THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-02030/HCA S-1451 of 2003

BETWEEN

SOMARIE MAHARAJ Claimant

AND

MARGARET GAMES Defendant

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Before: Master Alexander

Appearances:
For the Claimant: Mr Rennie Gosine
For the Defendant: Ms Ria Joseph

REASONS

1. The claimant has filed an application seeking relief from sanctions for failure to comply with the directions given on 20th January, 2011 and for an enlargement of the time for the filing and service of the claimant's witness statement. The notice of application was filed on 26th September, 2011 supported by the affidavit of the claimant's attorney, Mr Rennie Gosine. On 24th October, 2011 the defendant's attorney at law filed an affidavit in response asking that the claimant's application be dismissed. On 11th November, 2011 Marlon Nagassar, Legal Clerk to the claimant's attorney at law, filed an affidavit in reply.

Background

2. This matter is of some vintage having commenced by writ of summons and statement of case filed on 11th August, 2003 seeking a declaration as to ownership of and possession of a 4 acre parcel of land; injunctive reliefs; an order for the defendant to pull down and remove a concrete house built on the said lands and for damages for trespass. A defence and counterclaim and reply to defence and counterclaim were filed and further directions were given for the filing of

list and bundle of documents and statement of facts and issues. The matter was then on 8th July, 2008 converted to **the Civil Proceedings Rules 1998, as amended** and the first Case Management Conference (hereinafter "**CMC**") was convened on 18th December, 2008, where directions were given. The original action was filed by Messrs Harrikissoon and Company but by notice and affidavit filed on 6th March, 2009 permission was sought to cease to act for the claimant. On 30th October, 2009 the cease to act application was granted and further directions were given for the filing of list of documents, bundles and witness statements. The defendant complied with this order and filed her witness statement on 30th July, 2010 – the claimant did not. On 23rd September, 2010 Master Sobion ordered that the cease to act order be served on the claimant and that Messrs Harrikissoon and Company file and serve a bill of costs. It was also ordered on that date that all necessary applications by either party are to be filed before the next hearing and both the CMC and assessment of costs were adjourned to 22nd July, 2011.

3. On 20th January, 2011 Master Sobion granted by consent relief from sanctions for failure to comply with the directions of the court; and extended the time for the filing and service of the claimant's witness statements to 28th May, 2011 (hereinafter "**the January order**"). This application was determined without a hearing.

4. On 22nd July, 2011 when this matter came up before this court, there was non-compliance by the claimant with **the January order**; as the claimant was purportedly not aware of it. The court was informed that the claimant intended to make an application for an enlargement of time and relief from sanctions. This application was filed on 26th September, 2011.

Issue

5. Whether the claimant is entitled to relief from sanctions for failure to file her witness statement on or before 28th May, 2011?

The Law

6. **Part 26.6 (2) of the Civil Proceedings Rules, 1998** (hereinafter "**CPR**") states, "*Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.*"

7. The expressed sanction prescribed by **Part 29.13 CPR** for a failure to file and serve a witness statement within the time specified is that the witness may not be called to give evidence unless the court permits. Thus, a party who fails to comply with an order of the court must seek permission to obtain relief from the express sanction imposed.

8. **Part 26.7 CPR** governs all applications for relief from sanctions[1] and should be applied to promote a culture of compliance whilst accommodating the non-compliant within guided parameters. See ***AG* v *Regis***.[2]

Analysis

9. It is accepted that applications for relief from sanctions are contextual and to be assessed against their own backdrop of facts and circumstances. Generally, a claimant seeking relief from sanctions must satisfy all the requirements set out in **Part 26.7 (1), (2) and (3), CPR**. See ***Trincan Oil Limited* v *Schnake***.[3] This rule was considered by the Court of Appeal in ***Trincan Oil & Ors* v *Martin***[4] and Jamadar JA stated that there are three threshold pre-conditions to be satisfied before a court can exercise its discretion.[5] This was reaffirmed by Gobin J in ***Roger Alexander* v *Alicia's House Limited***[6] who stated further that this threshold test is one that is applied mechanically. However, the authorities in this area coming

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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.
   (1) An application for relief must be supported by evidence.
   (2) The court may grant relief only if it is satisfied that:
      (a) the failure to comply was not intentional;
      (b) these 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.
   (3) 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.
   (4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

2 *AG* v *Regis* CA79 of 2011

3 *Trincan Oil Limited* v *Schnake* Civil Appeal No 91 of 2009 per Jamadar JA.

