THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2013-05192

In the matter of an Application by WARREN ELIAS pursuant to Part 68 of the Civil Proceedings Rules 1998 as amended for an order for possession of ALL AND SINGULAR that piece of land situate in the Ward of Siparia in the island of Trinidad comprising POINT FOUR TWO SIX EIGHT HECTARES be the same or more or less (being portion of the land described in the Schedule to Deed No: 2818 of 1998) and bounded on the North by Lot 4, on the South by Santa Cecelia Estate, on the East partly Lot 4 and partly by Plot B and partly by Plot C and on the West by a Road Reserve 7.95 metres wide and partly by Santa Cecilia Estate and which said parcel of land is delineated and shown coloured pink as Plot No.5 on the General Plan marked "X" and annexed to Deed registered as 927 of 1991 and to Deed registered as No. 1609 of 1992.

BETWEEN

WARREN ELIAS

Through his lawful attorney Gordon Sarwan
Pursuant to Power of Attorney dated 22nd February, 2013
And registered as DE201300423863

Claimant/Applicant

AND

DEONARINE MAHABIR

Defendant/Respondent

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:
Ms. Rekha P. Ramjit instructed by Ms Gina N. Ramjohn for the Claimant
Ms Michelle T. Ramnarine for the Defendant

DECISION ON CLAIMANT'S APPLICATION TO STRIKE OUT

I. Background:

[1] This matter concerns the disputed ownership of a parcel of land in Siparia and the property thereon (collectively the "Subject Property"). The Claimant's case is that he became the sole owner of the Subject Property in 2011, by virtue of the rule of survivorship as a result of his father-in-law's death, with whom he shared a joint tenancy. The Defendant, who is in current occupation of the Subject Property along with his four brothers, professes his joint- ownership by virtue of a Deed of Gift from the Claimant's father-in-law. It is therefore the Defendant's case that the joint tenancy was severed prior to the Claimant's father-in-law's death.

[2] Proceedings were instituted by way of a Fixed Date Claim Form filed on the 20th December, 2013, where the Claimant sought an order for possession of the Subject Property and, inter alia, an injunction restraining the Defendant from entering or remaining on same. In support, the Claimant filed the affidavit of Mr Gordon Sarwan, the Claimant's attorney, pursuant to **Part 68 of the CPR** (the "Claim"). Attached to this affidavit was a **Form 5 Defence Form**. The Defendant proceeded to respond to the Claim by filing a Defence and Counterclaim in accordance with the Form 5 Defence Form, seeking an order that the Defendant jointly owns the Subject Property along with his four brothers.

[3] On the return date of the Claim, the Defendant applied to have the Claim struck out on several grounds, most importantly, that the Claimant failed to disclose a cause of action for the Claim. The Defendant's reasoning was that the Claimant failed to provide any evidence to support its contention that he became the sole owner of the property. The Claimant, in the alternative, sought to raise a preliminary point, being that the Defence and Counterclaim should be struck out as it was procedurally incorrect for the Defendant to file a pleading in response to an affidavit. The Court considered both submissions and directed that it would first deal with the Defendant's application to strike out the claim and in the interim, ordered that a stay be put on all directions concerning the Defence and Counterclaim.

[4] The Claim was eventually struck out on the 28th January, 2015, on the ground that it disclosed no cause of action. The stay on all directions regarding the Defence and Counterclaim was continued.

[5] At the following Case Management Conference, the parties wished to further the settlement negotiations and as a result, the Court ordered the parties to commission a valuation of the Subject Property. However, the parties were unable to agree on a suitable valuer and invited the commissioning of a Court-appointed valuer. The Court obliged and upon appointing a valuer, ordered that the parties bear the expense of the valuation report equally.

[6] At the following CMC on the 26th October, 2015, it was brought to the Court's attention that the Claimant had not yet paid his share of the fees for the valuation report. As a result, on the 11th December, 2015, the Court gave an 'unless order' mandating that the Claimant comply with the Court's previous Orders for payment of fees and costs, and in default, the Claimant would be debarred from defending the Counterclaim.

