REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

Claim No. CV2015 – 00124

BETWEEN

VENTEC LIMITED

Claimant

AND

THE TRINIDAD AND TOBAGO SOLID WASTE MANAGEMENT COMPANY LIMITED (SWMCOL)

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Shastri V.C. Parsad instructed by Ms. Laloo for the Claimant

Mr. Christopher Sieuchand instructed by Ms. Sashi Indarsingh for the Defendant

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DECISION ON APPLICATION

FOR EXTENSION OF TIME TO FILE DEFENCE

I. Introduction

[1] This decision is in respect of an application filed by the Defendant on 22 June 2015 for a second extension of time to file its defence. The Claimant is opposed to the grant of that extension of time.

[2] The substantive claim in this matter, concerns money alleged to be due and owing for work done by the Claimant for the Defendant pursuant to an alleged agreement made in the year 2009. The Claim Form together with a Statement of Case was filed on 14 January 2015, wherein the Claimant claimed:

(a) The sum of $454,990.25 plus VAT being in the difference of $275.00 per hour ($600.00 minus $325.00) being an agreed retroactive payment for work done;

(b) The sum of $2,400,000.00 for work done as agreed under agreement(s) between the parties made partly oral, partly in writing and partly by conduct as pleaded in 2009 and December 2010 for works and services and which works were completed at the end of September 2011 when payment became due and owing;

(c) Interest pursuant to **section 25 of the Supreme Court of Judicature Act Ch. 4:01**;

(d) Costs; and

(e) Further or other relief.

[3] On 27 February 2015 the Defendant entered an appearance to the claim wherein it disputed the whole claim and expressed an intention to defend against the allegations made in the claim.

[4] Thereafter, on 27 March 2015, the Defendant filed details of an agreement between both parties to extend the time for filing of the Defendant's defence. The Defendant stated the reason for the request to be that additional time was required to take instructions and to settle the defence. Thus, by agreement, time was extended to 22 June 2015.

[5] However, on 22 June 2015, the defence still had not been filed. Rather, the Defendant, on the same date, filed an application for a further extension of time on the grounds, inter alia, that:

(a) additional instructions were required in order to complete the preparation of its defence, which said instructions were expected to come from persons

who were employed with the Defendant at the material times but are no longer so employed; and

(b) despite its best efforts to do so, the Defendant had been unable to confirm appointments with the said individuals to provide written instructions on specific issues arising out of the claim.

The Defendant's application was supported by the affidavit of Ms. Sashi Indarsingh, the instructing attorney for the Defendant

[6] On 25 June 2015, the Claimant filed a Notice of Objection to this further extension of time. In support of this objection, the Claimant relied on the Affidavit of Peter Moralles filed on 2 July 2015.

[7] By Order dated 26 June 2015, this court, without a hearing, granted the Defendant an extension of time for the filing of its defence to 31 July 2015. However, on 2 July 2015 the Claimant filed an application to set aside the Court's Order granting the extension of time. At the hearing of that application on 24 July 2015, the Defendant consented to the Court's June Order being set aside to allow the Claimant the opportunity to be heard on its application to extend time for filing of the defence.

[8] At that same hearing, the Defendant then sought permission of this court by way of an oral application, to file a reply to the affidavit of Peter Moralles. Thus, this court invited the parties to file and serve written submissions in relation to that oral application. The Defendant filed its submissions on 28 August 2015 and the Claimant on 18 September 2015.

[9] On 12 October 2015, this Court gave a written decision refusing the Defendant's oral application to file an affidavit in reply. That decision was appealed by the Defendant and same was overturned by the Court of Appeal on 11 January 2016.

[10] As such, on the 18 January 2016, the Defendant filed an affidavit of Ria Ramdeen, in reply to the affidavit of Peter Moralles.

[11] Thereafter, pursuant to directions given by this court, the Claimant, on 18 March 2016, filed its written submissions in opposition to the Defendant's application for a further extension of time to file its defence, and the Defendant filed its written submissions in support of its application on 6 May 2016. Additionally, the Claimant filed, on 20 May 2016, submissions in reply to the Defendant's written submissions. The court also allowed and heard the oral submissions of counsel for both parties on 24 June 2016.

[12] This court has considered the extensive written and oral submissions and authorities presented by both parties. Having regard to the law and the facts at hand, this court finds that this is an appropriate case for the Court to grant the further extension of time requested by the Defendant for the filing of its defence.

