THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-02668
HCA 1454 of 1999

BETWEEN

LLOYD CHARLES

DIPNARINE MUNGAL **Claimants**

AND

NORTH WEST REGIONAL HEALTH AUTHORITY

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO **Defendants**

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Before: Master Alexander

Appearances:
Ms Fazia Khan holding for Ms Hyacinth Griffith for the Claimants
Ms Giselle Jackman and Ms Coreen Findley
Instructed by Ms Janelle John for the 2nd Defendant

DECISION

1. At a case management conference ("CMC") held on 9th November, 2009 it was ordered that "(a) time is extended for filing the agreed and unagreed bundle of documents to 15th January, 2010; (b) time is extended for filing and exchanging witness statements to 5th February, 2010 and (c) if the claimants do not comply with these directions, this claim will be struck out" (hereinafter the "unless order").

2. Before this court are now three applications for decision, arising from that unless order:
   i. The second defendant's application filed on 16th April, 2010 ("the first application") for time to be extended for the filing and service of a witness statement, hearsay notice, bundle of documents and for relief from sanctions.
   ii. The second defendant's application filed on 8th October 2010 ("the second application") for judgment pursuant to Part 26.4 of the Civil Proceedings Rules 1998 as amended

(hereinafter the "CPR") for failure by the claimants to comply with the order to file witness statements by 5th February, 2010 and costs;

iii. The claimants' application filed on 27th April, 2011 ("the third application") for an extension of time to file and serve their witness statements and for relief from sanctions.

3. When the matter came up before this court on 11th April, 2011, it was decided that the second application will be dealt with first in time as any decision thereon will impact upon the first application. After hearing attorneys on both sides, directions were given for parties to file and exchange written submissions with respect to the second application on or before 27th April, 2011 and the matter was adjourned for decision.

4. On 27th April, 2011 the claimants' attorney filed the third application but no written submissions on the second application. The second defendant filed its submissions on 27th April, 2011 in compliance with the directions given on 11th April, 2011. On the adjourned date of hearing, the claimants' attorney made oral submissions on both the second and third applications.

5. At this juncture, I will undertake a brief foray into the factual background of this matter, which will put the "*unless* order" that acted as a trigger for these applications in context:

   (i) This matter, which is of some vintage, was started by writ of summons filed on 7th July, 1999.

   (ii) In brief, it is a claim in negligence for damages for personal injuries and consequential loss suffered by the claimants who were allegedly exposed to noxious fumes from two bottles of potassium ferric cyanide during the course of their employment at the Port of Spain General Hospital.

   (iii) On 12th November, 1999 default judgment was taken up against the first defendant.

   (iv) By notice dated 17th July 2008 it was transferred to the CPR and a CMC was convened on 3rd November, 2008, where certain directions were given.

   (v) On two subsequent occasions (prior to the making of the "unless order") there was an enlargement of time by the court for documents to be filed.

(vi) At the fourth hearing on 9th November, 2009, parties were still not in compliance and, the claimants' attorney once again not in attendance, the unless order was made in the presence of the second claimant.

6. On 5th February, 2010 the claimants against whom the "unless order" was made purported to file documents labelled "Witness Statements" which were signed by their attorney.

THE SECOND APPLICATION:
FOR JUDGMENT PURSUANT TO PARTS 29.5 & 26.4 OF THE CPR

(a) The second-defendant's case:

7. Attorney for the second defendant sought an order for the entire claim to be struck out pursuant to **Part 26.4 of the CPR** on the basis that:
   - the claimants had failed to comply with the "unless order";
   - the documents filed on 5th February, 2010 were not witness statements as –
     (i) they were signed by Mrs Hyacinth-Griffith, attorney for the claimants;
     (ii) they did not include certificates of truth by the intended witnesses as required under **Part 29.5(1) (c) & (g) of the CPR**; and
   - the documents could not be deemed witness summaries to avoid the "unless order" taking effect and thus saving the claimants' claim as:
     (i) they were not in the proper form to be so classified;
     (ii) they were designated "Witness Statements" and referred to the intended witnesses in the first person;
     (iii) no direction was given for the filing and service of witness summaries and, in any event, leave was required under **Part 29.6 of the CPR** to do so;
   - the defects were incurable so the claim stood struck out in light of the "unless order".