[7] At this hearing of the 11th, the Claimant also reminded the Court of its desire to apply to have the Defence and Counterclaim struck out and noted that no direction was given by the Court for the filing of a Defence to the Counterclaim. He conceded that, while the Defendant was wrong to file a Defence to the Part 68 Claim, there was nothing preventing him from filing a Counterclaim. In response, counsel for the Defendant submitted that, based on the Claimant's argument—that he takes issue with the filing of the defence only, it would not be sensible for her to have to withdraw the Defence and Counterclaim, only to have to file a new claim, with the same information, afresh.

The Court then intervened to ask why, considering that it is agreed that the Counterclaim now stands as the only claim in the matter, the Claimant has failed to file a Defence to the Counterclaim. In response, counsel for the Claimant stated that his omission to do so was because the Court had stayed all directions on the Counterclaim and therefore, time could not have begun to run for filing of same.

With respect to the Claimant's submissions, the Court made the following comments:

i. That it was agreed by both parties that, as the Part 68 claim had been struck out, the Counterclaim stood as the only active claim in the matter. Accordingly, all efforts at settlement and for the commissioning of the valuer logically, were in relation to the Counterclaim. It therefore follows that, the Claimant should have either applied to have the Counterclaim struck out prior to engaging in the settlement process or in the alternative, filed its Defence to the Counterclaim;

ii. That it was still unclear as to what was the appropriate procedure for the Defendant in defending a Part 68 claim;

iii. That in any event, it was the Court's opinion that having been served with a Form 5 Defence Form annexed to the Part 68 Claim, it was reasonable for the Defendant to file a Defence and Counterclaim in response;

iv. That it would not be in the interests of justice and expediency to order the Defendant to withdraw the Defence and Counterclaim on such a procedural ground, only to have to file the same claim afresh.

[8] Nevertheless, at the termination of this hearing, the Court informed Counsel for the Claimant that it may file its application to have the Defence and Counterclaim struck out.

[9] The Claimant eventually settled all his outstanding costs thereby lifting the 'unless order' and thereafter, proceeded to file his application to strike out the Defence and Counterclaim on the 29th February, 2016 (the "Claimant's Application").

[10] Incidentally, the Defendant, on the said 29th February, 2016, filed a Notice of Application (the "Defendant's Application") seeking default judgment for the Claimant's failure to file and serve a Defence to the Defendant's Counterclaim.

[11] On the 4th March, 2016, the Court ordered that the parties file and exchange their affidavits and submissions with respect to the Claimant's and Defendant's Applications. The Court must therefore rule on the both Applications. However, it is both prudent and logically practical that the Claimant's application to strike out the Defendant's Counterclaim (with the alternative relief for an extension of time to file a Defence to the

Counterclaim) be dealt with first before considering the Defendant's application for judgment in default on the basis that if the Claimant is successful then the Defendant's application would become otiose.

II. Issues in relation to the Claimant's Application to strike out

[14] The Claimant sought two reliefs from the Court in its Application, which fall for determination:

a. Whether the Defence and Counterclaim should be struck out?

b. If not, whether the Claimant should be granted an extension of time to file its Defence to the Counterclaim?

III. Law & Analysis:

[15] Counsel for the Claimant made two essential submissions in support of his application to strike out the Defence and Counterclaim:

a. That it was absurd and contrary to any rule of law for the Defendant to file a pleading in response to an affidavit; and

b. That when the Claimant's objection was first raised, the Court stayed all directions with respect to the Defence and Counterclaim and accordingly, the Claimant has not consented, accepted or adopted the use of the said Defence and Counterclaim in these proceedings.

[16] The Claimant's Application was made pursuant to **Part 26.2 of the CPR**, on the ground of what he perceived to be a procedural error in the filing of a Defence and Counterclaim in response to an affidavit.