4 *Trincan Oil & Ors* v *Martin* Civ App No 65 of 2009 at paragraph 13

5 Jamadar JA in *Trincan Oil & Ors* v *Martin* Civ App No 65 of 2009 "*[T]he 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 26.7 (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 three 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.*"

6 *Roger Alexander* v *Alicia's House Limited* HCA 3761/2010

from the Court of Appeal hold that the application of **Rule 26.7, CPR** should in no way promote a mechanistic application of the rule but recognize that there is still a measure of latitude in the exercise of judicial discretion. See ***Miguel Regis* v *The AG***.[7] Is this a proper case for the exercise of the court's discretion in the claimant's favour? To determine this, I will now discuss the law as it relates to this application below.

Relief from Sanctions Pursuant to Part 26.6, CPR:

10. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose, as confirmed recently by the Privy Council in ***The Attorney General* v *Keron Matthews***.[8] Thus, as stated above in **Part 26.6 (2), CPR** whenever a *party has failed to comply with any of these Rules, a direction or court order*, and there is imposed a sanction for non-compliance, the court order has effect unless "*the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply*." The implication here is that the sanction attaches automatically. The case at bar is thus one where the claimant is required to apply for and obtain relief from sanctions.

11. It is instructive at this point to note the words of the Privy Council in ***The Attorney General* v *Keron Matthews***[9], "*rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from sanction <u>imposed</u> for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, 'any sanction for non-compliance <u>imposed</u> by the rule ... has effect unless the party in default applied for and obtains relief from sanction" (emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. <u>Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits)</u>*" [emphasis mine].

12. The circumstances under which such reliefs are available are expressly set out in **Part 26.7 (1-3) CPR** (supra) which mandates that the application be made promptly and be supported by evidence; the failure to comply must not be intentional; there must be a good explanation for

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7 *Miguel Regis* v *The AG* CA Civ 79/2011
8 *The Attorney General v Keron Matthews* [2011] UKPC 38 page 6
9 *The Attorney General v Keron Matthews* [2011] UKPC 38 page 6

the breach; and the party in default must show general complied with all other relevant rules, practice directions, orders and directions.

13. The local courts have adopted a strict approach to treating with such applications.[10] The court dealing with an application for relief from sanctions must first ensure, as a condition precedent, that **ALL** these threshold requirements are satisfied. Where any one of these threshold conditions is not satisfied, the application must fail, with no consideration to be given to any of the subsequent factors laid down in the rules at **Part 26.7 (4) (a-d), CPR** for granting such relief. The **Part 26.7 (4)** factors include (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.

14. In the seminal authority of ***Trincan Oil*** (supra)**,** Jamadar JA states, "*[N]o relief would be granted if the threshold test were not surmounted. However, passing the threshold test would not be sufficient in itself; it would only give the court a discretion to grant relief.*" If the threshold test is successfully surmounted, then there are specific factors to be applied by the court in exercising the discretion. I will now proceed to see if the claimant can successfully pass the threshold test. If she is unsuccessful, then the question of 'factors' to apply in exercising the court's discretion does not arise.