8. She submitted that upon the non-compliance by the claimants, the "unless order" took immediate effect. (***Marcan Shipping (London) Ltd* vs. *Kefalas*** [2007] EWCA Civ. 463). It could only have been avoided if the defaulting party had successfully applied for relief from sanctions but there was no such application before the court at that time. Given the lapse of

over one year since the failure to comply, the claimants would face an uphill battle to successfully obtain such relief now, in light of recent decisions of the Court of Appeal.

9. She further submitted that as the claim currently stood struck out, this application was just a means of having the court "formally recognize the status of the claim".

(b) The claimants' case:

10. The attorney for the claimants submitted that:
    - the second claimant had signed and sworn to his statement on the 5th February, 2010 so had done all that was necessary, on the deadline date, to comply with the order;
    - on the deadline date, the court office refused to accept his witness statement for filing because it was on long paper;
    - the second claimant had already left to do business in San Fernando so could not return that day to rectify the default and the first claimant was out of the jurisdiction;
    - Mrs Hyacinth Griffith, in a bid to meet the deadlines set by the court, signed the statements on behalf of both claimants;
    - the documents filed on 5th February, 2010 were "witness summaries" and the court was asked to exercise its discretion and so declare and allow their use at the trial;
    - the claimants had always demonstrated interest in pursuing their claim;
    - the "unless order" was draconian and made when the claimants were unrepresented in court; and
    - the claimants were the ones likely to be prejudiced by having their claim struck out.

ANALYSIS OF THE LAW ON PART 29.5

(a) Witness Statements

11. **Part 29.5 (b) & (c) of the CPR** states:

> *(1) A witness statement must –*
>
> *(a) give the name, address and occupation of the witness;*
>
> *(b) be dated;*
>
> *(c)* ***be signed by the intended witness****;*

(g) include a statement by the intended witness that he believes the statements of fact in it to be true. (emphasis mine)

12. **Part 29.5 (c) of the CPR** above clearly specifies the form that a witness statement must take and these provisions are mandatory. It is the intended witness, not his attorney, whether acting on his instruction or not, who is required to sign his statement and to certify that "he believes the statements of fact in it to be true". This witness statement must also be dated. There is no ambiguity in **Part 29.5 of the CPR**.

13. In the instant case, the two documents filed on 5th February, 2010, consisting of 10 and 16 pages respectively, were –

- both signed by the attorney, not the intended witnesses;
- did not adhere to the prescribed form of witness statements;
- contained no certificates of truth by the intended witnesses themselves; and
- in the case of the first claimant, was undated.

It is thus my opinion that the two documents labelled "Witness Statement of Lloyd Charles" and "Witness Statement of Dipnarine Mungal" signed by the claimants' attorney and filed on 5th February, 2010 are not witness statements.

(b) Witness Summaries

14. The submission by the claimants' attorney that these documents were in fact "witness summaries" is also not accepted by this court. They do not take the form of "witness summaries". A "summary" by its very nature speaks to brevity and conciseness and cannot masquerade as a "witness statement" or vice versa. By asking this court to use its inherent discretion to declare that these documents are summaries, although they do not take the form of summaries, so that an unless order would not kick in against the claimants, is to say that this court must not strictly adhere to provisions of the rules which are clearly and plainly expressed.[1] Resort may be had to the overriding objective to interpret the relevant provision under the CPR,

[1] It was stated by Jamadar JA in ***Trincan Oil Ltd* v *Chris Martin*** that, "*reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions.*" I agree.

with a view to curing defects and ensuring a just and fair result, but it is not a panacea for all ills in the drafting and conduct of litigation under the CPR.

15. This court also considered the submissions that the claimants are likely to suffer prejudice if the claim is struck out. It was submitted that on the deadline date the second claimant had signed his witness statement, which was refused for filing because it was on long paper. Thus, it would be in the interest of justice to treat the documents filed as witness summaries. It is my opinion that whilst at the genesis of the CPR, it would have been excusable if an attorney presented a document on long paper for filing in a matter transferred from the RSC, 1975 to the CPR, it can no longer be acceptable, especially in the face of an unless order, which held the threat of the claimants' case being struck out for non-compliance.

