REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-04731

BETWEEN

KRISENDAYE BALGOBIN
RAMPERSAD BALGOBIN

Claimants

AND

PINKEY ALGOO

First Defendant

ROOCHAN ALGOO

Second Defendant

RAJDAI ALGOO

Third Defendant

MEERA ALGOO

Fourth Defendant

AND

PINKEY ALGOO
(as Administratrix ad litem in the Estate of Seelochan Charitar)

Sixth Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Wednesday 12th December, 2018

Appearances:

Mr Saddam Hosein instructed by Mr Nazrudeen Pragg for the Claimants
Mr Gregory Delzin and Ms Tamara Sylvester instructed by Ms Dianne Mano for the Defendants

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DECISION ON THE APPLICATION FOR RELIEF FROM SANCTION

I. **Background:**

[1] On the 19th December, 2017 I gave a decision in this matter with respect to the Defendant's Application of the **7th July, 2015**, which sought judgment against the Claimants for their failure to file a Defence to the Re-Amended Counterclaim within 28 days or by the **12th June, 2015** as prescribed by **Part 18.12 of the CPR 1998**. While the Claimants had put in an application for an extension of time to file their Defence, such application, filed on the 28th September, 2015 was alleged to have occurred after the immediate sanction imposed by **Part 18.12(2) (a) of the CPR**, and thus, under a literal application of the Rule, would be deemed ineffectual.

[2] However, in that judgement, I cross-referenced the Rule in **Part 18.12 of the CPR** with the identical provisions in other jurisdictions, in particular, England, from which our Rules of Procedure are derived, and was of the opinion that there had been a misapplication in our drafting of the identical provision contained at **Part 20 of the UKCPR**. Such misapplication resulted in a sanction that was draconian and disproportionate and therefore, contrary to the principles of the **Overriding Objective**.

[3] The reasoning for these findings were clearly set out in my Judgment, however, suffice it to say that, had I applied the provisions in **Part 18.12(2) of the CPR** strictly, the Claimants would have been precluded from having their full case heard in circumstances when the Claimants had been found, by virtue of the court-appointed survey report, to be the true owners of the disputed lands. Not only that, but by virtue of the sanction in **Part 18.12 (2)**, the proceedings would have concluded in perpetuity and the Claimant's Claim would have been dismissed.

[4] In those circumstances, I thought it prudent to afford the Claimants another opportunity to get their Defence in by allowing them to include in their application for an extension of time, the instant **Application for Relief from Sanctions for their failure to file their Defence to the Re-Amended Counterclaim on time (the Application)**. Thus, on even date, I gave the following Order:

1) ***That permission be granted for the Claimants to amend their Application for an extension of time to file their Defence to the Re-Amended Counterclaim to***

include an Application for Relief from Sanctions pursuant to Part 26.7 of the CPR 1998 and the Practice Direction on late filing of documents dated the 25th February, 2013.

2) Such amended application to be filed and served on or before the 31st January, 2018.

3) …

4) …

5) *That costs be reserved pending the hearing of the Claimant's Application for relief from sanctions*.

[5] The Claimants filed their Application on the 31st January, 2018. It was supported by two affidavits— one from Mr Anand Seepersad and the other from Mr Nazrudeen Pragg. Mr Seepersad deposed that the failure to file the Defence to the Re-Amended Counterclaim was not intentional because he believed there had been a stay with regards to its filing pending the outcome of the surveyor's report.

[6] Mr Pragg's affidavit was more substantial as he contended that the Application was (i) filed promptly and in any event within the time prescribed by the Court Order of the 19th December, 2017; and (ii) was in the interests of the administration of justice because to dismiss the Application would contravene the principles of the Overriding Objective as it would bring the matter to a premature and perpetual end and therefore, not put the parties on equal footing.

[7] The parties gave oral submissions on the 21st February, 2018.

