REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-00923
(formerly HCA 3170/1997)

BETWEEN

REHANNA MOONAN RAJBANSIE
(EXECUTRIX OF THE ESTATE OF
CARL RAMNARINE MOONAN)

Claimant

AND

ROBERTS & COMPANY
(ATTORNEYS AT LAW, TRADEMARK & PATENTS AGENT)
A FIRM

Defendant

Before: Master Margaret Y Mohammed

Appearances:
Ms Shaheera Allahar for the Claimant
Mr Shastri Roberts for the Defendant.

DECISION

INTRODUCTION

1. The very nature of the application before me is in dispute by the parties. At this stage I will refer to the application filed on February 2, 2010 ("the instant application") by the

claimant, using the heading set out as a "Notice of application for relief from sanctions pursuant to Parts 27.9(2) (3), 26.1(d), 26.7 and 11.3 of the Civil Proceedings Rules ("the CPR") for the timetable set by Master Paray-Durity on January 7, 2010 to be varied without a hearing". The proposed variation was for the claimant to file and serve her witness statements on or before February 17, 2010 and to file and serve her agreed and unagreed statement of facts on or before February 23, 2010. The time previously set by the Master by order dated January 6, 2010 to file the aforesaid documents was February 2, 2010 and February 17, 2010 respectively.

2. In support of the application are 3 affidavits of instructing attorney for the claimant, Ms Shaheera Allahar filed on June 23, 2010 ("the SA 1 affidavit"), July 7, 2010 ("the SA 2 affidavit") and November 16, 2010 ("the SA 3 affidavit") respectively and the claimant's affidavit filed on April 5, 2011 (" the RMR affidavit"). A related action was filed S 1978 of 2003 (now CV 2008-01455) with the same parties and there is an identical application in that matter. In this regard, to save time and costs, the parties have agreed to be bound by my decision on this application for both matters.

THE HISTORY

3. On October 31, 2003 the claimant filed this action under the Rules of the Supreme Court 1975 ("the RSC") against the defendant for damages suffered as a result of the defendant's negligence and /or breach of contract as the claimant's attorney in Civil Appeal 88 of 2000 between the claimant and Ramsaran Moonan. The crux of the claimant's case is that the defendant acted negligently in advising her to appeal the costs award made by Ventour J on April 13, 2000 and thereafter to allow the said appeal to be dismissed by the Court of Appeal for non-compliance in accordance with Order 59 of the RSC.

4. This matter was set down for trial on March 15, 2007 and in accordance with the Part 80 rule 80.3 (1) (b) CPR it was "converted" to the CPR and a notice was issued by the Court Office on November 13, 2008 informing the claimant's attorneys of the CPR case number and that a CMC was scheduled before the Master for July 21, 2008.

5. On July 14, 2009, the second CMC in this matter, Master Paray-Durity gave directions for:

(a) Discovery and inspection to take place on or before October 12, 2009;
(b) Agreed and unagreed bundles of documents to be filed on or before October 30, 2009;
(c) Agreed and an unagreed statement of issues to be filed and served on or before November 20, 2009 ;
(d) Witness statements to be filed and exchanged on or before December 18, 2009;
(e) Agreed and unagreed statement of facts to be filed and served on or before January 15, 2010;
(f) Adjourned the CMC to February 24, 2010.

6. On December 18, 2009 the defendant filed a joint application on behalf of both parties pursuant to Part 27.9(4) and (5) CPR requesting relief from sanction and an extension of time for the parties to comply with the directions of July 14, 2009. On January 6, 2010 Master Paray-Durity granted the order with the extension of time as requested by the parties. The time was extended as follows:

(a) Discovery and inspection to take place on or before December 22, 2009;
(b) Agreed and unagreed bundles of documents to be filed and served on or before January 12,2010;
(c) Agreed and an unagreed statement of issues to be filed and served on or before January 20,2010
(d) Witness statements to be filed and exchanged on or before February 2, 2010;

(e) Agreed and unagreed statement of facts to be filed and served on or before February 17, 2010.