[13] Further, it is the view of this Court that given the conduct of both parties, each party ought to bear its own costs of the Defendant's Oral Application to file an affidavit in reply as well as the costs on the instant application for a further extension of time.

[14] I have hereinafter detailed the reasons for my decision.

II. Facts Relevant to the Instant Application

[15] The factual evidence relevant to the instant application is deduced from the affidavit evidence of Ms. Sashi Indarsingh and Ms. Ria Ramdeen (both on behalf of the Defendant), and Mr. Peter Moralles (on behalf of the Claimant).

[16] According to Ms. Sashi Indarsingh, instructing Attorney for the Defendant, the firm M.G. Daly & Partners received instructions on 26 February 2015 from the Defendant to act on its behalf in the substantive claim. Ms. Indarsingh deposed that upon receipt of the instructions of the Defendant, the advocate attorney, Mr. Christopher Sieuchand, began a diligent assessment of the papers in the claim, which, due to the volume thereof and his management and attention to his other commitments, took a considerable period of time. It was for this reason that the Defendant made its first request for an extension of time to 22 June 2015, which was agreed on by the parties.

[17] Ms. Indarsingh deposed that in the weeks subsequent to the grant of the extension of time, communication was made between Mr. Sieuchand and the Defendant's Corporate Secretary, Ms. Ria Ramdeen, to ascertain a list of persons from whom he would require instructions in specific answer to the claim, including, Mr. Anthony Taitt and Mr. Carlton Watson, both of whom were employees of the Defendant at the material times referred to in the claim, but who were no longer employed with the Defendant. Ms. Ramdeen however, informed Mr. Sieuchand that efforts would be made to locate both individuals and assess their willingness to provide instructions.

[18] Ms. Indarsingh further deposed that up to the date of filing the application to extend time for filing the defence, the Defendant was still unable to make contact with either individual but further attempts through non-official channels were hoped to bear fruit. Finally, Ms. Indarsingh deposed that upon confirmation of certain instructions from Mr. Taitt and Mr. Watson, the Defendant's defence may be settled and filed one week after the date of the application for extension.

[19] However, Mr. Peter Moralles, the Managing Director for the Claimant, deposed that upon being given notice of the Defendant's application for an extension of time, he immediately gave instructions to counsel for the Claimant to object to same because of the Defendant's procrastination in the round in dealing with the Claimant in this matter since before the action was filed.

[20] According to Mr. Moralles, paragraphs 21, 22 and 23 of the Claimant's Statement of Case, highlight the Defendant's laissez-faire approach to the instant matter long before the action was filed, and which approach continues even now that the action has been filed. To this end, he emphasised that at paragraph 21 of the Claimant's Statement of Case, it is pleaded that despite several letters, emails and a protocol letter from the Claimant, all such correspondence being sent between 6 October 2011 and 17 June 2013, the Defendant neglected and refused to pay the Claimant any of the monies due to it as alleged in its claim.

[21] Further, Mr. Moralles emphasised the Claimant's pleading at paragraph 22 of the Statement of Case, that despite the Claimant's ten written requests to the Defendant between 6 October 2011 and 6 December 2013, for dialogue, resolution and a settlement, the Defendant has willfully refused to reply, neglected and refused to pay the Claimant the sums claimed.

[22] Moreover, Mr. Moralles further highlighted the pleading at paragraph 23 of the Statement of Case that the Defendant has also disregarded the Claimant's pre-action protocol letter of 6 December 2013 to resolve the matter amicably and has bluntly refused to reply. In support of those pleadings, Mr. Moralles exhibited the said emails and letters in ten attached exhibits to his affidavit:

(i) a letter dated 6 October 2011;
(ii) an email dated 2 February 2012;
(iii) an email dated 12 March 2012;
(iv) an email dated 6 September 2012;
(v) a letter dated 4 November 2012;
(vi) an additional letter dated 4 November 2012;
(vii) a letter dated 9 November 2012;
(viii) an email dated 2nd May 2013;
(ix) an email dated 17 June 2013; and
(x) a pre-action letter dated 6 December 2013.

All of which, Mr. Moralles deposed, received no response from the Defendant.