Promptitude

15. The **January order** extended the time for the claimant to file witness statements to 28th May, 2011. It is to be noted that the **January order** was made in chambers and without a hearing. By 22 July, 2011 when this matter came up, the witness statement of the claimant was not filed and the time for compliance had long expired. An associate in the office of the claimant's attorney indicated to the court that her office was unaware that the order had been granted and had not receives a copy of same. The application for an extension was made on 26th September, 2011, some two months after becoming aware that the deadline date for compliance had passed but a full 4 months from the date the sanction was imposed.

[10] This strict approach has been deemed necessary if "*a meaningful shift is to occur in the way civil litigation is practiced here*" per *Trincan Oil Ltd et al* v *Schnake* Civ App. No. 91 of 2009, para. 54, page 18.

16. In ***Trincan Oil Ltd et al* v *Schnake***[11] per Jamadar JA stated, **"*[P]romptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact*.** *'Prompt' must be considered in relation to the date when the sanction is imposed*." This was confirmed in ***Reed Monza (Trinidad) Limited & ors* v *Price Waterhouse Coopers Limited & ors***[12] where Kangaloo JA stated, "*[P]romptitude is a factor which necessarily falls to be considered within a certain factual context. If that context is one of ambiguity it is both just and fair that the ambiguity must be resolved in favour of the person who is likely to be gravely prejudiced by a less favourable, more stringent interpretation*."

17. It follows that care must be exercised in making reference to relief from sanction decisions to be aware that no two cases are alike and that each case should be looked at within its own contextual and factual matrix as pointed out by Kangaloo JA in ***Monza*** (supra). In the cases below the timeframes were deemed not to have satisfied the requirement of promptitude:
    - ***Trincan Oil Limited* v *Keith Schnake*** [supra], where the Court of Appeal deemed an application ensuing some 1 ½ months after the period for the filing of the witness statements, without any explanation for the delay, as not prompt.
    - ***Maniram Maharaj* v *The Arima Race Club***[13] where a 3 week delay in filing two witness statements and an application for relief from sanction almost 1 month after the deadline were deemed too late.
    - ***The Attorney General* v *Universal Projects Ltd***[14] where a delay of 18 days in making an application for relief from sanction was upheld by the Court of Appeal as being too late, because the attorney was aware of the of the deadline more than 1 month before.

18. The factual matrix and context within which the non-compliance in the instant case occurred are simple and straightforward. On the filing of the application for relief from sanctions, the court office granted a date for the hearing of the application on 22nd July, 2011. Counsel for the claimant has submitted that when his associate attended court on 22nd July, 2011 and was informed that an order was made in chambers extending the time for the filing and service of the witness statements of the claimant, he made a request by letter dated 9th August, 2011 to the

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11 *Trincan Oil Ltd et al* v *Schnake* Civ App. No. 91 of 2009

12 *Reed Monza (Trinidad) Limited, Reed Plastics Limited & Petpak Limited* v *Price Waterhouse Coopers Limited & Ors* Civil Appeal 2011-15 per Kangaloo JA page 3, paragraph 5

13 CV 2006-04021 per Carol Gobin J

14 *The Attorney General of T&T* v *Universal Projects Ltd* Civil App. No 104 of 2009

defendant's attorney seeking consent for the extension. By letter dated 23rd August, 2011 the defendant declined to accede to the claimant's request. By this time, he still was not in possession of the **January order** and he made attempts to review the court's file, which only became available to him on 17th September, 2011 and the application for relief from sanctions was made on 26th September, 2011.

19. It is accepted that since the advent of **the CPR, 1998** both attorneys and clients are encouraged to be diligent and to act swiftly in meeting deadlines and resolving matters before the court. In determining promptitude, the learning seems to suggest that this criterion in any given case will hinge always on the particular circumstances of the particular case. In this regard, promptitude will be influenced by context and fact. See ***Trincan Oil Ltd et al*** **v** ***Schnake*** (supra) as confirmed recently by ***Monza*** (supra). On the face of it, a 2 month delay seems to fall outside the band of acting with promptitude, especially when compared to the timeframes in the cases above but it is important that the circumstances of each case be taken into account and the facts placed within their own contextual reference. The law is not to be applied in a mechanistic and legalistic manner so as to erode the discretion of the court. This is not a case where, I can find procrastination to litigation by the claimant's attorney, as steps were taken to secure consent. Further, when the order was made it was not brought to the attention of the claimant's attorney. In the circumstances and context of this particular case, I find that the requirement of promptitude was met by the claimant.