7. On October 14, 2009 the claimant filed and served a list of documents and on November 20, 2009 she filed an unagreed statement of issues.

8. On December 22, 2009 the defendant filed and served its list of documents and on January 12, 2010 the respective index for the claimant's agreed and unagreed bundle of documents was filed and served. The defendant filed its index to its agreed and unagreed bundle of documents on January 18, 2010.

9. At a case management conference on February 24, 2010 time was extended to March 8, 2010 for the defendant to file and serve its statement of facts and on March 3, 2010 it complied with this direction.

10. By March 8, 2010 the defendant had fully complied with all the Master's directions but the claimant had not yet filed her witness statements and statement of agreed and unagreed facts which were due on or before February 2, 2010 and February 17, 2010 respectively.

11. On February 2, 2010 the claimant filed the instant application. On March 22, 2011 the instant application came up before me for the first time. At that hearing Ms Allahar presented a letter to indicate that Counsel for the claimant, Mr Rambally was ill and could not attend court. At that hearing I expressed my concerns that for more than 1 year an application by the claimant for relief from sanctions was still pending before the court and therefore to make the best use of the court's and parties time I gave directions for the claimant to file and serve submissions and relevant authorities on or before April 5, 2011 and to make any other applications as she may see fit. The defendant was directed to respond with on or before April 18, 2011 and the claimant to

reply on or before May 2, 2011. I also informed the parties that upon receipt of the submissions I will fix a date in May 2011 to render my decision.

12. The claimant filed its submissions on April 5, 2011 together with a notice seeking permission of the court to rely on the RMR affidavit which was annexed to the notice. In response, the defendant filed its submissions on April 18, 2011.

13. On May 2, 2011 instead of filing its submissions in response the claimant filed an application to be dealt with without a hearing, requesting permission of the court to extend time to June 15, 2011 to file its submissions in reply. The reason for the extension as set out in paragraph 1 of the grounds of the application was that on April 28, 2011 Counsel for the claimant, Mr Dinesh Rambally was notified of his appointment as an Industrial Court judge with effect from May 2, 2011 and Mr Rambally had not yet completed the submissions in reply.

14. In light of the history of this matter, I thought it prudent to seek the views of the attorney for the defendant. As such, I informed the attorney for the claimant through my judicial support officer, that I had no difficulty with an extension to May 18, 2011 but I wanted her to obtain the position of the defendant before I dealt with the application. Not having received a response by May 13, 2011, I scheduled a hearing on May 18, 2011 to deal with the application.

15. At the hearing of the application, Ms Allahar informed the court that the firm had still not retained a counsel for this matter. Attorney for the defendant submitted that while the purpose of submissions is to assist the court, the position by the claimant was unacceptable and that in any event the claimant's main submissions were already filed.

16. I informed Ms Allahar that I was not minded to grant an extension to June 15, 2011 as requested since this date was outside the time I had set to render a decision on the instant application, that the claimant's main submissions were already filed and the court in its management of this case is not concerned with the internal reorganization of

the claimant's firm of attorneys. I also expressed my grave concern to Ms Allahar of the firm's approach in light of the age of this matter. In the circumstances, I gave Ms Allahar an extension to May 23, 2011 to file her submissions in response and directed that the costs of the application to extend time to file the claimant's submissions in response would be dealt with at the end of the main application. I also fixed May 31, 2011 as the date for the decision. Ms Allahar filed the submissions in reply on May 23, 2011.

THE PRELIMINARY ISSUES

17. There are a few preliminary issues which I must address since they will impact on how I treat with the substance of the instant application before the court. The preliminary issues are:

    (a) Is the instant application for an extension of time to comply with the Order of Master Paray-Durity dated January 6, 2010 or for relief from sanction and an extension of time?

    (b) Did the application comply with the requirements of the CPR when it was made?