[23] Mr. Moralles, further deposed that when he received notice of the Defendant's first request for an extension of time, as a result of the Defendant's track record for abject inaction and approach in relation to the Claimant's claim before the instant action was filed, it was with the greatest sense of discomfort and unease that he reluctantly instructed counsel for the Claimant to agree to the ninety (90) days extension sought, in hope that there would be no further delays. He stated that his discomfort is now justified by the fact that the Defendant now seeks a further extension of time.

[24] Moreover, Mr. Moralles maintained that having regard to the several unanswered correspondence sent by the Claimant to the Defendant, that the Defendant was well aware that the Claimant was contemplating the filing of court proceedings for the monies

claimed in this action, yet apparently did nothing to ensure that the statements were recorded from Mr. Taitt or Mr. Watson prior to the termination of their employment with the Defendant.

[25] However, Ria Ramdeen, Corporate Secretary of the Defendant, replied to the affidavit of Peter Moralles, in essence disputing that the Claimant had ever made numerous requests for settlement of the sums claimed, prior to the filing of its instant action.

[26] Ms. Ramdeen noted the following in her affidavit, that:

(a) The email of 6 October 2011 simply had annexed to it a report of that said date. This email, she stated, appeared to have been made in response to the Defendant's attempts to contact Mr. Moralles with regard to the arrangements made for the alleged accounting program. Consequently, there was no obligation inferred on the part of the Defendant that any response thereto was mandatory. It did not contain any written request for dialogue, resolution and settlement.

(b) The contents of the email dated 2 February 2012 as well as those of the email dated 12 March 2012 do not refer to a dialogue in respect of any cause of action which the Claimant claims to have, but rather to the conclusion on the alleged accounting program.

(c) The email dated 6 September 2012 constitutes a statement of the Claimant's intention to seek legal assistance and calls for no response by the defendant, and further the Claimant did receive a response to this particular email by the Defendant's email dated 5 October 2012 (which Ms. Ramdeen exhibited to her affidavit).

(d) The letter dated 4 November 2012 itself belies the Claimant's allegations of a history of non-responses by the Defendant as the letter itself refers to the Defendant's email of 5 October 2012.

(e) The letter dated 9 November 2012 and email dated 2 May 2013 were not independent correspondence in respect of which the Defendant was obliged to respond. It is clear from the contents thereof that these letters

were all prepared and issued in answer to the Defendant's email of 5 October 2012.

(f) In relation to the Claimant's pre-action letter dated 6 December 2013, the Defendant requested legal advice which was prepared by its Attorneys-at-law and issued to the Defendant on 18 February 2014. Since that advice was received, however, the Defendant experienced several personal changes, including changes in the employment of those persons who had previously been dealing with the matter. As a result, the Defendant was unable to address the Claimant's pre-action letter with sufficient dispatch and certainly not prior to the filing of the claim on 14 January 2015.

[27] Ms. Ramdeen additionally deposed that after the filing of the action by the Claimant, an appearance had been entered by M.G Daly & Partners on behalf of the Defendant and prior to Mr. Christopher Sieuchand's acceptance of instructions in this matter, Mr. Sieuchand was admitted to Westshore Medical Centre on 26 January 2015 for intense pain and further to that during the period 1 March 2015 to 1 May 2015 he experienced several episodes of nausea and intermittent pain associated with the course of antibiotics under which he was placed.

[28] Additionally, surgical procedure was necessary and thus on 2 July 2015 Mr. Sieuchand was admitted to Gulf View Medical Centre for same, which was successfully performed. Ms. Ramdeen states that these are the other commitments of Mr. Sieuchand to which Ms. Indarsingh referred in her affidavit in support of the Defendant's request for a further extension of time, and these difficulties were made known to counsel for the Claimant during several calls to them at the time of the difficulty.

[29] Moreover, Ms. Ramdeen deposed that in relation to Mr. Taitt and Mr. Watson, their instructions were necessary in order for the Defendant to be able to substantively respond to the specific paragraphs in the Claimant's claim. Neither of these gentlemen was employed with the Defendant presently and thus several unsuccessful attempts during the months of April, May and June 2015, were made to contact them. Further to that, Ms. Ramdeen stated that she made enquiries of several persons to try to obtain the

contact information of these gentlemen. She deposed that she had since been able to obtain a cell number for Mr. Taitt and has since spoken with him. Consequently, she said that the Defendant is now in a position to receive his instructions on this matter and finalise its defence.

