

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2008-02172  
(formerly HCA 3170/1997)**

**BETWEEN**

**CLAUDETTE WILLIAMS**

**Claimant**

**AND**

**SOUTH WEST REGIONAL HEALTH AUTHORITY**

**Defendant**

**Before: Master Margaret Y Mohammed**

**Appearances:**

**Mr Shaheed Hosein for the Claimant**

**Mr Harrikissoon for the Defendant.**

**DECISION**

**INTRODUCTION**

1. This is an application by the claimant for relief from sanctions for failure to file and exchange witness statements on or before May 5, 2009 and to extend the time to file the witness statement of Dr David Santana and to file a supplemental or further witness statement of the claimant to deal with the issue of loss and damage suffered. The application was made at the case management stage.

## **THE HISTORY**

2. On December 10, 1997 the claimant filed its action under the Rules of the Supreme Court 1975("the RSC") against the defendant for damages for personal injuries and consequential loss caused by the negligence of the defendant its servant or agents on or about December 11, 1996. The claimant's claim was that on December 11, 1996 a medical officer employed by the defendant at the San Fernando General Hospital administered a myelogram to her which produced a chemical arachnoiditis resulting in severe complications and leaving the claimant 100% disabled.
3. At the hearing of the summons for directions on July 5, 2006 Assistant Registrar Mr. Ramcharan gave directions to both parties to file and serve their respective list of documents, statement of issues and facts and for inspection to be completed on or before October 3, 2006. The Assistant Registrar also recorded that the claimant (then referred to as the plaintiff) intended to call 3 witnesses at trial namely the claimant, and 2 others whose names are to be disclosed at the pre-trial review ("the PTR"). The defendant was required to disclose the names of its witnesses at the PTR.
4. The claimant filed its list of documents on March 19, 2007 and the respective statement of facts and issues on July 4, 2007. The defendant filed its list of documents on September 21, 2006 and its respective statement of facts and issues on October 16, 2007.
5. The matter was eventually set down for trial on April 4, 2007 and in accordance with the Part 80.3 (1) (b) of the Civil Proceedings Rules 1998 ("the CPR") it was converted to the CPR and a notice was issued by the Court Office on June 13, 2008 informing the claimant's attorneys of the CPR case number and that a case management conference ("the CMC") was scheduled before Master Paray-Durity for Tuesday July 29, 2008 at 10:00 am.

6. There were several hearings of the CMC when various directions and extensions were given. For the purposes of clarity I will list the following material events in order of chronology:

- July 29, 2008 - Mr Brendan Sutherland of the law firm Alexander, Jeremie and Co who were the attorneys on record for the claimant from inception of the claim and Mr Chariah from the firm of Harikissoon and Co represented the defendant attended. Master Paray-Durity gave directions for the parties to file and serve their bundles of documents on or before October 15, 2008 and to file and exchange their witness statements on or before December 1, 2008 and adjourned the CMC to December 15, 2008.
- October 22, 2008 - the defendant filed its bundle of documents On that date the defendant filed an application for relief from sanction for failing to file and exchange its witness statements on December 1, 2008.
- December 15, 2008 - time was extended for parties to file and exchange witness statements to April 9, 2009, for the claimant to file bundle of documents and for the defendant to file a supplemental bundle of documents by that date .
- March 25, 2009 - Mr. Shaheed Hosein came on record for the claimant.
- April 2, 2009 - the claimant filed its bundle of documents and the defendant filed its witness statement, that of Dr Anthony Ameeral.
- May 4, 2009 - Mr. Hosein and Mr. Chariah attended and time was again extended time for the claimant to file and serve witness statements to May 4, 2009, to serve statement of issues and bundle of documents to June 19, 2009 (this court took judicial notice that this date is annually a public holiday in this

jurisdiction). The CMC was again adjourned to October 12, 2009. The claimant filed 2 witness statements an undated one and the other is dated April 4, 2000.

- June 18, 2009 - The claimant's statement of issues was also filed.
- October 12, 2009 - Time was extended again for the agreed bundle of documents to be filed and served to January 25, 2010.
- January 25, 2010 – Attorney for the claimant indicated that his client was ill and he was still awaiting a MRI report.
- May 11, 2010 – Time was extended for the agreed bundle to be filed and served on or before May 26, 2010.
- May 18, 2010 - The claimant filed its bundle of documents.
- July 6, 2010 - The claimant filed the application which is before the court. In support of the application is the affidavit of Shaheed Hosein ("the SH affidavit") filed on the same day.
- December 12, 2010 - directions were given for the defendant's affidavit in response to the application to be filed and served on or before January 28, 2011. The defendant did not file any affidavit in response.