Intention

20. Counsel for the claimant has stated that there was no deliberate intention to refuse to comply with the **January order**. He outlines (see below) several factors that led to the **January order** not being brought to his intention in a timely fashion by the court office staff as well as his attempt to secure, as a first option, the consent of the defendant to an extension of time to file the witness statement, which was eventually not acceded to. Added to this was the difficulty in securing the court file and a copy of the **January order**. It is to be noted also that the unfortunate string of circumstances unfolded during the court vacation.

21. In the case of ***Trincan Oil Ltd*** **v** ***Schnake*** (supra), Jamadar JA stated that, "*[T]o 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 non-compliance.*"

22. The Court of Appeal has held that generally a positive intention is required and that mere inaction or laxity would not usually suffice. This was established in ***The Attorney General* v *Universal Projects Limited*** (supra) where the Court of Appeal stated, "*what must be shown is that the motive for the failure to comply was* ***a deliberate intent not to comply****. It is accepted that this positive intention can be inferred from circumstances, but ... it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended. However, because the consequences of actions or omissions or choices are not intended, does not necessarily exempt one from taking responsibility for them.*"[15] (emphasis mine)

23. According to the affidavit evidence, there were difficulties experienced by the claimant's attorney with securing the defendant's permission as well as a copy of the **January order**. I note, however, that whilst the consequences of the actions, omissions or choices of the claimant and her attorney may not be intended, it does not mean that as of right she is exempted from taking responsibility for them. I note for instance that on 22nd July, 2011 an associate attorney in the office of counsel for the claimant was made aware of the granting of the order and that the deadline date for compliance may have passed yet it took a further 2 months for the application to be filed.

24. Counsel for the defendant has submitted that there is insufficient evidence for the court to rule definitively on the intentionality limb but this is not accepted as the evidence is clear that the failure to comply was linked to several factors. On the facts before me, I can find no deliberate, positive intention or purposive refusal on the part of the claimant or her attorney to comply with the **January order** or the rule or deadline. I have no difficulty in accepting that the **January order** which was granted in chambers may not have reached the attention of the claimant's attorney. By the time the claimant and her attorney became aware of the **January order** the deadline date for compliance had long elapsed, so compliance was impossible. Also, the affidavits of Rennie Gosine and Marlon Nagassar provide evidence of the attempts by the claimant and her counsel to secure the consent of the defendant in making the application for relief from sanctions and for an extension of time which was not acceded to, so these serve as clear and cogent evidence that the claimant was not seeking to avoid compliance with the order of the court but was always interested in pursuing her matter. In the context of this claim and

15 *Universal Projects case*, para. 70, page 24.

the surrounding circumstances as well as the learning above, I find that the breach of the **January order** was not intentional.

Good Explanation

25. The claimant's explanation for the delay in filing the application for relief after the deadline date included:

    - The initial application for relief from sanctions (i.e. as filed on 16th December, 2010) was assigned a date of hearing and on that premise, counsel for the claimant did not make enquiries prior to the hearing set for 22nd July, 2011.
    - For unknown reasons, when the matter was dealt with in chambers and the **January order** was made, granting an extension to 28th May, 2011, the claimant did not receive a copy of the order. Further, by affidavit evidence, the Legal Clerk in the office of the claimant's attorney, on his many weekly visits to the court office, stated that the **January order** was not available for him to collect.
    - Counsel for the claimant found out when his associate attended court on 22nd July, 2011 that the **January order** was granted, by which time the extension date for filing the witness statement had elapsed.
    - Permission was sought from the defendant via letter dated 9th August, 2011 for a consent application to file the witness statement but same was refused by letter dated 23rd August, 2011. By this date the claimant still was not in possession of the requisite **January order** and made attempts to review the file on the matter, which only became available on 17th September, 2011.
    - The instant application was made on 26th September, 2011. The delay in the application was not intentional but due to the inadvertence of the court staff in ensuring that a copy of the **January order** reached the office of the claimant's attorney in a timely manner.