[17] **Part 26.2** states that a Court ***may*** strike out pleadings if there is *"...a failure to comply with a rule, practice direction or with any order or direction given by the court in the proceedings."*[1] In exercising its discretion, the Court is required to consider the

[1] Part 26.2(1)(a) of the CPR

overriding objective and any other relevant rules of procedure. In this case, a relevant rule is contained at **Part 26.8**, which allows the Court to rectify procedural errors made by the litigants.

[18] Part 26.8 applies to circumstances where *"…the consequence of a failure to comply with a rule, practice direction or court order* ***has not been specified by any rule, practice direction or court order****."*

Part 26.8 (2) & (3) state:

> *"An error of procedure or failure to comply with a rule, practice direction or court order* ***does not invalidate any step taken in the proceedings, unless the court so orders****.*
>
> *Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction,* ***the court may make an order to put matters right.****"*

[19] Accordingly, to activate **Part 26.8,** two elements must be present, namely (i) that there has been an error of procedure and (ii) that the consequence of that error has not been specified by any rule, practice direction or court order.

The Procedural Error:

[20] The Claim was made pursuant to **Part 68 of the CPR,** which requires that the action be brought by way of Fixed Date Claim Form supported by evidence[2]. Evidence in support of a Part 68 Claim is required to be by affidavit (**Part 11.8 CPR**). However, neither under Part 68 nor anywhere else in the CPR does it specify how a defendant must respond to a Part 68 claim save to say that Part 68.7(1) provides that *"At the first hearing the general rule is that the court must give judgment unless there is a defendant who attends and satisfies the court that he has a* ***defence*** *with a realistic prospect of success"*. On the other hand, under **Part 8.15 CPR**, it is expressly stated that Defence Forms are only to be annexed to a claim that is brought by way of **a Claim Form and Statement of Case**.

[2] Part 68.2(1) and Part 68.3 CPR 1998

Therefore, the only procedural error in this proceedings was on the part of the Claimant when he chose to incorrectly annex the **Defence Form 5** to his **Part 68 Claim**.

[21] The Court also noted **Part 10.2**, which is a general provision and states ***"a defendant who wishes to defend all or part of a claim must file a defence."*** The affidavit filed by the Claimant was submitted as part of the initiating claim and not separately as stand-alone evidence. Therefore, the Part 68 Claim in the instant proceedings is caught by the general provision in **Part 10.2(1) of the CPR**.

[22] In essence, the CPR makes no provision for defending a claim other than by way of a Defence and therefore, it cannot be said that the Defendant committed a procedural error by responding to a Part 68 Claim with a Defence and Counterclaim.

The Overriding Objective:

[23] Further, the Court must, at all times in exercising its discretion, be guided by the overriding objective. In this light, Defence counsel's submissions are persuasive, particularly, its reliance on the case of **Vitco TT Ltd v Motilal Ramhit & Sons Construction Company**[3].

[24] In **Vitco TT Ltd**, the claimant therein, in response to a Defence and Counterclaim, filed a document which he entitled a Reply, instead of properly labelling it a "Defence to Counterclaim". Despite the misnomer, the Reply responded to each allegation of fact in the Defence and Counterclaim. However, the Defendant proceeded to apply for judgment in default of a Defence to its Counterclaim and accordingly, the Court had to decide whether the incorrect reference of the document as a Reply was sufficient to grant the Defendant's application for default judgment.

[25] In dismissing the application for default judgment, Justice Kokaram viewed that the defendant was attempting to prey upon a minor deficiency in the claimant's pleading that could easily be corrected by consent. Further, in the absence of consent, he was of the view that the court was entitled to treat the Reply as a Defence to the Counterclaim, in

[3] CV2011-03758.

accordance with the overriding objective[4]. Justice Kokaram also relied on the Court of Appeal decision in **Real Time Systems Limited[5]**, where it was stated that under the new rules, the case management system is designed to give the Court wide powers to manage the case and further the overriding objective. These powers include identifying issues and determining whether they should be heard and how. Accordingly, the court is entitled to take the necessary steps or give the appropriate direction to manage the case and further the overriding objective. In applying this learning, Justice Kokaram found that, on balancing proceduralism with substantive justice, it would be disproportionate to grant default judgment in such a case especially when there would be no prejudice, surprise or disadvantage to the defendant in preparing for the trial. Such reasoning seems logical to this Court.