Is the instant application for an extension of time or for relief from sanction and an extension of time?

18. The claimant submitted that the instant application was for an extension of time to file her witness statements and statement of agreed and unagreed facts, since it was made before the expiration of the time before any sanction (expressed or implied) was imposed.

19. In reply, the defendant was of the opinion that the instant application was for relief from sanction for the following reasons:

- Based on the words "clearly emblazoned in capital letters on the face of the application".
- It was filed after the deadline for compliance had passed.
- The affidavit in support of the application was only filed on June 23, 2010 and the court should deem this as the proper date of the application.
- The claimant's attorney was aware that at the hearing of the CMC on February 24, 2010 the dates for the extension of time sought, had passed.
- The claimant failed to make any further application.

LAW AND ANALYSIS

20. It was undisputed by the parties that the deadline imposed for the claimant to file and serve her witness statement and statement of agreed and unagreed facts was February 2, 2010 and February 17, 2010 respectively. Having examined the instant application I note that while the title of the instant application referred to is "an application for relief from sanctions" the substance is an application for an extension of time under Part 27.9(2) CPR. In **Andrew Khanhai v Darryl Cyrus and anor[1].** Jamadar JA distinguished the different approach to be adopted by attorneys before and after any sanction is imposed by stating:

> "Simply put, a party can apply for an extension of time for filing a defence at any time prior to the time limited for so doing. In such circumstances the strictures of Part 26.7 will not apply. In such circumstances, the courts will exercise their general discretion as to whether or not in all the circumstances an extension should be granted."

[1] Civ Appeal 158 of 2009 at para 22

21. Part 27. 9(2) CPR clearly indicates that any party who seeks to vary any date in the timetable set by the court without the agreement of the other parties must take 2 steps. Firstly, apply to the court for permission to vary the dates fixed in the timetable secondly, make the application before the deadline. In this case both steps were complied with by the claimant on February 2, 2010 before no sanction had been imposed. Accordingly, I find that the instant application was made under Part 27.9(2) CPR and as such I will treat the instant application as one seeking permission of the court for an extension of time.

Did the instant application comply with the requirements of the CPR?

22. Having determined that the instant application was for an extension of time, I will address the issue whether the application complied with the requirement of the CPR with that premise.

23. The claimant submitted that:

- The instant application has complied with Part 29.9(2) CPR where there is no requirement to file evidence in support of the application.
- Part 11.7 CPR states that the application must include the order the applicant is seeking and why it is being sought.
- The grounds of the application are set out at pages 2 and 3 of the instant application and annexed thereto is a copy of the operation note of Mr Teodori, Cardiac Surgeon, Caribbean Heart Care Medcorp Limited.
- Pursuant to Part 11.7(3) CPR instructing attorney Ms Allahar certified that the facts stated in the application are true to the best of her knowledge, information and belief.
- The instant application has not been dealt with and continues to be pending before the court and it is not necessary to file a new application.

24. In response, the defendant submitted that the instant application was not properly before the court for the following reasons:

- At the time the application was filed there was no evidence filed in support. If it was the intention of the claimant for the court to extend time to the dates requested, there was no evidence for the court to deal with the application.
- Even after the proposed dates set out in the instant application passed none of the documents were filed before the dates requested and the application is now 'spent'.
- The failure by the claimant to appear at the CMC hearing on February 24, 2011 where the Master did not deal with the application does not mean that the application is still alive.
- The extension sought in the relief has long passed.
- This application was made pursuant to Part 11.13 CPR for it to be dealt with without a hearing. Therefore it is improper after the date of the application to allow the claimant to provide its evidence in support of the application.

LAW AND ANALYSIS

25. Unlike the provisions of Part 26.7 CPR which deals with relief from sanctions applications, Part 27.9 (2) CPR is silent on the requirement for evidence to be provided in support of an application. Part 26.7 (2) CPR provides that any application for relief from sanction must be supported by evidence. Part 29.9(2) CPR only provides for a party seeking to vary any other date in the timetable without the agreement of the other parties to apply to the court and to do so before the date imposed by the court.