II. Law & Analysis:

[8] Applications for Relief from Sanctions are governed by **Part 26.7 of the CPR**. Numerous judgments have been written on the requirements under this Rule and I see no need to set out its provisions in full. In any event, the learning on such applications was succinctly

stated by Jamadar JA in the Court of Appeal decision of **Trincan Oil Limited and Ors** v **Chris Martin**[1]**.**

> ***"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 26.7 (3) prescribed the three conditions precedent that must be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise this 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."***

[9] Further, **Rule 1.1** states that the overriding objective of the **CPR** is to enable the courts to deal with cases justly. Dealing justly with the case includes:

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

b. *Saving expense;*

c. *Dealing with cases in ways which are proportionate to—*

   i. *the amount of money involved;*

   ii. *the importance of the case;*

   iii. *the complexity of the issues; and*

   iv. *the financial position of each party;*

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."*

[1] Civ App No 65 of 2009 at para 13.

Accordingly, this Court must first consider whether the mandatory threshold requirements of (i) **promptitude**; (ii) **intentionality**; (iii) **a good explanation** and (iv) **compliance with other rules** have been met in accordance with **Parts 26.7 (1) & (3) of the CPR**.

The Claimants must satisfy the Court that each of these requirements has been met or else the Application will fail. If they so satisfy, then the Court can proceed to consider the other, non-mandatory factors, provided for by **Part 26.7 (4).**

Promptitude:

[10] In **Rowley** v **Ramlogan C.A.CIV.P.215/2014**, Justice Rajnauth-Lee J.A. said:

> *"Where an application for an extension of time is made **before the sanction takes effect, it should be regarded generally as a prompt application**. I am mindful however that there may be circumstances where the applicant, knowing full well that the order of the court cannot be complied with, may yet delay the making of the application. **In that event, it would be for the trial judge to consider how such a delay would impact on the exercise of the court's discretion**."*

[11] In the instant case, the Order permitting the Claimants to file the Application was made on the 19th December, 2017 and specifically gave them until the 31st January, 2018 as a deadline. The Application was filed within the deadline and thus, is considered prompt.

Intentionality:

[12] In assessing whether the failure to comply with the rule was intentional, our Court of Appeal in **Trincan Oil Limited** v **Keith Schnake**[2] 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***

[2] Civ Appeal No. 91 of 2009, Kangaloo, Jamadar & Bereaux J.J.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."

In **Trincan Oil**[3] *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.

[13] Counsel for the Defendants submitted orally that the Claimants' mistaken belief that there was a stay on the requirement to file their Defence to the Re-Amended Counterclaim was based on a misunderstanding of the law and was evidence that their non-compliance was intentional. However, as stated in the learning above, while such reasoning for the non-compliance advanced by the Claimants may not be persuasive and/or, as submitted by the Defendants' counsel, be premised on a faulty understanding of the rules, it does not necessarily evince a lack of intention to defend the Counterclaim.

Rather, the question is whether the Claimants' explanation is one that is consistent with an intention to defend the Counterclaim. In my opinion it is. Just as occurred in **Trincan Oil** *supra*, where the explanation, though not good, nevertheless indicated an intention to comply with the Rule, I similarly find that though premised on a mistaken belief, the Claimants' explanation shows that they have always intended to defend the Counterclaim. Such a finding is supported by the fact that both survey reports show that the disputed land is in fact theirs. Thus, it defies all logic for the Claimants, equipped with such information, which is certainly beneficial to their Claim to the disputed lands, would intend to let their Claim fail for want of a Defence.

Good Explanation:

[14] As stated by the Court of Appeal in **Trincan Oil**, *supra "...except in exceptional circumstances,* ***default by attorneys will not constitute a good explanation for non-compliance with the rules of court****."*

[3] At paragraph 42.