### **ANALYSIS**

7. The expressed sanction prescribed by Rule 29.13 CPR for a party failing to file and exchange a witness statement within the time set by the court is that the witness may not be allowed to give evidence without permission of the court. As such when a

party is in breach of this obligation it must obtain relief from this sanction imposed by the CPR. The Court of Appeal in this jurisdiction has clarified and settled the approach which must be adopted by a court in dealing with Part 26.7 of the CPR relief from sanction<sup>1</sup> applications. The threshold questions which must be addressed are :

- Was the application filed promptly?
- Was it supported by evidence?
- Was the failure by the applicant to comply intentional?
- Was there good explanation for the breach?
- Has the party in breach generally complied with all the relevant rules, practice directions, orders and directions?

I will now address the threshold requirements.

#### **Was the application filed promptly?**

8. Attorney for the claimant submitted that the instant application was filed promptly since he discovered the unsigned statement of Dr Santana in or about late June 2010 and immediately he made enquiries into whether or not this witness statement had been filed/signed and when he realised that this had not occurred he immediately filed the instant application. In response attorney for the defendant submitted that the instant application was not prompt since it was filed some 13 months after the deadline for filing witness statements.
9. Jamadar JA in **Trincan Oil Ltd v Keith Schnake**<sup>2</sup> set out the test to be used by the court in determining what is prompt when he stated:

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<sup>1</sup> 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.

<sup>2</sup> Civ Appeal 91 of 2009 at para. 22

“Promptitude 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”.

**10.** In the instant case the sanction was imposed on May 5, 2009 which was the last deadline set by the court for the parties to file and exchange witness statements. Time therefore began to run from the default which was May 5, 2009. In this regard, the conduct of the attorney for the claimant was consistent with his knowledge of this deadline since he filed the 2 statements of the claimant on May 4, 2009.

**11.** In the context of this case where Master Paray-Durity extended time on 2 occasions for for the parties to file and exchange witness statements it cannot be said that the instant application which was filed more than 14 months after the deadline was prompt. This is fatal to the application.

**Was the failure by the applicant to comply intentional ?**

**12.** Paragraph 8 of the SH affidavit states that “Failure to file the statements herein were not intentional but rather due to the circumstances set out herein.” In the circumstances, I cannot say from the evidence before me that the failure to comply was intentional by the claimant.

**Was there good explanation for the breach?**

**13.** The claimant submitted that as soon as the unsigned witness statement was discovered in or about late June 2010, immediate enquiries were made and the instant application was made. In response attorney for the defendant submitted that the claimant has failed to provide good reason for not filing the witness statement of Dr Santana and the supplemental witness statement of the claimant on time since the

claimant's attorney had ample time since taking conduct of the matter to have Dr Santana sign the witness statement within the time allowed by the court order. It was also submitted that the claimant's attorney's failure to comply with the directions due to inadvertence and lack of continuity in the conduct of this matter do not amount to good reason.

14. The rule requires not simply an explanation but a "good explanation". The reasons advanced by the claimant for the breach were set out in paragraphs 4, 5 6 and 7 of the SH affidavit. The reasons given for not filing a witness statement for Dr Santana were :

"4. The documentation and paperwork in this matter is voluminous. It is only recently in preparing this matter and checking on all that is to be done in preparation for trial that I discovered among papers a copy of a statement prepared for signature of Dr David Santana on the file. On further enquiries it became apparent that the said statement was never signed nor filed.

5. The evidence of Dr Santana would be of considerable importance to the claimant in establishing negligence as alleged. ....

6. The reason for not filing the statement or discovering this oversight before was due to inadvertence and lack of continuity in the conduct of this matter. The attorney that had the conduct of this matter before left the firm and I was not able to get an overview from anyone when I took over this matter."

The reason for now requesting permission to file a supplemental witness statement for the claimant was set out in paragraph 7 of the said affidavit which stated:

"7. The statement of the claimant filed in this matter concentrates primarily on the issue of liability and does not go into the details of her loss and damage suffered as a

result of her injury. Leave is being sought to file a supplemental statement to deal with this aspect of her claim.”