26. For applications for relief from sanctions therefore there is an express mandatory obligation to file evidence in support. The failure to file supporting evidence at the time of making the application is fatal to the application (**John Bruce Milne v Trinidad Dock**

and Fishing Service Ltd and anor.[2]). However, it is different for applications made under rule 27.9(2) CPR where there is no such requirement.

27. This may be so because setting out sufficient grounds in the application is significant in itself. This was underscored by the EC Court of Appeal in **Beach Properties Ltd v Laurus Master Fund Ltd**[3] where it was noted that:

> " the prescribed form for making applications expressly requires the grounds to be stated in the form by providing a section beginning, 'The grounds of the application are-'…One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making an application, before making it, lawyers are required to consider the merits of the application…. The requirement of stating the grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought"

28. Of course when considering an application for an extension of time where evidence would be required to support any ground relied upon this may prove fatal to the application.

29. However, having examined the instant application, I am satisfied that even in the absence of any evidence there are sufficient details in the grounds of the said notice to allow me to exercise my discretion. The presence of evidence serves to bolster the claimant's case but is not a specific requirement.

30. Further, all the affidavits filed in support of this application provide an update of the status of the health of the claimant which is the claimant's main reason for the instant application. I am therefore, of the view that it is not unreasonable for me to examine all

[2] CV 2007-03438
[3] The Caribbean Civil Practice at page 122

the supporting evidence including the RMR affidavit to make a determination of the instant application at this stage on its merits. In this particular case, the claimant chose to filed 4 affidavits at various intervals while it was pending.

31. I will now deal with the substantive application.

EXTENSION OF TIME

32. The evidence in support of the claimant's application is contained in the SA 1 affidavit, the SA 2 affidavit, the SA 3 affidavit and the RMR affidavit. The reasons advanced in support of the application are :

(a) The claimant has been seriously ill from the period October 2009 to April 1, 2011[4] due to chest pains and fluctuations in her blood pressure. The claimant was advised by her doctors to avoid "stressful situations" which included litigation. She was not able to resume her normal business routine nor to visit her attorneys' office to give further instructions in this matter.

(b) During the period December 10-15, 2009 the claimant was hospitalized and underwent coronary artery bypass surgery[5]. On January 8, 2010 the claimant was again hospitalized in connection with the aforementioned surgery and chest pains[6].

(c) After the claimant was discharged from the hospital she continued to be weak and in pain and she has not been able to return to normal everyday business and routine[7].

(d) In September 2010, the claimant started having difficulty speaking and swallowing and on November 4, 2010 she underwent surgery on her right thyroid lobe[8].

[4] RMR affidavit para. 6-24
[5] RMR affidavit para 9
[6] RMR affidavit para 12
[7] RMR affidavit para 12
[8] RMR affidavit para 20

(e) Despite the serious illnesses of the claimant, her attorneys have complied with the directions with respect to list of documents, unagreed statements of issues and index for the agreed and unagreed bundle of documents.[9]

(f) The claimant has continued to be treated by Dr Carl Ferdinand for her heart condition[10].

THE DEFENDANT'S RESPONSE

33. In response, the defendant submitted that:

(a) The application for the extension was not made promptly.

(b) The application was filed without supporting evidence.

(c) There was a delay by some 4 months before any evidence in support of the application was first filed.

(d) The medical report dated June 25, 2010 stated that the claimant required 2 months to resume her normal activities.

(e) There is no medical evidence which indicates that the claimant suffered from any cognitive difficulties that prevented her from approving the witness statement.

(f) The claimant has not provided any good reasons to persuade the court to allow this application since the sole explanation for the breach is an alleged medical condition.

(g) The medical information submitted is inadmissible since the doctor did not provide any evidence.