[15] In **Roland James v The Attorney General Civ App No. 44 of 2014**, the explanation given was that there was *"administrative bungling."* Mendonca J.A. agreed with the trial judge that, without more of an explanation for the cause of the administrative delay itself, *"it is difficult to conclude that the explanation advanced was a good explanation."*

[16] The reasoning for the non-compliance in this case is stated above—i.e. that the Claimants were under the assumption that all directions in the matter were stayed pending the outcome of the court appointed surveyor.

Counsel for the Defendants relied primarily on the fact that the original application for an extension of time was not filed until the 28th September, 2015, over two months after the Defendants applied for judgment under **Part 18.12 (2) (a) of the CPR 1998** on the **7th July, 2015**. She submitted that there was no good explanation for this extended delay.

In assessing the fulfilment of this requirement, the following facts become relevant:

The Claimants, upon the Defendants' encroachment on the disputed lands, commissioned a survey which revealed that the disputed land was in fact part of the Claimants' land. On the **16th April, 2015** however, this Court by Court Order, gave leave to the **first four Defendants only** to amend their Defence and Counterclaim. In response, **all six Defendants filed a Re-Amended Defence and Counterclaim on the 15th May, 2015**, which contended that even if the findings of the survey were correct, it would be immaterial as the Defendants had already acquired possession of the disputed land adverse to the Claimants based on 16 years of continuous and exclusive occupation prior. Thus, it meant that the Claimants' Defence to the Re-Amended Defence and Counterclaim would have become due by the 13th June, 2015.

However, in my **Judgment of the 19th December, 2017**, I had found at para 37, that because the Re-Amended Defence and Counterclaim was brought by all 6 Defendants in contravention of the Court Order of the 16th April, 2015, it meant that the Defendants' Re-Amended Defence and Counterclaim would not have been deemed properly filed until the **7th July, 2015,** when this Court removed the 5th Defendant from these proceedings. In those circumstances, the 28 'clear days' time period would have only begun to run from this date. By my calculations, considering that time does not run during the long

Court vacation from the 1st **August, 2015 to the 15th September, 2015**, the time period for filing the Defence would not have expired until the **22nd September, 2015**. This means that the Claimants' application for an extension of time filed on the **28th September, 2015** would have been about 5 days out of time.

Compliance with other Rules:

[17] Aside from the non-compliance with respect to the filing of the Defence to the Counterclaim, there are no other instances of non-compliance on the part of the Claimants.

Other considerations in Part 26.7 (4) of the CPR 1998:

[18] The non-compliance of the Claimants will not affect the trial date in this matter as no trial date has yet been set. Further, considering that a draft of the Defence to the Re-Amended Counterclaim has been filed with the Application, the Claimants non-compliance would be immediately remedied upon granting of the Application. However, it is noted that the non-compliance was due solely to the attorneys' oversight and no blame can be placed on the client. Nevertheless, and most importantly, given my rationale in the **Judgment of the 19th December, 2017** and as summarised above, it is in the interests of the administration of justice to have the Application granted. This is especially so considering that the survey report indicates that the disputed lands are the Claimants' lands and thus, it would be unfair for the Claimants case to fail on account of a mere procedural misstep.

III. Disposition:

[19] Accordingly, in light of the foregoing analyses, the Court Orders as follows:

ORDER:

1. **That the Defendants' Notice of Application filed on the 7th April, 2015 be and is hereby dismissed.**
2. **That the time for the Claimants to file a Defence to the Re-Amended Defence and Counterclaim be extended to the 21st December, 2018;**

3. **That the Claimants be relieved from the sanction imposed in Part 18.12 (2) of the CPR for failing to file their Defence to the Re-Amended Counterclaim within the prescribed period.**

4. **Costs occasioned by the Defendants' Notice of Application filed on the 7th April, 2015 and the Claimants' Notice of Application filed on the 31st January, 2018 are hereby reserved, to be dealt with at the case management conference.**

5. **The case management conference is fixed for the 31st January, 2019 at 9:45am in POS 20.**

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Robin N. Mohammed
Judge