[26] In similar fashion, the Claimant is submitting that the Defendant's response to the Part 68 Claim was incorrectly filed as a Defence and not, as it should have been, in the form of an affidavit in response. Considering (i) that the Defence and Counterclaim dealt with every fact set out in the Claim; and (ii) that refusing the application to strike out the Defence and Counterclaim would afford no disadvantage or prejudice to the Claimant, applying the overriding objective would suggest that the Defence and Counterclaim be treated as the appropriate response to the Part 68 claim.

[27] In any event, as the Part 68 claim was eventually struck out prior to the Claimant's Application, the parties agreed, in their oral submissions, that the Defence has become redundant as it no longer serves as a response to any claim. The result is, as correctly submitted by the Defendant, that the Counterclaim remains the only claim in the matter and accordingly, the duty shifts to the Claimant to further the proceedings by responding with a Defence. The law on this point is crystal clear and expressed as such in **Part 18.6 of the CPR**, which states:

a. "The defendant may continue a counterclaim even if—

[4] Paragraph 3 of the judgment.
[5] Civ App No. 238 of 2011.

i. *The court gives judgment on the claim for the claimant and does not dismiss the counterclaim; or*

ii. ***The claim is stayed, discontinued or dismissed****."*

[28] The independence of the Counterclaim from the claim is further evidenced by the learning from the text **Civil Procedure**[6], which states:

> *"A counterclaim is independent of the main claim…a counterclaim can be wholly separate from the claim…It goes without saying that the claimant needs to serve a defence to the counterclaim if he wishes to contest it. Failure to respond to a counterclaim would entitle the defendant to apply for default judgement against the claimant in respect of the counterclaim."*

[29] Based on the above, the Court finds that (i) there is no rule suggesting that there was a procedural error in the filing of the Defence and Counterclaim in response to the Part 68 Claim; and (ii) considering that the Part 68 claim was dismissed coupled with the fact that there was no Court Order striking out the Defence and Counterclaim, the Defendant was entitled to continue with the Counterclaim.

Accordingly, the Claimant's application to have the Defence and Counterclaim struck out is hereby dismissed.

[30] Considering that the Counterclaim was filed since the 7th February, 2014, there can be no dispute that the 28 day period for the Claimant to file its Defence has elapsed. As a result, the Claimant has sought, as an alternative remedy, that he be granted an extension of time to file his Defence to the Counterclaim.

Extension of time:

[31] Our Court of Appeal has expressed its views as to the appropriate approach to be taken by the trial judge when an application is made for an extension of time. In **Rowley v Ramlogan**[7], Madam Justice Rajnauth-Lee J.A. agreed that the trial judge's approach in applications to extend time should not be restrictive and that the judge should take into

[6] Adrian AS Zuckerman, Paras 3.36- 3.38.
[7] Civil Appeal No. P215 of 2014

account: (i) the factors contained in **Part 26.7** without the mandatory requirements; (ii) the overriding objective; and (iii) the question of prejudice. The learned Judge noted, however, that these factors are not to be *"…regarded as hurdles to be cleared…"* but rather *"…factors to be borne in mind by the trial judge…"* in exercising his discretion with respect to the application for an extension.[8]

[32] The following therefore, are the relevant factors applicable to an application for extension of time without the threshold restrictions:

a. whether the application was made promptly;

b. Whether the failure to comply was not intentional;

c. whether there is a good explanation for the application;

d. Whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions;

e. The interests of the administration of justice;

f. Whether the failure to comply was due to the party or his attorney;

g. Whether the failure to comply has been or can be remedied within a reasonable time; and

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

[33] The **Overriding Objective** contained in **Rule 1.1**, which enables the Court to deal with cases justly, includes:

a. Ensuring, as far as is practicable, that the parties are on equal footing;

b. Saving expenses;

c. Dealing with the case in ways that are proportionate to—

i. The amount of money involved;

[8] Page 13 of Rowley v Ramlogan supra.

ii. The importance of the case;

iii. The complexity of issues; and

iv. The financial position of each party; and

d. Ensuring that it is dealt with expeditiously; and

e. Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Was the application for an extension of time filed promptly?