III. Issue for determination by this Court

[30] The main issue for determination by this Court is whether the Court should exercise its discretion to extend the time for filing of the Defendant's defence.

Claimant's Submissions

[31] The Claimant submitted that the Defendant may file his defence within any time provided that an application for default judgment is not made: **The Attorney General v Keron Matthews (2011) UKPC 38**. Thus, in electing to file the present application pursuant to **Part 10.3(5) of the Civil Proceedings Rules 1998, as amended (CPR)**, the Defendant has chosen to instead bring the issue within the Court's discretion.

[32] The Claimant emphasised the guidance given by the Court of Appeal in **Roland James v The Attorney General CA No. 44 of 2014**, wherein it was established that the Court should exercise its discretion having regard to the overriding objective of the **CPR** as stated at **Part 1.1(2)** as well as having regard to all other relevant circumstances. To that end the Claimant reminded this Court that in terms of considering what other circumstances may be relevant, consistent with the guidance of the Court of Appeal in **Roland James (supra)**, the factors outlined in **CPR Part 26.7(1), (3) and (4)** would generally be of relevance to the application for an extension and should be considered. So that the promptness of the application, whether or not the failure to comply was intentional, whether there is some good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions should all be considered.

[33] The Claimant did not challenge the promptitude of the Defendant's application in light of the previous ninety (90) day extension of time granted by the Claimant. However, the Claimant submitted that the circumstances of the matter point to the inexorable conclusion that the Defendant's failure to file its Defence within the prescribed time period was intentional. The Claimant further submitted that there is no good explanation for the Defendant's breach. In particular, the Claimant noted that the Defendant at paragraph 3 of the Ramdeen affidavit admits to receiving the following items of pre-action correspondence:

(i) letter dated 6 October 2011 form Peter Moralles setting out history of the SWMCOL Accounting Report program development. One of the several written requests for dialogue, resolution and settlement;

(ii) letter dated 4 November 2012 from the Claimant's Director to the Defendant; and

(iii) pre-action protocol letter dated 6 December 2013 from the Claimant's Managing Director to the Defendant for the sum of $3,982, 459.43.

[34] Further, the Claimant submitted that the Defendant elected not to answer or respond to correspondence from the Claimant dated 9 November 2012 enclosing the substantive documentation of the SWMCOL reporting system software that was requested by the Defendant; and also failed to respond to the emailed letter dated 2 May 2013.

[35] The Claimant took the view that the Defendant had notice of the Claimant's claim since in or around 6 October 2011 but some 3 years, 8 months and 16 days later and some 1 year, 6 months and 16 days since the Claimant's pre-action letter (that is up to the date of filing of the Defendant's application on 22 June 2015), it was not in a position to proffer a response to the Claimant's pre-action protocol letter of claim or a defence to the Claimant's claim. Further, that the Defendant's application is some 5 months and 8 days since the filing of the Claimant's Claim Form and Statement of Case. Additionally, the Claimant noted that paragraph 3(h) of the Ramdeen Affidavit provides that the Defendant was issued legal advice by the firm M.G. Daly & Partners since 18 February 2014, some

1 year 4 months and 4 days prior to the filing of the Defendant's application for an extension of time.

[36] Yet further, in support of its submission that the Defendant has not proffered any good reason for the further extension, the Claimant submitted that it is only some 7 months after the Indarsingh Affidavit that the Defendant has now since been able to obtain a cell number for Mr. Taitt. Moreover, the Defendant is only now in a position to receive instructions on this matter some 14 months since the Defendant first had notice of the Claimant's proposed claim, some 18 months since the pre-action protocol letter of claim and some 14 months since the filing of the Claimant's claim. These figures being arrived at, by the Claimant, with reference to the Ramdeen Affidavit.

[37] The Claimant also submitted that while it is sympathetic to Mr. Sieuchand's illness, the Defendant is unable to rely on Counsel's misfortune to justify its apathetic and pedestrian attitude toward the Claimant's claim of which the Defendant's abject inaction and approach is manifest. To this end the Claimant stated that it has been established in **Darren Morris v The Attorney General CA Civ 253/2009** that the personal difficulties of Attorneys-at law are no longer a good excuse in applications for extensions of time. Further, the Claimant referred to **rules 27 to 29 of the Third Schedule, Part A of the Code of Ethics of the Legal Profession Act, Chap. 90:03** which provide that an Attorney-at law shall deal with his client's business with due expedition and it is improper for an Attorney to accept a case unless he can handle it without undue delay. Moreover, where an Attorney determines that the interest of his client requires it he may with the specific or general consent of his client refer his business or part of it to another Attorney whether or not a member of his own firm.