(h) There is no evidence, despite the alleged medical condition to account for the failure to settle a witness statement or summary or whether such was beyond the competence of the claimant.

(i) The last medical report stated that the claimant needed 2 months from November, 2010 to recover. There is no medical reason why the witness statement could not be filed by January 16, 2011.

[9] SA 1 affidavit para 4 and 7
[10] RMR affidavit para 26

(j) The claimant has not stated when the witness statements will be prepared or what she intends to say.

(k) There is no evidence provided to the court to indicate the usefulness of the witness statements which the claimant intends to file.

(l) The claimant has not done anything to comply with the other outstanding directions.

(m) The claimant is competent 4 days after the last medical by Dr Ferdinand to file a lengthy 28 paragraph affidavit in support of the application on April 5, 2011 but not a draft of the witness statement or witness summary. This is evidence that it was her intention to be in breach of the order of the court.

(n) Due to the length of the delay the court can infer prejudice to the defendant.

(o) The administration of justice must be even-handed. A claimant who has not complied with the rules and orders of the court ought not to be granted an extension of time. To grant the extension would go against the grain of the cases.

LAW AND ANALYSIS

34. The power of the court under the CPR to grant extensions of time is found under Part 26.1(1)(d) CPR which simply states that the court may extend or shorten the time for compliance with any rule, practice direction or order or direction of the court.

35. Part 1.1 CPR provides that the court must give effect to the overriding objective when exercising any discretion under these rules.

36. In examining the powers of the court to grant an extension of time under the UK CPR the court in **Price v Price** [11] explained that the list of factors set out under Part 26.7 CPR is a convenient list that should be considered where a party is seeking an extension of time for complying with an unless order *before* the time for complying has elapsed.

[11] (2003) 3 AER 911

37. More recently, the Court of Appeal in this jurisdiction has noted that a court has to exercise its "general discretion" in determining whether or not to grant an extension of time. In exercising its "general discretion" *it would not be appropriate to apply strictly* the requirements of Part 26.7 CPR in dealing with such applications since no sanction has been imposed. In **Lincoln Richardson v Elgeen Roberts-Mitchell** [12] Mendonca JA provided a general checklist which a court may consider when exercising this "general discretion when he said "you look at the 26(7), without the threshold, and add to that questions of prejudice and the overriding objective".

38. In **Richardson** Chief Justice Archie went further when he commented that in considering the overriding objective, the court ought to apply it in "the context of the rest of the rules[13]".

39. It is not clear to me if Mendonca JA was referring to the concept of a "threshold" or to the factors set out Part 26(7) (1) to (3) CPR commonly referred as the "threshold provisions". However, I am of the view that "in the context of the rest of the rules" it is not unreasonable for me to assume that the learned judge was referring to the "concept" of a "threshold" rather than sub rules 1 to 3 since the factors of unintentional failure to comply, good explanation for the breach and general compliance with the rules, practice direction and orders[14] are all relevant considerations to be taken into account under the broad umbrella of the "overriding objective" when I am exercising my general discretion.

40. The factors set out in the overriding objective in Part 1.1 CPR are important in considering how to deal with the case fair and justly. To do so, the court is called upon to ensure that the parties are on equal footing as far as practicable, expense is saved, the principle of proportionality with respect to the amount of money involved, the

[12] Civ Appeal No 83 of 2010 Transcript dated May 10,2010 at page 3 line 46
[13] Civ Appeal No 83 of 2010 Transcript dated May 10,2010 at page 8 line 18
[14] Part 26.7(3)

importance of the case, the complexity of the issues and the financial position of each party is observed, that the matter is dealt with expeditiously and an appropriate share of the court's resources is allocated to it in the context of all the cases before the court.

41. By Part 1.3 CPR the parties are required to help the court to further the overriding objective of dealing with the cases justly. The combination of the aforesaid guidelines is not inconsistent from that outlined by the authors in **O'Hare and Browne Civil Litigation**[15] which was referred to by the claimant's attorney in their submissions. The tension here is therefore between the interest of the administration of justice and the effect that granting the extension would have on each party.