[34] The Claimant, in his submissions, failed to provide any reason as to why this Court should consider that its application for an extension of time, made almost two years after the time had expired for him to file his Defence to the Counterclaim, was made promptly. Further, while there is no sanction imposed by the Rules for not filing a defence in the allotted time, Mendonca J.A. viewed that this does not mean the Court should engage in a 'rubber stamping' exercise when granting extensions. He stated:

> *"…the hearing of the application for an extension of time is not a rubber stamping exercise. It must not be taken for granted that such an application…is one the court must or would ordinarily grant*".

He later continued:

> "*…the old lax culture is not to be tolerated and while that does not mean zero tolerance, the intention of the CPR is to create a culture of compliance. There is therefore a need for compliance with the rules and this applies as much to rules where a sanction is imposed as to other rules where there is none.*[9]*"*

[35] In the case of **Roland James v the A.G.**[10], an application for extension was deemed to be made promptly when it was filed *"…six days after the matter was assigned…"* to the attorney and *"…seventeen days after the time for delivery of the Defence had expired.*"[11]

[9] At paragraph 27 of Roland James v the A.G.
[10] Civil Appeal No. 44 of 2014.
[11] At paragraph 32.

However, on any calculation, it cannot be reasonably advanced that this application was made promptly in the context of this case.

Was the failure to file the Defence to the Counterclaim on time, intentional?

[36] Counsel for the Defendant submitted that the Claimant's failure to file the Defence to the Counterclaim on time was intentional considering (i) the ample time he had at his disposal to do so; and (ii) the fact that he did not need a court direction. However, the learning suggests that this submission does not meet the requirements to show intentionality.

[37] In assessing whether the failure to comply with the rule was intentional, our Court of Appeal in **Trincan Oil Limited** v **Keith Schnake**[12] stated that intentionality, for the purpose of Part 26.7(3) of the CPR, requires that there be *"...**a deliberate positive intention not to comply with a rule.** This intention can be inferred from the circumstances surrounding the non-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 one that is consistent with an intention to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied."*

[38] In **Trincan Oil**[13] *supra*, the Panel determined that, despite the fact that the reasoning for the delay—being that senior counsel's several attempts to get a proper note on the law were unsuccessful—may not amount to a good explanation, the party always had the intention of filing an appeal.

[39] In the instant case, there is no evidence of a positive and deliberate intention not to file the Defence to the Counterclaim. The Claimant's non-compliance with the Rules resulted from his misunderstanding of the stay placed on all directions relating to the Counterclaim. This, in this Court's opinion, does not evidence intentionality.

Has the Claimant advanced a good explanation?

[40] The reason advanced by the Claimant was that he interpreted the Court's decision to stay all directions regarding the Counterclaim to mean that time had not begun to run for the

[12] Civ Appeal No. 91 of 2009, Kangaloo, Jamadar & Bereaux J.A.
[13] At paragraph 42.

filing of a Defence to same. However, it must be noted that on the CMC of the 11th December, 2015, the Court duly explained that the stay of directions was given to facilitate settlement negotiations, which, when considering that the Part 68 Claim was struck out, could only relate to the Counterclaim. Logically, it therefore followed that the Counterclaim remained as the only active claim in these proceedings. Accordingly, it was at all times open to the Claimant to file its Defence to the Counterclaim. Having had his misconception clarified at this point, the Claimant's explanation for its persistence in omitting to file a Defence to the Counterclaim is without merit.