[38] Thus, it was the Claimant's view that despite Counsel's illness, the Defendant has proffered no reason or justification for the Defendant's Instructing Attorney's failure to brief other or additional Counsel or otherwise take any further step in the Defendant's defence of the Claimant's claim with all due expedition and without delay. Moreover, the Defendant has ignored and breached **section 3.2 of the CPR Practice Direction in respect of Pre-action Protocols,** and also breached **CPR Part 9** which requires that the

Defendant must include in its appearance form an address to which documents may be sent. Thus, the Defendant has demonstrated a history of disregard for the Civil Proceedings Rules.

[39] The Claimant submits that in these circumstances the Defendant should not be granted a further extension of time to file its defence.

Defendants' Submissions

[40] Though the Defendant went on to submit further case law in its submissions, there appears to be agreement between the Defendant and the Claimant as to the relevant law concerning the exercise of the Court's discretion when determining whether to grant an extension of time to file a defence. The Defendant placed reliance particularly on the guidance of the Court in the cases of **Roland James v The Attorney General Civ App. 44 of 2014**; **Trincan Oil Ltd v Schnake Civ App. 91 of 2009**; **The Attorney General v Universal Projects Ltd Civ App 104 of 2009**; and **Reed Monza (Trinidad) Ltd v Price Waterhouse Coopers Ltd and Ors Civ App 15 of 2011**.

[41] The Defendant submits that its application for an extension of time to file the defence was prompt as it was filed within the time for the filing of the defence, as extended by consent. Further, it is the Defendant's submission that the prompt filing of the application for an extension of time prior to the expiration of the deadline for filing the defence demonstrates an intention to file the defence which could not be achieved by the previously agreed extended timeline and in respect of which the Defendant has proffered a good explanation.

[42] The Defendant maintained that at the time of the making of the application for extension, it had not breached any rule and that it advanced the following as good, if not perfect explanations for the Defendant not filing its defence by the agreed deadline:

(i) The fact that the claim was voluminous and required considerable time to assess;

(ii) The difficulties in contacting key witnesses who were no longer employed with the defendant; and

(iii) The severe illness of the Defendant's counsel during the period for the filing of the defence.

[43] The Defendant contended that many of what the Claimant refers to as pre-action letters fall woefully short of what is expected of a pre-action protocol letter within the context of the Practice Direction on Pre-action Protocols. Further, in the Defendant's view, not only was its pre-action conduct not egregious but also that the circumstances surrounding the Defendant's pre-action conduct, while relevant to the issue of costs and non-compliance, are entirely irrelevant to a good explanation for a breach of the timeline for filing of a defence.

[44] Additionally, the Defendant contended that the fact remains that at the time of the Defendant's Attorneys-at-law accepting the Defendant's matter, neither of them anticipated any difficulties in dealing therewith. There was therefore no breach of the Code of Ethics as alleged. Moreover, the Defendant opined that the duty of barristers and solicitors in cases where there is a danger that the client's business would not be addressed without undue delay and with all due expedition completely ignores the fact that the delay in this case was for good and due cause, and further ignores all of the other reasons for the Defendant's inability to file its defence on or before the agreed extended deadline for so doing.

[45] Moreover, the Defendant contends that in the present case, where the extension of time sought was one month beyond the agreed and extended deadline, and where the Defendant demonstrated a clear intention and willingness to defend the claim, that the interest of justice weigh far more heavily in favour of this Court granting the relief sought in the Defendant's application for extension.

IV. The Law and its application to the issues

(i) Law

[46] At the basis of the instant application is **CPR Rule 10.3 (5).** That rule provides that:

> **"10.3 (5) A defendant may apply for an order extending the time for filing a defence."**

[47] Since the decision of the Court of Appeal in **Roland James v The Attorney General of Trinidad and Tobago Civ App No.44 of 2014,** there has been greater clarity on the manner in which a Court is to approach applications by a defendant for an extension of time to file a defence. In that case, the Court of Appeal, relying on the Privy Council decision of **The Attorney General v Keron Matthews (2011) UKPC 38 (at para 14)**, made clear that there is no sanction imposed by the rules for the failure to file a defence within the period for so doing allowed by **Part 10.3(3) CPR**. Once judgment has not been entered when the defendant applies out of time for an extension of time, there is no question of any sanction having yet been imposed on a defendant.