42. In examining the granting of extensions of time for a party to file witness statements, as a general rule, the authors of **The Caribbean Civil Court Practice** at page 224 has noted that:

> " Where a party fails to serve witness statements on time, the court will usually extend time for service and will only in very extreme circumstances use its powers to exclude a party from adducing evidence at trial; such circumstances may include the deliberate flouting of court orders, or inexcusable delay such that the only way the court could fairly entertain the evidence would be by adjourning the trial" (emphasis mine)

43. After carefully considering all the factors, I have decided that I will grant an extension of time to the claimant by 21 days from the date of this order since in the context of this case it is consistent with the overriding objective and in dealing with this case justly. The following are my reasons for granting the application.

[15] 11th ed. At page 584 which referred to the guidelines decided by the Court of Appeal in Mortgage Corp Ltd v Sandoes (1996)T.L.R. 751

Failure to comply was not intentional

44. There is no evidence before me to conclude that the failure by the claimant to comply with the directions to file the witness statements and the agreed and unagreed statement of facts was intentional. Rather, quite the opposite, the claimant has demonstrated a keen interest in her matter. Despite the several serious medical problems which affected her during the period October 2009 to April 1, 2011 the claimant maintained contact with her attorneys keeping them informed of her condition.

Good explanation

45. The claimant has provided a good explanation for requesting an extension of time. The order was made in July 2009 and the first deadline was December 18, 2009 and January 15, 2010 respectively. The claimant started preparation in September, 2009 3 months before the deadline which was not unreasonable. However, during the period October 2009 to September 2010 the claimant became seriously ill, firstly with a heart ailment and then thyroid problems. In both cases she underwent surgery and she was hospitalized for 3 periods (December 10 to 15, 2009, January 18, 2010 and in September 2010). With respect to her heart problems the claimant underwent coronary artery bypass surgery in December 2009 and in September 2010 when she underwent surgery on her right thyroid lobe.

46. However, this was not the end of her medical woes. During this time she also suffered from the effects of high blood pressure and chest pains all associated with her "heart condition". As a consequence, between the period October 2009 to April 2011 the claimant was not able to "resume her normal business" since she was advised by her doctors (Dr Jhagroo and the Dr Carl Ferdinand) to avoid "over exerting herself" and any "potential stressful situations" which would raise her blood pressure and stress levels.

Her bouts of illness also prevented her from travelling from her home in Rio Claro to her attorney's office in San Fernando to give instructions on the documents to be included on the list of documents and for preparation of the witness statement.

47. I appreciate that the claimant's restrictions prevented her from giving her attorneys instructions for the period October 2009 to present. However, I note that the claimant having been advised to avoid stressful situations was able to sign a detailed 28 paragraph affidavit in support of her application on April 5, 2011. Despite the claimant's restriction in commuting from Rio Claro to San Fernando I also find it instructive that the said affidavit was sworn to Liberty House 8, Irving St (North) San Fernando which is also the address of the claimant's attorney's office. In light of these observations, it is not unreasonable for me to conclude that she is now in a position to have her witness statement and statement of unagreed facts prepared and filed within a short time.

48. On the other hand, I am not satisfied that the claimant's attorney has adopted a proactive approach to the conduct of this case. Chief Justice Archie in **Richardson** in examining whether a party should be allowed to file additional witness statements posed this question to the attorney:

> "..the question is what else have you done to assist the progress of the matter within the limits, within the constraints that the intervening circumstances have placed upon you?"

49. Mendonca JA in **Richardson**, also shared this view when he commented on the failure by the attorney to take any steps during the period when the application was filed and when it was determined to prepare a draft witness statement. He said:

> "Your application was filed on the very date it was supposed to be filed. The judge decided to hear it as a pretrial review on the date of the pretrial review, which was perhaps two months later, I think, roughly, but in the interim nothing was done. Was there any attempt made to—did you prepare your witness

statement? Did you have it available at that moment if the judge were to extend the time?"

