of agreed facts, issues and agreed or unagreed documents on or before 10th January 2019;
5. Parties to file and exchange witness statements on or before 28th January 2019;
6. Application filed 24th August 2018 is adjourned to 12th December 2018 at 10:00am for a status hearing to explore a resolution of the claim;
7. Parties to forward a draft consent order, if any, varying the injunction dated 28th August 2018 on or before 8th October 2018 by email to this Courts' Judicial Support Officer;
8. A Pre Trial Review is fixed for 13th February 2019 at 9:30am in courtroom TG04 at the Supreme Court, Tobago;
9. Trial is fixed for 28th February 2019 and 1st March 2019 at 9:30am in courtroom TG05 at the Supreme Court, Tobago, on each day;
10. Injunction dated 28th August 2018 to continue.

[6] The Claimant also filed several witness summons: Witness summons filed on 28th January 2018 for The Chief Executive Officer of the Telecommunications Services of Trinidad and Tobago; Witness summons filed 28th January 2018 for the Medical Chief of State, Scarborough Regional Hospital; Witness summons filed 19th February 2019 for the Medical Chief of Staff.

numerous witness statements and documentation. Both parties far from being recalcitrant were focused on the promise of a judicial solution by trial, if not by some consensual agreement. In this context, how is a Court to approach the Claimant's application for an extension of time and relief from sanctions to file a Reply and Defence to Counterclaim which was one month late but which was a formal pleading advancing no new facts that would not take the Defendant by surprise? How is the procedural device of relief from sanctions to be deployed in the overall management of this case?

7. In my view, in deference to the parties' view that a relief from sanctions ought to be made by the Claimant, given the context of this case, I accepted that the Claimant's application[7] was made promptly in the circumstances of the case, that there was a good reason for not complying with the deadline, no intention to breach the deadline and general compliance with deadlines. Having satisfied the threshold, I was satisfied that it was in the interests of the administration of justice in granting relief. The failure to comply can be remedied within a reasonable time and the trial date can still be met[8].

The Application

8. The Claimant's application for relief from sanctions came on for hearing at the PTR. It was

[7] Claimant's application filed 28th January 2019

[8] By order dated 13th February, 2019, the Court ordered:

1. Time is extended for the Claimant to file and serve a Reply to Counterclaim on or before 15th February, 2019.
2. Claimant to pay to the Defendants costs of the Claimant's application filed on 28th January, 2019 assessed in the sum of Three Thousand Dollars ($3500.00).
3. Defendants' application filed 31st January, 2019 is dismissed with no orders as to costs.
4. Time is extended for the Claimant to file and serve a Reply to Counterclaim on or before 15th February, 2019.
5. Claimant to file and serve a list of unagreed documents on or before 19th February, 2019.
6. Parties to file and serve evidential objections on or before 19th February, 2019.
7. Parties to file and serve replies inclusive of issues for determination and propositions of law on or before 22nd February, 2019.
8. Claimant to file and serve a trial bundle comprising of pleadings, without exhibits and witness statements on or before 22nd February, 2019.
9. Claimant to file and serve an agreed bundle with copies on or before 22nd February, 2019.
10. Court to send parties its decision on evidential objections on or before 25th February, 2019.
11. Trial is fixed for 28th February, 2019 at 9:30am in Courtroom TGO05 and 8th March, 2019 at 9:30am in Courtroom TGO02.

met by an application by the Defendant for judgment in default in defence to the Counterclaim. At that occasion the Court addressed the question of an amicable resolution and focused on the management of the case for trial. The grounds for the Claimant's application included that the delay in filing the Defence to Counterclaim was not intentional but was caused by certain personal health emergencies faced by Attorney for the Claimant which resulted in her having to travel out of the country for the first two weeks in December 2018 to provide support for her grandson who had to undergo serious surgery. This was in addition to her heavy case load which contributed to her failure to file the Defence to Counterclaim.

The threshold criteria

Promptitude

9. The issue of promptitude is "fact driven and contextual" and is to be determined in the "circumstances of each case".[9] The Counterclaim was for an order that the Court shall pronounce for the force and validity of the Last Will and Testament dated 26th April 2018 of Marcel Henry-Taylor who died on 29th July 2018; a declaration that the deceased did make reasonable financial provisions for the Claimant; an order that a grant of probate of the estate of the deceased be granted to the First Named Defendant.