16. Further, there is no permission of this court for the filing of witness summaries. There is also no application on record to date seeking leave as required under **Part 29.6 (1) of the CPR**. This court also notes that the signed 'witness statement' on long paper, which the court has since had sight of, was also not in compliance with the form of witness statements as prescribed by the rules. A certificate of truth was not endorsed thereon. Such defaults show a clear disregard by the claimants' attorney for adhering to the clear and plain provisions of the rules. Under the philosophy of the new rules both the claimants and their attorneys shoulder the responsibility for meeting deadlines and ensuring compliance with the rules, orders and directives of the court in advancing their matters towards disposal. It is thus the ruling of this court that the two 10 and 16 pages documents labelled "Witness Statement of Lloyd Charles" and "Witness Statement of Dipnarine Mungal" respectively are also not 'witness summaries'.

(c) The Unless Order

17. As at 5th February, 2010 there was non-compliance by the claimants with the unless order. The consequence was that the claim automatically stood struck out. The learning is clear that where a sanction is embodied in an unless order and there is non-compliance in any material respect then it takes effect automatically.[2] This means that there is no need to seek any further order to have the court pronounce on or validate the sanction.

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[2] ***Marcan Shipping (London) Ltd* v *Kefalas*** [2007] EWCA Civ. 463 established that any sanction prescribed for non-compliance with a rule or direction takes effect without the need for further order by the court.

18. The second defendant has, however, filed an application for judgment to be entered against the claimants. According to the learning, on any application to enter judgment ensuing from a sanction taking effect, the court's power would be limited to determining the proper order to make to reflect the sanction which had already taken effect:

[*I]f it is thought that the party seeking to take advantage of the default must apply to the court in order to render the sanction effective, in my view that is wrong. The sanction takes effect without further order and the statement of case is struck out; it follows, therefore, that it is unnecessary and inappropriate to make an application ... for an order to that effect*. (per Moore-Bick LJ in ***Marcan Shipping (London) Ltd*** **v** ***Kefalas*** [2007] EWCA Civ. 463, p. 1875.)

The form of any likely order in this matter, however, can only be treated with after examining the third application i.e. for relief from sanctions.

THE THIRD APPLICATION FOR:

i. EXTENSION OF TIME TO FILE WITNESS STATEMENTS; AND

ii. RELIEF FROM SANCTIONS PURSUANT TO PART 26.6 OF CPR

(a) The claimants' case:

19. The claimants' submissions were a mere rehash of their arguments under the second application above, with the exception that the court was asked to note that:
    - judgment was already entered against the first defendant so that the 'draconian' order to strike out the claim should not be imposed as against that defendant; and
    - the defendants would suffer no prejudice if the relief was granted, only the claimants.

(b) The second-defendant's case:

20. In response, attorney for the second defendant submitted that:
    - The court should not be concerned at this stage with whether or not the sanction ought to apply, as it had already taken effect.
    - The proper channel to ventilate the claimants' concerns about the draconian nature and effect of the sanction was on an appeal, not before this court almost a year later.

- The history of the proceedings would show the claimants not complying with directions and their attorney's non-attendance at hearings, giving rise to the unless order.
- The prejudice point was pre-mature as it spoke to **Part 26.7(4) (b) of the CPR** i.e. whether the failure to comply was due to the party or his attorney. The claimants have to first cross the compulsory threshold pre-conditions of **Part 26.7(3) of the CPR** before raising those factors that the court must apply in the exercise of its discretion.
- The claimants were aware that they were not in full or proper compliance on the deadline date and yet failed to act expeditiously to rectify the breach.
- The court cannot exercise its discretion contrary to the clear provisions of the rules.

ANALYSIS OF THE LAW ON PART 26 CPR

(a) Overriding Objective

21. With respect to applications for extension of time, Blackstone states that:

> 46.20 *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 ... 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.*

22. There is a fundamental difference between applying for an extension of time **before** time expires and **after** it expires and seeking relief from sanctions after the event.[3] The learning seems to suggest 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) of the 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*

[3] "*... because of the significant differences in the relief from sanctions provisions in Trinidad and Tobago when compared to England and particularly the threshold requirements provided for at Part 26.7(1) and (3), in my opinion it would not be appropriate to apply strictly the Part 26.7 requirements and approach to applications for an extension of time that are made* ***before*** *any sanctions are imposed ... whether implied or expressed.* Per Jamadar JA in ***Trincan Oil Limited*** **v** ***Keith Schnake*** Civ. App. 91 of 2009