50. In the aforesaid instance, the judges were referring to the conduct by the attorneys in their failure to take certain steps where pre-trial and trial dates were fixed and keeping the court's timetable for the case would have been adversely affected.

51. The Court of Appeal in this jurisdiction has consistently denounced the "casual approach" to the conduct of litigation over the years both under the RSC and the CPR to practitioners and litigants[16].

52. Given the demands of the CPR for a more effective and efficient civil justice system I am of the view that the claimant's attorney did the bare minimum of filing an application to extend time on the last date before the deadline. However the claimant also failed to provide any information to address the following questions such as:

- Who are the witnesses?
- When can the witness statements be prepared and filed?
- When can the statement of agreed and unagreed facts be prepared and filed?
- Why the attorney for the claimant did not use the initial instructions taken from the claimant when the action was instituted and supplemented with information received via the telephone to prepare a draft of the witness statement which could have been attached to the claimant's affidavit so at least the court would have some information of the evidence which the claimant is likely to give?
- Why the attorney did not seek permission to file a witness summary?

[16] Civ Appeal No 132 of 2007 National Lotteries Control Board v Michael Deosaran; Civ Appeal; Civ Appeal 65 of 2009 Trincan Oil Ltd v Chris Martin ; Civ Appeal 91 of 2009 Trincan Oil Ltd v Keith Schnake;
Civ Appeal 104 of 2009 The AG of Trinidad and Tobago v Universal Projects Ltd and Andrew Khanhai v Darryl Cyrus and anor.

- Why the attorney for the claimant could not prepare a bundle of documents and statement of agreed and unagreed facts based on the information which she had and seek the court's permission to file a supplemental bundle or amended statements when the claimant overcame her health problems?

53. I do not condone the attorneys conduct in this matter. However, I am of the view that this proactive claimant should not be penalized because her attorney adopted a casual approach to the conduct of her litigation.

General compliance with the rules, orders and directions by the claimant

54. There has been general compliance with the directions and rules by the claimant. The claimant obtained 1 extension of time to file the witness statement and statement of agreed and unagreed facts. This was based on a joint consent application where both parties requested an extension of time to comply with the directions. Thus far, from the directions given the claimant has complied with all the other directions. Further, when the claimant realized that she was not going to meet the deadline to comply with the other directions with respect to witness statements and unagreed statement of facts, she promptly filed the appropriate application to seek permission to extend time for doing so.

Trial date and prejudice if application is not granted

55. This matter has been in the civil court system for 8 years. This is a long time but it is still at the case management stage and neither a date for a pre-trial review nor a trial date has been set. Before the instant application was filed there were 2 CMCs. Subsequently there have been 3 additional CMCs.

56. The defendant has complied with all the court's directions. The failure by the claimant to file its unagreed statement of facts may not be prejudicial to the claimant. However,

the claimant would be prejudiced, if the case is allowed to continue if the instant application (in particular with respect to witness statements) is not granted. The claimant will effectively be shut out at this pre-trial stage of the proceedings from having any evidence before the court at trial. Such a response by the court at this stage would be disproportionate. In my view to grant an extension with conditions at this stage would be more proportionate.

57. I note that when the defendant was not in compliance with the directions it did not hesitate to file a joint application to extend time but once it had complied with the directions it adopted a different, more adversarial approach. It is therefore not unreasonable for me to conclude that such change in strategy was to gain a tactical advantage.

58. The length of the delay thus far is 14 months. However, while the instant application was filed on February 2, 2010 the failure by the court to deal with the application in a more timely manner cannot be attributed to the claimant. In the circumstances, I am not prepared to infer prejudice on the part of the defendant as a result of this delay. Further, delay must be taken into account with the other factors which are being considered.