15. The SH affidavit was lacking in particulars and omitted many details which could assist the court in an explanation for the delay such as:

- How many pages and/or documents did Mr Hosein had to go through for him to describe the “paperwork” as voluminous?
- When was he “recently” preparing this matter and “checking on all that is to be done in preparation” did he discover the statement prepared for Dr Santana’s signature?
- Who had conduct of this matter at the firm previously on record ?
- When were the papers handed over to him by the previous firm on record?
- When did he realize that the 2 witness statements which he filed for the claimant on May 4, 2009 only dealt with the issue of liability and did “not go into details of her loss and damage suffered as a result of her injury”?

16. There have been several pronouncements in this jurisdiction on the change in the culture in which civil litigation is to be conducted since the introduction of the CPR in September 2005. Jamadar JA in **Trincan Oil Ltd v Keith Schnake**<sup>3</sup> at paragraph 38 had this to say:

“ The timelines in the CPR, 1998 are fair and are to be strictly complied with. The failure to do so without good reason and/or to act promptly to remedy any default can have serious consequences, especially at this time in Trinidad and Tobago when the civil litigation system is suffering the consequences of a *laissez-faire* approach to the conduct of civil litigation which is undermining public trust and confidence in the administration of justice”.

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<sup>3</sup> Civ Appeal 91 of 2009



**17.** A fundamental aspect of the culture change is the duty of attorneys in the conduct of their cases. In this regard in **Trincan Oil Ltd v Keith Schnake**<sup>4</sup> Jamadar JA stated the Court of Appeal's position as:

" The Court of Appeal has been consistent in stating that, except in exceptional circumstances, default by attorneys will not constitute a good explanation for non-compliance with the rules of court".

**18.** In the context of this case the reasons advanced by the claimant for the failure to file Dr Santana's witness statement and for the need to now file a supplemental witness statement of the claimant I do not consider to be a "good explanation" for the following reasons:

- The claimant's attorney came on record on March 25, 2009 more than 1 year before the instant application was filed and more than 1 year before his discovery in June 2010. This information which he seeks permission to file is not new. It was available to the claimant since he came on record.
- Given the present civil litigation culture, Mr Hosein ought to have thoroughly reviewed all the documents which had been passed over to him and or search the court file to be properly briefed in the matter. In particular, since he appeared in court at the CMC on at least 5 occasions if he had done so he would have realized that the witness statements of Dr Santana was not filed, at the hearing of the summons for directions the then attorney at law for the claimant indicated to Assistant Registrar Ramcharan that the claimant intended to call 3 witnesses at trial and that the claimant's 2 statements which he filed on May 4, 2009 had not addressed the loss or damage suffered by the claimant.

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<sup>4</sup> Civ Appeal No 91 of 2009

- At least 2 extensions of time were given, over a period of 15 months, for the claimant to file witness statements and he therefore had adequate time to do so.
- The claimant's attorney was present in court before Master Paray-Durity when all the orders/extensions of time were given to file witness statements and ought to have known the consequences for failing to do so.
- The attorney for the claimant had a duty to pay attention to the orders being made by Master Paray-Durity to check the order after delivery and to comply with its terms.

**Has there been general compliance with the rules practice directions, orders or directions?**

**19.** The attorney for the claimant submitted that the claimant has complied with all directions thus far. In response attorney for the defendant submitted that the claimant has not complied with the other directions given in this matter since the claimant obtained at least 3 extensions of time to file his witness statements and bundle of documents despite his failure to file any application for relief from sanctions.

**20.** In paragraph 8 of the affidavit of SH there is a sweeping statement that "The claimant has complied with all other directions given in this matter" is made. However there are no details of all the directions which the court has given in where there has been compliance. In this matter there have been at least 5 extensions of time granted by Master Paray-Durity for parties to file and serve bundles of documents and file and exchange witness statements. This has spanned over the period of several months. I do not consider this to be general compliance with the rules or orders of the court by the claimant.

## **CONCLUSION**

**21.** Applications for relief from sanctions ought not to be taken lightly by both attorneys and litigants. Part of changing the culture of how civil litigation is now conducted in this jurisdiction is attorneys are required to include adequate clear and cogent details in affidavits in support of such applications, which could persuade the court that the applicant has met the threshold test set out in Part 26.7 CPR. In the given circumstances, I find that the claimant has failed to meet the requirements set out in the threshold test under Part 26. 7 CPR. In this regard I make the following order:

- (a) The claimant's application for relief from sanctions filed July 6, 2010 is dismissed.
- (b) The claimant is to pay the defendant the costs of this application to be assessed.

Dated this 27 May 2011.

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