Such a conclusion is supported by the Court of Appeal in **Trincan Oil**, which stated that *"…except in exceptional circumstances,* ***default by attorneys will not constitute a good explanation for noncompliance with the rules of court****."*

Has the Claimant complied at all times with all of the Court's orders?

[41] At the CMC on the 29th June, 2015, the Court ordered that both parties bear the costs of the valuation report equally. However, on the 26th October, 2015, it was brought to the Court's attention that the Claimant **had not paid its part of the valuation fees**. The Court, in addition to mandating the Claimant's compliance with its earlier Order, further ordered that the Claimant pay the costs of the CMC. On the 11th December, 2015, it was again brought to the Court's attention that **the Claimant failed to comply with either of the Court's previous Orders.**

Therefore, on two separate occasions, the Claimant had failed to comply with the Court's Orders.

Has the Claimant shown that the failure can be remedied in a reasonable time?

[42] A trial date has not yet been fixed in this matter and therefore, if the extension is granted, the matter can proceed to a PTR and the fixing of a trial date. However, the Claimant has not indicated whether it has yet drafted the Defence to the Counterclaim nor has it attached one to its application to show that his non-compliance can be remedied within a reasonable time frame.

The Justice of the matter lies in favour of the application being granted:

[43] Should the extension be refused, the Court may be required to spend further resources and time in assessing an application for relief from sanctions that would likely follow. If that application also fails, the Claimant would be unable to defend the Counterclaim and therefore, would be restrained from entering the property. Alternatively, if the extension is granted, the matter can eventually proceed to trial. Considering the Court's time and resources that have already been spent in dealing with this application, it would be in the interests of justice and saving costs for the extension to be granted.

Conclusion:

[44] Accordingly, in analysing the **Part 26.7** factors above, the Court notes the following material considerations that favour the granting of the extension:

a. The failure to file a Defence to the Counterclaim on time was not intentional;

b. No trial date has been fixed and therefore, the matter can proceed to trial if granted;

c. The prejudice to be suffered by refusing the application outweighs any prejudice to be occasioned by granting the application;

d. The justice of the matter favours the granting of the application.

[45] In opposition, the following material considerations favour the refusal of the application:

a. The application was not filed promptly;

b. The failure to file the Defence to the Counterclaim was not the fault of the Claimant but rather, his attorney;

c. The Claimant failed to provide a good explanation for its inability to file the Defence to the Counterclaim on time;

d. The non-compliance has adversely affected the expeditiousness of the matter;

e. There is no evidence that the Defence was drafted to show that the non-compliance can be remedied within a reasonable time;

f. The Claimant has, on two occasions, failed to comply with the Court's Orders.

[46] The Court, in conducting its balancing exercise, notes that the majority of the Part 26.7 factors favours the refusal of the extension. However, and most notably, the questions of prejudice and the overriding objective suggest that it is more justiciable to allow the extension for the Claimant to defend the Counterclaim. The Court proposes to do so.

[47] Having regard to the order the Court proposes to make, the Defendant's Application for default judgment has become otiose and therefore not required to be considered.

IV. Disposition:

[49] In light of the foregoing analyses and findings, the order of the Court is as follows:

ORDER:

i. The Claimant's Notice of Application to strike out the Defence and Counterclaim filed on 29 February 2016 be and is hereby dismissed.

ii. Costs of this application to be paid by the Claimant to the Defendant to be assessed in accordance with Part 67.11 CPR 1998, in default of agreement.

iii. The time for the Claimant to file and serve a Defence to the Defendant's Counterclaim be and is hereby extended to the 28 January 2020.

iv. The Defendant's Notice of Application for default judgment filed on 29 February 2016 for failure to file and serve a Defence to the Defendant's Counterclaim be and is hereby dismissed.

v. There be no order as to costs on the Defendant's Notice of Application.

vi. A CMC in relation to the Defendant's Counterclaim is fixed for Friday 20th March, 2020 at 9:30 am in Courtroom SF 09.

Robin N Mohammed
Judge