Administration of justice

59. Justice must be even handed. Pemberton J in **Mainway Industrial Installation Ltd v Bravelion Industries Limited**[17] defined the term "administration of justice" to mean "the control or regulation of a system designed to ensure fair play, equity, impartiality and lack of bias and even handedness". I agree with this definition.

[17] CV 2009-02485 at para 21

60. The defendant has referred to several cases[18] in its submissions on the negative impact an extension of time, if granted to the claimant, would have on the administration of justice. Those cases can be distinguished from the facts of the instant case by the following features:

- The courts were dealing with applications for relief from sanctions Part 26.7 CPR and not an application for an extension of time.
- Sanctions (either impliedly or expressly) were already imposed.
- Trial dates were already set.
- The case management was already completed.

61. I am concerned that there is no evidence before me to indicate who are the witnesses, when the witness statements can be filed and what evidence the proposed witnesses would be giving. However, in keeping with the overriding objective, an extension of time at this stage of the proceedings would put the parties on equal footing. To shut out the claimant at the case management stage where no sanction has been imposed is a drastic step and would serve no useful purpose.

62. I have also considered the effect of an extension to the claimant, on the entire civil justice system. Lord Woolf MR in **Arbuthnot Lathan Bank v Trafalgar Holdings Ltd**[19] had this to say to litigants on the effects on delay on the entire system of the administration of justice :

> " Litigants and their legal advisers must therefore recognize that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to

[18] CA No 104 of 2009 The Attorney General of Trinidad and Tobago v Universal Projects Ltd ; Trincan Oil v Chris Martin ; CV 2008-00675 Tiger Tanks Ltd v Caribbean Dockyard & Anor. ; CV 2007-04439 Rupert Peters v the AG of Trinidad and Tobago ; Privy Council Appeal 22 of 2009 Charmaine Bernard v Ramesh Seebalack

[19] (1998) 1 WLR 1426 at 1436 E

the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice."

63. I appreciate that this case cannot be examined in isolation. In allowing the instant application another litigant who is awaiting the court to allocate its resources to move his case forward may be adversely affected. However in my view, there must be some balance. I am aware that the claimant has made it difficult for the court to actively manage this case within the last 2 years. However, this must be taken in the context of a claimant who has waited 8 years since institution of the action and due to serious illness she was unable to deal with her case when the court was ready .

64. I have cross referenced the exercise of my discretion in considering the 26.7 CPR factors against the overriding objective of the CPR and I am satisfied that in the context of this case, an extension of time of 21 days from the date of this order is an available route which can still do effective justice to both sides and would not have a significant impact on other litigants waiting their turn in the civil justice system.

CONCLUSION

65. Having examined all the aforesaid factors, in the context of this case, I grant the said application for the following reasons:

(a) The claimant was not in breach of any order, direction or rule when the application was filed. There was no sanction impliedly or expressly imposed.
(b) The claimant always demonstrated a keen interest in her matter.
(c) The serious bouts of illness adversely affected the claimant in assisting her attorney to ensure compliance with the directions.
(d) The claimant should not be shut out at the case management stage where no trial date has been set from filing her documents. To take such a drastic step at this stage

would be prejudicial to the claimant, and not place the claimant on an "equal footing" with the defendant.

(e) The failure by the claimant's attorneys to adopt a proactive approach in the conduct of this matter thereby restricting the claimant's of her options such as witness summaries should not be detrimental to the claimant.

(f) All the other directions have been complied with in this matter.

(g) While it is important not to relax the disciplinary framework created by the CPR to not grant the extension would be a disproportionate response.

ORDER

66. Permission is granted to the claimant to use the RMR affidavit.

67. Time is extended to the claimant to file and serve witness statement and statement of unagreed and agreed facts on or before June 21, 2011. In default the claimant would not be able to call any witnesses at trial.

68. The claimant to pay the costs of this application to be assessed.

Dated this 31 May 2011.

Margaret Y Mohammed
Master of the High Court (Ag.)