26. Counsel for the defendant submitted that these reasons particularly that the application for relief and extension was listed for hearing on 22nd July, 2011 should be disregarded as no date was noted on the application. The submissions of counsel for the defendant are not accepted as it is not unusual for a date to be assigned by staff of the court office and, for reasons unknown, not have it reflected on the actual application. Further, whilst the usual practice

under the **CPR** is to deal with consent applications in chambers, it is not unknown or unusual for these applications to also be dealt with on the adjourned date of hearing. At the material time, there was a date fixed for this matter to be heard and it is quite plausible that the application may have been set to proceed on that date.

27. Further, where orders are granted in chambers, the usual practice is for the attorneys' legal clerks/secretaries to collect same from the San Fernando court office (as was done by the defendant's secretary) and not for them to be served on the office of the attorneys. There is no evidence of the claimant having collected this order and in the circumstances and in the interest of the just and fair disposition of this matter, I am minded to accept the evidence advanced by the claimant that the order was not made available by the court office for collection by the clerk attached to the claimant's attorney's office and that given that a date was assigned to the matter, he did not hunt down the court office staff for any such order as he assumed it would be dealt with on 22nd July, 2011.

28. Whilst attorneys and their clients are required under the CPR paradigm shift to be vigilant and to monitor and manage their matters and through the exercise of due diligence ascertain the status of their applications or matters, this does not exclude the occasional administrative glitches that do occur. As there is no sufficient evidence before me of a clear lack of diligence on the claimant's part in treating with this matter, I am minded to accept the reasons given by the claimant. In so doing, I note the words of Kangaloo JA in ***Reed Monza (Trinidad) Limited*** (supra) that, *"[I]t 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.*"

29. This position was recently re-asserted by Kokaram J who stated, "*[J]udges in exercising this discretion under rule 26.7 CPR4 must be cautious in drawing references to "relief from sanction" decisions in other cases as no two cases are alike. As Kangaloo JA pointed out these are judgment calls being made by the*

Court in their management of the case against its own backdrop of facts and circumstances." See ***Karen Teshiera (Executrix of Russell Tesheira)*** **v** ***Gulf View Medical and ors***.[16]

30. Given the circumstances of this case, I find that the claimant's explanation suffices to satisfy this particular limb and that this threshold hurdle of 'good explanation' has been surmounted.

General Compliance

31. Counsel for the claimant has submitted that he has generally complied with the rules, orders and directions of the court and that the present application is not to be construed as a further attempt to delay the proceedings. Counsel for the defendant states that there was general non-compliance by the claimant with the orders of the court and gives in support of this contention the failure by both the claimant and defendant in complying with the directions order given on the date the first CMC came up for hearing on 18th December, 2008. Subsequently, when the CMC came up again on 30th October, 2009 there were directions given for list, bundles and witness statements and the defendant filed its witness statement but the claimant did not comply. These two instances of non-compliance by the claimant with the filing of witness statements she states should suffice to show general non-compliance with the directions of the court and the court is precluded from exercising any discretion to grant relief from sanctions. Counsel for the defendant states further that the claimant has been granted several reprieves, both from the court and the defendant, and despite this has still failed to comply, choosing rather to place the blame for this 4 months delay on the court's personnel.

