

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2009-01606

BETWEEN

**MITCH FRANCIS
AND
NATASHA FRANCIS**

Claimants

AND

**THE TRINIDAD AND TOBAGO
HOUSING DEVELOPMENT CORPORATION**

Defendant

Before: Master Margaret Y Mohammed

Appearances:

Ms Christlyn Moore for the Claimants

Mr Kerwyn Garcia instructed by Ms G Edwards for the Defendant.

DECISION

BACKGROUND

1. This is an application by the claimants for relief from sanction for failure to file and serve the list of documents, bundle of documents and file and exchange its witness statements on or before February 21, 2011. The application came up for hearing on April 12 2011 the date fixed for the assessment of damages to proceed. This assessment

was transferred to the Master by the Honourable Madame Justice Dean Armorer on July 22, 2010. The said judge had declared that the lease made between the claimants and the defendant on January 30, 2006 was determined and ordered damages for loss of bargain, mesne profits, aggravated and exemplary damages to be assessed. In support of the claimants' application were 2 affidavits of instructing attorney Joseph George filed on March 14, 2011 ("the JG 1 affidavit") and on April 20, 2011 ("the JG 2 affidavit"). In response the defendant filed an affidavit of Glenda Edwards ("the GE affidavit") on May 4, 2011.

ISSUE

2. The issue for me to determine is whether the claimants' application have met the requirements of rule 26.7 of the Civil Proceedings Rules, 1998 ("the CPR").

LAW AND ANALYSIS

3. It is undisputed that the express sanction prescribed by 29.13 CPR for the failure by a party to serve a witness statement within the time ordered by the court is that the witness may not be allowed to be called to give evidence at the assessment of damages. Further 28.13(a) CPR prescribes that the failure by a party to give disclosure by the date specified in the order is prevented from relying on or producing any document not so disclosed. As such any party who has failed to comply with such orders must seek permission of the court to obtain relief from the sanctions imposed by 28.13 and 29.13 CPR¹.
4. I am guided in my approach to this application by the well known case of **Trincan Oil Ltd v Chris Martin**² where Jamadar JA explained at paragraph 13

¹ See 26.6(2) CPR

² Civ Appeal 65 of 2009

“The 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 27.3 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 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.”

5. It was undisputed that the claimants met the requirements of 26.7(2) since JG1 affidavit and JG 2 affidavit were filed in support of the application. I will now examine the mandatory provisions of 26.7 (1) and (3).

Was the application made promptly?

6. The claimants’ attorney submitted that the date for filing the documents was February 21, 2011. Instructing attorney became aware that the deadline to file the documents had passed on March 14, 2011 and he filed the application on the same day³. Therefore the application was made promptly.
7. Attorney for the defendant disagreed with this position. Instead he referred to the test for promptitude as set out in paragraph 22 of **Trincan Oil Ltd v Keith Schnake**⁴ which states:

“Part 26.7 (1) is mandatory. It requires that an application for relief from any sanction imposed must be made promptly. Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced

³ Para 8 of the JG 2 affidavit

⁴ Civ Appeal 91 of 2009

by the context and fact. 'Prompt' must be considered in relation to the date when the sanction was imposed."

8. He submitted that in the context of this case, the claimants' attorney was aware of the directions given by Master Paray-Durity on November 8, 2010⁵ and the deadlines to be met.
9. He also submitted that the event which gave rise to the delay must be considered in relation to promptness. In the instant case the event was the misplacing of the file in January 2011⁶ when the attorney for the claimant ought to have known that he would not have met the deadlines and therefore should have filed an application for an extension of time before the sanction was imposed.
10. In this case the application was made some 21 days after the sanction was imposed and 3 months after the claimants' attorney was aware of the deadline. In considering the periods of delay which the courts have rejected, attorney for the defendant referred me to the following cases:
 - (a) **The Attorney General v Universal Projects Ltd** ⁷.The application for relief from sanction was filed 10 days after the deadline. The Court of Appeal ruled that this was not prompt since the attorney was aware of the deadline more than 1 month before;
 - (b) **Asha Charan v Omar Mohammed**⁸. The application for relief from sanction was filed 3 days after the deadline but the attorney was aware that the deadline would not have been met 6 days before the sanction was imposed;

⁵ Para 3 of JG 1 affidavit

⁶ Para 4 of the JG 1 affidavit

⁷ Civ Appeal No 104 of 2009

⁸ CV 2008-00683

- (c) **Suresh Churan v Shiv Durgasingh**⁹. The attorney was aware of the deadline to file the witness statement 2 months before the deadline but made the application was made 1 month after the deadline passed on the date of the trial;
- (d) **Ishmael v Partraj Parasram and anor.**¹⁰ The application for relief from sanction was made more than 1 month after the deadline to file witness statements without any explanation given;
- (e) **Trincan Oil Ltd v Keith Schnake**¹¹. The application for relief from sanction was filed 3 weeks after the sanction was imposed and which sanction the attorneys were aware of;
- (f) **Fortune v the Attorney General of Trinidad and Tobago**¹². The application for relief from sanction was filed 6 weeks after the deadline had passed and where the attorney was aware of the deadline 2 months before the sanction was imposed ;
- (g) **Bernard Mohamdally v Dr Godfrey Rajkumar and anor**¹³. The application for relief from sanction was filed more than 8 weeks after the sanction was imposed and 6 months after the attorneys were aware of the deadline to file the witness statements.