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

(b) Relief from Sanctions

23. The rules provide for the court to impose consequences for failure to comply, when making an order or giving directions. It goes on to expressly provide in **Part 26.6 (2) of the CPR** that, "*[W]here 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.*" (emphasis mine) The implication here is that the sanction attaches automatically. In the instant case, the application was filed long after the breach occurred and the sanction had taken effect

24. The circumstances under which such reliefs are available are also expressly set out in the **CPR** in **Part 26.7 (1-3)** to wit:

> *(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***. (emphasis mine)

25. The approach of the local courts to such applications has been rather rigid.[4] The court sitting to deal 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

[4] 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.

the subsequent factors laid down in the rules at **Part 26.7 (4) (a-d) of the CPR** for granting such relief.[5] In this regard, the leading local authority is the judgment of Jamadar JA in ***Trincan Oil Limited*** **v** ***Chris Martin*** Civ. App. No. 65 of 2009.

26. In the words of Jamadar JA, "*No 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 specifically stipulated factors to be applied by the court in exercising the discretion. In the instant case, therefore, the first step is to determine if the claimants were successful in passing the threshold test, if not, then the question of 'factors' to apply in exercising its discretion does not arise.

THE THRESHOLD TEST

(a) Promptitude

27. The claimants' application for relief from sanctions was filed on 27th April, 2011, more than one year and two months after the default. In the case of ***Trincan Oil Limited*** [2009] above, the Court of Appeal deemed an application ensuing some one and one-half months after the period for the filing of the witness statements, without any explanation for the delay as not prompt. "*One and one-half months, in the absence of any explanation, is not prompt in the context of the time lines of the CPR, 1998 and in the context of the orders that were made by the judge, ...*"[6]

28. A three week delay in filing two witness statements and an application for relief from sanction almost one month after the deadline were deemed too late in ***Maniram Maharaj*** **v** ***The Arima Race Club***.[7] This decision was upheld by the Court of Appeal. Further, a delay of eighteen days in making an application for relief from sanction was upheld by the Court of Appeal as being too late in Civ. App. No 104 of 2009 ***The Attorney General of T&T*** **v** ***Universal Projects Ltd***.

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5 These **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.

6 ***Trincan Oil Limited*** **v** ***Chris Martin*** Civ. App. (2009) page 9.

7 CV 2006-04021 per Carol Gobin J.

29. In the instant case, in the face of an unless order, the claimants' attorney saw it fit to file two documents that were neither witness statements nor witness summaries then sat back for over one year before taking steps to seek relief. Based on the second claimant's affidavit, the claimants and their attorney were aware at all times that they were in breach and of the clearly harsh effect of the order yet they only took steps to seek relief in April, 2011. In the opinion of this court, they failed to act with the required promptitude in filing their application.

(d) Intention

30. There is insufficient evidence before this court to rule definitely on the intentionality limb. It appears that at least initially, the claimants' failure to comply was not intentional since they had taken some steps to satisfy the directions of the court, albeit with wrong documents. Why they failed, within a more reasonable time thereafter, to take curative steps to fix the default shows a continuing disregard for complying with the plain and clear rules, orders and directions of the court. However, there is no clear or positive intention of actual default, especially since the claimants proffered no explanation for their inaction. The local 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 of T&T*** **v** ***Universal Projects Limited*** CA No 104 of 2009 *per* Jamadar JA at paragraph 69 & 70, pages 23-24. According to Jamadar JA, "*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.*"[8] (emphasis mine)

This court is, therefore, unable to find with certainty that the default was intentional.

(e) Good Explanation

31. The second claimant's explanation for the breach in his affidavit is that the counter clerks refused to file the document because it was on long sheets and that it was not possible for him to return that day (the deadline date) to correct the default. This is unacceptable. No

[8] ***Universal Projects case***, para. 70, page 24.

explanation was proffered as to why the claimants did not subsequently take steps to correct the default or to make the necessary application for relief from sanction until more than a year had passed. There was also no explanation given as to why the attorney felt empowered to sign the claimants' witness statements in contravention of the rules of court. Seeking to meet the time lines in an order by acting in breach of the rules of court cannot qualify as a 'good explanation'. Their explanation lacks credibility. Consequently, this particular threshold hurdle also has not been surmounted by the claimants.