32. It was submitted further that, "*the court must draw the line at some point. The entire conduct of the claimant in these proceedings since the matter has been converted to the CPR 1998 cannot be tolerated in the proper administration of justice. The claimant must accept responsibility for their (sic) actions at some point in time*." In support of her position, the defendant referred to a previous decision of this court ***Lloyd Charles & Mungal Dipnarine*** **v** ***NWRHA and the Attorney General of Trinidad and Tobago***[17] where this court condemned a general history of non-compliance by the claimants with the timetables set by the court. That case can, however, be distinguished from the instant case at bar as there was a history of consistent and continuing non-compliance, even in the face of an unless order, with absolutely no proper explanation provided. Reference was

16 CV2009-02051 *Karen Teshiera (Executrix of Russell Tesheira)* v *Gulf View Medical and ors* page 3 per Kokaram J

17 *Lloyd Charles & Mungal Dipnarine* v *NWRHA and the Attorney General of T&T* CV2008-02668 at paragraph 36

also made to the comments of Boodoosingh J that, "*the Court of Appeal has pronounced clearly about the demands of the rules and the new litigation culture it has been designed to usher in. It is fundamental to the administration of justice that there is consistency in the application of the rules. To depart from the approach clearly set out by the Court of Appeal would itself be to undermine the administration of justice.*" ***Jerry Hussain* v *Yara Trinidad Limited***.[18]

33. It is to be noted that in the instant case between the directions given at the first and second CMC hearings was a cease to act application where the order was granted. There is no record that the claimant was present at either hearing and, in fact, on the third hearing of the CMC in September, 2010, an order was made to serve the claimant with the cease to act order. It is assumed that she was not present on that occasion also. It is clear that the claimant was interested in pursuing her matter since upon being served with the cease to act order, she retained current counsel who filed the December, 2010 application to extend the time for compliance and relief from sanction. The **January order** was made in chambers and without a hearing. As stated above, it is accepted that for reasons unknown, this order was not made available to the claimant. Clearly the claimant took steps to comply with the directions of the court after being served with the cease to act order and subsequently, after learning that the extension was granted and time had elapsed for compliance thereto. The refusal of the defendant to accede to the request and the subsequent application all point to a claimant who was seeking to comply with the directions of the court and taking steps to move her matter forward. In fact, there has been general compliance by the claimant with the orders of the court and this is certainly not one of those 'hard cases' referred to by Jamadar JA, "*when sanctions are imposed, that signals that non-compliance has serious consequences and there will be no relief unless the strictures of Part 26.7, CPR, 1998 are also complied with... Until there is real change in the culture in which civil litigation is conducted in Trinidad and Tobago it is unlikely that Part 26.7 will be applied differently. There will always be 'hard cases'. Making exceptions in such cases often only creates 'bad law'*.[19] This court is satisfied that there has not been any blatant and intentional disregard of its timetables by the claimant to justify the taking of steps to ensure that the default does not go unmarked. See ***Biguzzi* v *Rank Leisure Plc***[20]. This aspect of the threshold test is also satisfied.

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18 *Jerry Hussain* v *Yara Trinidad Limited* Procedural Appeal CA 235 of 2010 at page 3

19 *The Attorney General of T&T* v *Universal Projects Ltd* Civil Appeal No 104 of 2009

20 Per Lord Woolf MR in *Biguzzi* v *Rank Leisure Plc* (1999) 1 WLR 1926, page 1932D

Extension of Time to File Witness Statements

34. Having found that the claimant has successfully been able to surpass the threshold tests in **Part 26.7**, this court now turns its attention to the factors that would influence the exercise of its discretion to grant relief including: the interests of the administration of justice; whether the failure to comply was due to the party or his attorney; whether the failure to comply has been or can be remedied within a reasonable time; whether the trial date or any likely trial date can still be met if relief is granted.