[48] Additionally, the Court of Appeal gave further guidance on the manner in which a Court's discretion is to be exercised when considering whether to grant an extension of time. According to the Court of Appeal in **Roland James (supra)**, because no criteria is mentioned in **Part 10.3(5) CPR,** it was intended that the Court should exercise its discretion having regard to the overriding objective.

[49] It is useful in the instant case to repeat in some detail the guidance given by the Court of Appeal in **Roland James (supra)**. The Court of Appeal stated thus -

> *"20. Unlike rule 26.7, rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises, how the Court's discretion is to be exercised**. I think because no criteria is mentioned in rule 10.3(5) it was intended that the Court should exercise its discretion having regard to the overriding objective** (see Robert v Momentum Services Ltd. [2003] EWCA Civ. 299).*

21. ***The overriding objective of the CPR is identified in rule 1.1(1) as enabling the Court to deal with cases justly.*** *Rule 1.1(2) identifies some of the considerations relevant to dealing justly with the case. This rule is as follows:*

> ***"(2) 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."***

22. ***It is relevant to note that the list in 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances.*** *This begs the question, what other circumstances may be relevant.* ***In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.***

23. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.

> *24……**The Court must take into account the respective disadvantages to both sides in granting or refusing their application**….*
>
> *25. So far as the merits of the defence are concerned the applicant is not required to establish that he has a good defence or for that matter to outline the merits of the defence…."*

[50] Further assistance was also ascertained from the Court of Appeal cases of **Trincan Oil Ltd v Schnake Civ App 91 of 2009** and **The Attorney General v Universal Projects Ltd Civ App 104 of 2009**, both provided by Counsel for the Defendant.

[51] In terms of establishing the element of intentionality for the purpose of **Part 26.7(3) (a) CPR**, the Court of Appeal in **Trincan Oil (supra)**, in relation to an extension of time for an appeal, stated that -

> *"41. In my opinion, to establish intentionality for the purpose 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 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****."*

[52] Additionally, in the case of **Universal Projects (supra)**, the Court of Appeal clarified at paras 69 to 70 that -

> *"69.* ***Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice, negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order****. All of these reasons may be assessed as not providing any good explanation for the breach of the order, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7 (3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7 (3) and wedded to all of the requirements of Part 26.7.*

> *70.* ***In my opinion, to satisfy intentionality in Part 26.7 (3) (a) a more positive intention not to comply is required. That is to say, what must be shown is that the motive for the failure to comply was a deliberate intent not to comply****……In circumstances such as these, it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended…"*

[53] In relation to whether the reasons advanced by a defendant are good, the Court is further reminded by the Court of Appeal decision in **Reed Monza (Trinidad) Ltd v Pricewaterhouse Coopers Ltd Civ App No. 15 of 2011** that it is always a judgment call as to whether the reason advanced for delay is good reason. In that case the Court of Appeal stated that each case must be considered in its own context and further that the reasons proffered for the delay need not be perfect, the reason(s) need only be good and acceptable.

(ii) Application of the law to the issues

[54] Applying the law to the instant matter, I am of the view that this is an appropriate case for the Court to grant the further extension of time requested by the Defendant for the filing of its defence.

[55] Applying the guidance of the Court of Appeal in **Roland James**, I have, in coming to my decision, taken into consideration the overriding objective of the CPR that requires the Court to deal with cases justly. The substantive claim in the instant matter is for a sum of approximately **three million dollars ($3,000,000.00),** based not on a clear written agreement signed by both parties but rather alleged by the Claimant to have been made by the parties partly orally, partly in writing and partly by conduct. According to the Claimant's Statement of Case, the said agreement was made at meetings and interviews between Mr. Anthony Taitt (Defendant's Chief Financial Officer); Mr. Carlton Watson (the Defendant's then Chairman); and Mr. Peter Moralles (the Claimant's Managing Director).

[56] Therefore, consistent with the overriding objective at **Part 1.1 of the CPR**, this Court has considered the necessity to ensure that this matter is dealt with proportionate to the amount of money involved and the complexity of the issues that are likely to arise in relation to the alleged agreement being partly oral, partly in writing and partly by conduct.