11. The approach by the courts is instructive to me. I agree with Boodoosingh J in **Jerry Hussain v Yara Trinidad Limited**¹⁴ when he commented :

“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.” (Emphasis mine).

⁹ CV 2009-01794

¹⁰ CV 2006-04031

¹¹ Civ Appeal 91 of 2009

¹² CV 2010-00054

¹³ CV 2006-02891

¹⁴ Procedural Appeal CA 235/2010 at page 3

12. It is undisputed from the evidence before me that the claimants' attorney was firstly aware of the deadline of February 12, 2011 some 3 months before when the order was made on November 8, 2010. It is also clear to me that the claimants' attorney knew in January 2011, some weeks before any sanction was imposed and when the file was misplaced that the deadlines may not be met, thus his degree of urgency in reconstructing the file, yet no application was made then for an extension of time. It took him some 14 days after the sanction was imposed to file the instant application. In the circumstances, I agree with the submission by attorney for the defendant that in the context of this case the application was not made promptly. This is fatal to the application

Was there a good explanation for the breach?

13. The attorney for the claimants submitted that there was good explanation for the breach. She submitted that the following reasons set out in the JG 1 affidavit and JG 2 affidavit for the failure to comply with the directions are:

- (a) The claimants' file was misplaced in January 21, 2011 during a change in secretarial staff, the only note of the orders made by the court on November 8, 2010 was in the file and therefore the claimants' attorney was unaware of the deadlines and directions¹⁵;
- (b) To date the claimant's attorney is yet to locate his file and on or about January 27, 2011¹⁶ he requested an office copy of the file from the High Court where he was told that there was a 3 week waiting period¹⁷ ;
- (c) On or about 17 February 2011 his clerk was informed by the office copies section that the copies were not ready¹⁸;

¹⁵ Para 4 of the JG 1 affidavit

¹⁶ Para 5 of the JG 2 affidavit

¹⁷ Para 4 of the JG 1 affidavit

¹⁸ Para 6 of the JG 2 affidavit

- (d) Upon discovering that the file went missing he informed the claimants of the need to reconstruct the file in particular in obtaining receipts to prove the special damages which were necessary for the assessment of damages¹⁹. This proved to be a lengthy and tedious process since the claimants reside in Princes Town would often travel to his office to bring the data²⁰ ;
- (e) Obtaining copies of various bills and receipts proved to be a protracted and long process²¹ ;
- (f) During that time he made attempts to communicate with Ms Edwards, attorney for the defendant to settle this matter but that was futile²²;
- (g) On March 14, 2011 his office telephoned the registry to ascertain the orders made at the last hearing where he was informed that the dates for filing witness statements had already passed;
- (h) To date he has not received a copy of the order made on November 8, 2010;
- (i) The amended order which was attached to the exhibit of the GE affidavit was received at the same date of the letter dated February 10, 2011.
- (j) The reasons submitted amounts to a good explanation for the delay and the failure to comply with the directions since there were exceptional circumstances.

14. In response, attorney for the defendant submitted that :

- (a) The reasons set out in the JG1 affidavit and JG 2 affidavit do not amount to a good explanation.
- (b) Even if the court finds that the application was made promptly, if the court finds that there is no good explanation, the application still cannot succeed. (**Tiger Tanks Trinidad Unlimited v Caribbean Dockyard and Engineering Services Ltd** ²³).

¹⁹ Para 4 of the JG 2 affidavit

²⁰ Para 4 of the JG 2 affidavit

²¹ Para 4 of the JG 2 affidavit

²² Para 7 of the JG 2 affidavit

²³ CV 2008-00675

- (c) The courts have found that when the failure was that of the attorney this is no longer a good excuse (**Elgeen Roberts-Mitchell v Lincoln Richardson**²⁴).
- (d) If the claimants' attorney had misplaced the file how was it possible for him to write a letter to instructing attorney for the defendant annexing a copy of the amended order of the Honourable Madame Justice Dean-Armorer²⁵.
- (e) The "heartstrung" appeal to the court cannot circumvent the mandatory requirements of 26.7 (**Bernard Mohamdally v Dr Godfrey Rajkumar and anor**²⁶ ; **Tiger Tanks Trinidad Unlimited v Caribbean Dockyard and Engineering Services Ltd**²⁷).
- (f) The courts have maintained a policy of strict compliance with the rules in order to establish an overall change in the existing culture of civil litigation (**Trincan Oil Ltd v Keith Schnake**²⁸ ; **Elgeen Roberts- Mitchell v Lincoln Richardson**²⁹).
- (g) To allow the instant application would go against the grain of the recent decisions on the approach taken by the court.