10. The deadline for filing the Defence to Counterclaim was twenty eight (28) days after service of the Counterclaim[10] and the application was made approximately one month after the deadline had passed. In my view the application was made promptly in the circumstances of the case which was at least two weeks before the PTR. There was no element of surprise in the filing of these documents since the matter was on a fast track and the parties were already on a footing of receiving and treating with documents in a short time frame. I took into account the Claimant's difficulties and the intervening Christmas days in determining that the Claimant acted promptly in the circumstances.

[9] Paragraph 13 of **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No 79 of 2011. Rule 26.7(1) CPR

[10] Amended Defence and Counterclaim filed 28th November 2018

Good explanation for the breach

11. I accepted the Claimant's reason for non-compliance was a good reason. It was not a perfect reason, however, looking at the Reply and Defence to Counterclaim which advanced no new facts, there was no element of surprise. I was also 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."

12. In **Rawti,** Mendonca J.A had this to say at paragraph 32 and 33:

> "32. In the **AG v Universal Projects Limited** [2011] UKPC 37, the Privy Council rejected a submission that a good explanation is one which properly explained how the breach came about, but which may involve an element of fault, such as inefficiency or error in good faith. The Privy Council in its judgment stated (at para. 23):
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> > "The Board cannot accept these submissions. First, if the explanation for the breach, i.e. the failure to serve a defence by March 13th, connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative

inefficiency."

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."

13. In my view, the personal difficulties of the Claimant's attorney rendered the breach excusable.

General Compliance

14. There was general compliance by the Claimant of the orders and directions of the Court in the course of these proceedings. More importantly all the relevant documents were filed to prepare the case for the trial.

Discretionary Factors

The interests of the administration of justice

15. 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."[11] The Court had been managing this case to either consensual resolution or a full trial. The parties genuinely needed a determination of the issues in the case. It was a family dispute and a measure of certainty was required. The parties needed to have their stories told. It would therefore be unjust to shut out the pleading. What impact it will have on the Claimant's case was a matter for submissions at the trial.

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

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

16. The failure to comply was due to the fault of the attorney and the party should not be penalised.

Whether the failure to comply has been or can be remedied within a reasonable time and whether the trial date or any likely trial date can still be met if relief is granted.

17. I was satisfied that the Claimant's attorney's failure to file the Reply and Defence to Counterclaim was remedied within a reasonable time. The grant of relief from sanctions did not affect the trial date which was eventually set for 28th February 2019 and 8th March 2019.

Extension of time

18. In any event, in my view, all that was required was an application for an extension of time. There is no sanction provided in the rules for the failure to file a reply[12] nor is there a sanction for the failure to file a defence to counterclaim in probate proceedings[13]. The principles set out in **Roland James v The Attorney General of Trinidad and Tobago** Civ App No. 44 would therefore be applicable where the entire scheme of Rule 26.7 should be considered in the round without a threshold requirement. Additionally, the question of prejudice and the overriding objective are relevant factors. In this case, there clearly was no prejudice to the Defendant in granting the extension of time. I have already explored above my assessment of the Rule 26.7 factors.

Conclusion

19. For these reasons, the application for relief from sanctions was granted and time extended for the Claimant to file his Reply and Defence to Counterclaim. I was disappointed to learn that the Defendant filed a procedural appeal after participating in what I thought to be a constructive exercise at the PTR in preparing for trial. In negotiating the trial dates I was led to believe the Defendant was also anxious to have his trial date within the short window set by the Court. The effect of that appeal, ironically, has caused the trial dates to be vacated.

[12] See Rule 10.10 CPR
[13] See Rule 18.9 CPR.

Attorneys need to be mindful of their overall duty to help the Court to give effect to the overriding objective pursuant to Rule 1.3 of the CPR. It is indeed unhelpful, if not unproductive, for the Defendants' attorney to argue that relief ought not to be granted, implicitly contending that a trial date would be affected if relief was granted, and then appeal that decision with the obvious consequence of disrupting the trial dates. The rules are not designed to be used as a game but as a means to achieve justice for the parties. I continue to urge attorneys to meaningfully collaborate on procedural matters to develop a "credo of procedural consensus"[14], rather than engage in senseless procedural satellite litigation.

Vasheist Kokaram

Judge

[14] **Karen Tesheria v Gulf View Medical Centre and others** CV2009-02051