(f) Compliance

32. The claimants' submissions that they have generally complied with the rules, orders and directions of the court and that they did in fact file the bundle of documents on time are also not accepted by this court. Both parties have been guilty of failing to comply with previous deadlines set by the court. A history of this matter shows that time was extended on three occasions for parties to comply with the orders and directions of this court. If anything, the records speak to the claimants' attorney rather lax approach in the conduct of this case.

33. On the hearing prior to the making of the purported 'draconian order' the claimants' attorney did not attend court and the matter was adjourned. On the adjourned date of hearing, when the alleged 'draconian order' was made, the claimants' attorney once again was not in attendance to represent her clients' interest. The situation was compounded since as at that date, she was still flouting the orders and directions of the court by her non-compliance thereto. To now cry "draconian" and "prejudice to the claimants" when ample opportunities were given for compliance with the directions of the court is simply untenable. By now attorneys must be aware that the time lines set under the CPR cannot be disregarded with the impunity displayed under the RSC 1975, without consequences attaching.[9]

34. In commenting on the court's duty to manage cases to avoid delays, Lord Woolf MR puts it thus, "*if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default*

[9] In the words of 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'.* Civ App No 104 of 2009 ***The Attorney General of T&T* v *Universal Projects Ltd***.

does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as unimportant." per ***Biguzzi* v *Rank Leisure Plc*** (1999) 1 WLR 1926, page 1932D.

35. Under the new dispensation of the CPR, an attorney who in the face of a stringent unless order can still act without any sense of urgency in seeking relief is clearly unmindful of the approach of the local courts towards delays. They will not be tolerated or go unmarked without a good excuse. If the administration of justice locally is not to be handicapped then parties must comply with dates, timelines and/or deadlines set by the court. As Gobin J puts it, "*access to justice does not contemplate access at a pace determined by the litigants or their attorneys... [a] party who has had access to the new system, has failed to comply with orders which are made to provide him with an early hearing of his case, and who has not sought relief from sanctions in a timely fashion, can hardly maintain a claim for denial of access to justice if through his own default he is shut out.*"[10]

Thus, this aspect of the threshold test is also not satisfied.

CONCLUSION

36. Under the CPR, it is incumbent on both litigants and their attorneys to recognize that delays will be assessed from the point of view of not only prejudice caused to the claimants but to the defendants or other litigants as well as the prejudice caused to the due administration of justice as observed by Lord Woolf MR in **Arbuthnot Latham Bank v Trafalgar Holdings Ltd** [1998] 1 WLR 1426 @ 1436E. In this jurisdiction, delays (particularly those without a good explanation) are viewed as unpalatable. Parties must strive to meet deadlines or act expeditiously to seek relief. In the instant case, this was not done. The claimants are now faced with the ultimate penalty – striking out of their claim because of failure to comply with the time limits set by the court. In this regard, both the attorney and claimants must take responsibility – the attorney for her inaction and the claimants for their lack of vigilance.[11] Given the history of this matter, the disregard by parties of timetables laid down, and the duty of the court to manage

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[10] Per Gobin J in ***Maniram Maharaj* v *The Arima Race Club***, CV2006-04021, page 16.

[11] In the words of Jamadar JA, "[*W]hat is at stake is not simply justice between the parties to a single case, but the entire administration of the civil justice system.*" (***National Lotteries Control Board* v *Michael Deosaran***)

cases in a way that would minimise delays, it was incumbent on this court to ensure that such defaults are not encouraged so as to furnish fertile ground for other intending defaulters.

37. It is thus the order of this court that –

(i) On the second application, i.e. for judgment, the claimants having failed to comply with the directions of the court, the claim as at the 5th February, 2010 was automatically struck out as against the second defendant, with costs to be paid by the claimants to the second defendant.

(ii) The third application i.e. for an extension of time and relief from sanctions is dismissed, with costs to be paid by the claimants to the second defendant.

(iii) On the first application, no order was made as it was not necessary.

(iv) Costs of both the second and third applications are assessed in the global sum of $2,500.00 to be paid by the claimants to the second defendant.

Dated 29th June, 2011

Martha Alexander
Master of the High Court