15. The new culture of civil litigation which the CPR was designed to usher in, bestowed duties and obligations on both attorneys and litigants. Jamadar JA in **Andrew Khanhai v Prison Officer Darryl Cyrus**³⁰ stated that "We agree however that "the CPR bring with them a new litigation culture-a paradigm shift in the administration of civil justice". Under the CPR, 1998 parties and their attorneys have a duty and responsibility to manage and monitor their matters. The CPR 1998 provides fair and reasonable time lines for the performance of events in civil litigation".

²⁴ CV 2009-00618 at para 24 (i)

²⁵ Exhibit to the GE affidavit

²⁶ CV 2006-02891 at para 2

²⁷ CV 2008-00675 at para 2.5

²⁸ Civ Appeal 91 of 2009 at para 56

²⁹ CV 2009-00618 at para 26

³⁰ Civ Appeal No 158 of 2009

16. The reason for having time lines which are fair but must be strictly complied with was again referred to by Jamadar JA in **Trincan Oil Ltd v Keith Schnake**³¹ where he stated “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”.
17. I believe that the learned judge was saying to both the attorneys and litigants that the new culture of civil litigation under the CPR demands both parties to be proactive in their approach once the civil justice system is engaged. To me a proactive approach is systematic and logical with an underlying degree of urgency to ensure that time lines are met.
18. In this regard, I accept that the system which the claimants’ attorneys operated with was not the best since there was no other place than the file (like a diary as suggested by attorney for the defendant) where court directions were recorded. I am also puzzled that the claimants’ attorney chose to embark on the more challenging steps of reconstituting the file, pursuing the request for office copies, attempting to contact Ms Edwards to settle the matter (all which are important) *but* not take the simple first step of telephoning the High Court Registry, or the judicial support officer assigned to the Master-Paray Durity, or the customer services desk situate on the ground floor at the Hall of Justice, Knox Street ,Port of Spain to obtain the information on the directions to be complied with.
19. In the circumstances, I am of the view that the explanation offered by the claimants does not amount to a good explanation.

³¹ Civ Appeal 91 of 2009

Was the failure to comply intentional?

20. The claimants attorney submitted that the claimants always intended to comply with the directions. The defendant attorney made no submissions on this. In **Trincan Oil Ltd v Keith Schnake** ³²Jamadar JA addressed the issue of intentionality in the judgment as follows:

“In my opinion, to 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 compliance. However, where as in this case, there is an explanation given for the failure to comply with a rule which, though it may not be a ‘good explanation’, if it is nevertheless as one that is consistent with an intention to appeal, then the requirements of Part 26.7(3)(a) will more than likely be satisfied.”

21. I therefore find that the failure to comply was not intentional.

Has the defendant generally complied with all other relevant rules, orders and practice directions?

22. The claimants’ attorney submitted that save and except for the failure to issue a pre-action protocol letter to the defendant before the commencement of the claim, the claimants have generally complied with the directions of the court. The claimant has notified the defendant 2 out of 3 times of the dates of hearing. Attorney for the defendant also did not make submissions on this issue. In the circumstances, I am of the view, that the claimants have been in general compliance with the orders, rules of court and practice directions.

³² Civ Appeal 91 of 2009 at para 41

CONCLUSION

23. The provisions of 26.7 (1), (2) and (3) are mandatory. If an application fails to meet any of the conditions then the application must fail. In this case, the claimants have failed to get past the mandatory requirements under 26.7(1) and (3). It is unfortunate that the consequences of the dismissal of this application is that the claimants would not be able to realize the fruits of their judgment but they must take some responsibility for failing to actively follow up this matter with their attorney to ensure that he complies with the orders of the court.

24. The results of an application for relief from sanctions often inevitably cause some degree of hardship on one of the parties in the matter. Jamadar JA in **the Attorney General of Trinidad and Tobago v Universal Projects Ltd** ³³ summed up the effect of dismissing such applications when he said “There will always be hard cases. Making exceptions in such cases often creates bad law”.

25. As such I make the following order:

- (a) The claimants’ application for relief from sanctions filed March 14, 2011 is dismissed.
- (b) The claimants are to pay the defendant’s costs of this application to be assessed.

Dated this 20 May, 2011.

Margaret Y Mohammed
Master of the High Court (Ag)

³³ Civ Appeal No 104 of 2009