The interest of the administration of justice

35. The effective administration of justice requires a court in the exercise of its functions to do substantive justice. See ***Roger Alexander* v *Alicia's House Ltd***.[21] Generally, an injustice results when substantive justice is prevented for an insufficient reason. Further, the proper administration of justice requires a balance between the management of dockets containing hundreds of cases and allowing litigants to access substantive justice. This dilemma was highlighted by Bingham LJ in ***Costellow* v *Somerset CC***[22]:

As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed ... The principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with the time limit ... The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate ...

36. It is incumbent on any court to strike a balance between the two principles enunciated upon by Bingham LJ and to note that certain circumstances will allow the court in the interests of justice to tilt the scale on a particular side. The facts of the present matter allow the court to tilt the scale in the claimant's favour and so allow her to access substantive justice as there is a clear demonstration by her in pursuing her matter.

37. With respect to applications for extension of time, Blackstone states that, "*The court has a general power to extend and abridge time ... A party who will be unable to comply with an order or a direction in time*

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21 *Roger Alexander* v *Alicia's House Ltd* CV2010-03761

22 *Costellow* v *Somerset CC* [1993] 1 WLR 256

... and who has not been able to agree an extension with the other side, may make an application asking the court to extend time for compliance. The discretion given to the court under r.3.1 is unfettered other than by the general requirement to further the overriding objective."

38. Further, the recent comments made by the Court of Appeal on 13th June, 2011 in ***Reed Monza (Trinidad) Ltd*** (supra) on the trend following the ***Trincan Oil*** **case** are to be noted:

It is entirely erroneous to interpret the ***Trincan Oil*** *line of cases as laying down any inflexible principle of law that a court has no real discretion in its determination of whether the requirements of rule 26.7 (1), (2) and (3) have been satisfied. The type of analysis involved in determining whether the application was made promptly, whether the failure to comply was intentional, 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 discretion which is readily apparent from the structure of the relief from sanctions provisions.*

39. The learning suggests that in exercising its discretion to extend time for filing of witness statements, the court must do so in accordance with **Part 26.7(4) CPR** as well as the overriding objective. In explaining the overriding objective, Saunders CJ (Ag) states, "*it must not be assumed that a litigant can intentionally flout the rules and then ask the Court's mercy by invoking the overriding objective ... It is a statement of principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any Discretion exercised by the Court must be found not in the overriding objective but in the specific provisions itself.*" ***Treasure Isles*** **v** ***Audulon Holdings Ltd & Ors***.[23]

40. In the context of the present claim, I accept that it is incumbent on litigants and their attorneys to comply with the rules and orders of court, to minimize any likely prejudice to other litigants or the due administration of justice as observed by Lord Woolf MR in **Arbuthnot Latham Bank v Trafalgar Holdings Ltd**.[24] In my view, there is no prejudice to the interest of administration of justice if the extension sought were to be granted.

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23 *Treasure Isles & Or* v *Audulon Holdings Ltd & Ors* BVI Civ. App No 22 of 2003

24 *Arbuthnot Latham Bank* v *Trafalgar Holdings Ltd* [1998] 1 WLR 1426 @ 1436E

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

41. In the face of the reasons advanced for the non-compliance neither the claimant nor her attorney can be faulted for the failure to file the witness statements on time, given the string of unforeseen circumstances and missteps that led to the failure to comply.

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

42. The failure to file witness statements does not affect the filing of same at this stage in the proceedings and the default can be remedied within a reasonable time.

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

43. In the instant matter, no trial date has been fixed so no inconvenience of having to vacate a trial date arises.

Order

44. It is ordered that on the notice of application filed on 26th September , 2011:
    (i) The claimant is granted relief from sanctions for failure to file her witness statements within the timeframe stipulated by the order dated 20th January, 2011.
    (ii) An extension of time is hereby granted to the claimant to file and serve witness statements on/before 9th July, 2012 and in default no further extension will be granted and the matter to proceed on whatever witness statements that have already been filed.
    (iii) The defendant to pay to the claimant the costs of this application assessed in the sum of $1,000.00.

Dated 29th June, 2012

Martha Alexander
Master (Ag)