[57] The fact is that, when it comes to dealing with the substantive claim, the Court will not be able to ascertain the terms of the agreement alleged by the Claimant in the substantive claim from any one or more written documents. Rather, to deal with this matter justly, the Court would require the evidence of the relevant witnesses from both parties particularly in respect of what was said and what was done in relation to the alleged agreement. Thus, without the defence of the Defendant, surely, given the circumstances alleged by the substantive claim, it would be difficult for this Court to achieve the overriding objective of dealing justly with the substantive matter in a manner that ensures, so far as practicable, that the parties are on an equal footing.

[58] Moreover, this Court has considered and applied the further guidance of the Court of Appeal in **Roland James,** that in deciding whether to utilise its discretion to extend time a Court ought to also take into account all other relevant circumstances including those factors outlined at **Part 26.7(1), (3) and (4) of the CPR**.

[59] With respect to **Part 26.7(1) of the CPR** which requires that an application of this nature must be made promptly, both parties agreed in their submissions that the Defendant's application for an extension of time was indeed prompt. I agree, given that the application was made before the date had expired for the filing of the defence (based on the agreement between the parties to extend the time to file the defence to 22 June 2015).

[60] Regarding the considerations, premised upon **Part 26.7(3) CPR**, that the failure to comply ought not to be intentional; should be supported by a good explanation for the breach; and that the partly in default ought to have generally complied with all other relevant rules, practice directions, orders and directions, I find in favour of the Defendant.

[61] It is clear from a review of the Court of Appeal decisions in **Trincan Oil** and **Universal Projects** that to prove an intention not to comply, on the part of the Defendant, what must be demonstrated is a deliberate positive intention not to comply with a rule. Inaction, laxity, negligence or the like will not suffice in demonstrating such intention. In those premises, while I agree in the strongest terms with the Claimant that greater efficiency needs to be shown by the Defendant in its attempt to settle its defence, I cannot find in the affidavit evidence of any of the parties, such evidence that suggests that the Defendant had the intention not to comply with the time agreed for the filing of the defence by 22 June 2015. In fact, the main reason proffered in the evidence for not filing the defence points to the fact that some attempt was being made to contact the two key witnesses for the Defendant for the purpose of settling and filing the defence; both witnesses who are now no longer employed with the Defendant and importantly both witnesses who are referred to in the Claimant's Statement of Case as persons who played a key role in the alleged agreement.

[62] With respect to whether the Defendant has supported its application by good reason, in essence, three reasons were proffered, namely, (i) the fact that the claim was voluminous and required considerable time to assess; (ii) the difficulties in contacting key witnesses who were no longer employed with the defendant; and (iii) the severe illness of the Defendant's counsel during the period for the filing of the defence.

[63] I do not accept as good reason that the volume of the claim should of itself justify the further extension of time, particularly in light of the first grant of 90 days extension of time by agreement of the parties. Additionally, I am cautious of condoning the use of the excuse of one attorney's medical ailment to justify the delay in a matter that touches and concerns others, particularly in circumstances where the instructing attorney in the matter may have very well assisted in the advancement of the claim and employed such assistance from another attorney be it within the same firm or outside, to assist in reaching the deadline dates as directed by the Court so as to avoid prejudice or hardship to the client and other parties involved. It is a matter of life that Attorneys are human beings who are naturally susceptible to sickness and other personal difficulties, but it ought not to be thought that such a matter as this that concerns other parties' interests

should be put on halt until the betterment of one person. As much should be done by an Attorney-at-law to put in place alternative provisions that will assist in mitigating against prejudice of a client's case.

[64] That said, I am of the view, however, that the difficulty in contacting the key witnesses who were no longer employed with the Defendant, can stand as sufficiently good reason in support of the extension of time. To this end I have also considered that in the affidavit of Ms. Ria Ramdeen filed on 18 January 2016 she stated that she was finally able to contact Mr. Taitt at least, and that she had spoken to him. She further stated that the Defendant was in a position to receive his instructions and finalise the defence. Thus, if an extension were to be granted by the Court to file the defence, a short extension should suffice.

[65] Finally, as pertains to the question of whether the Defendant has generally complied with all other relevant rules, practice directions, order and directions of the court, I agree with the submissions of the Defendant that the issue of the Defendant's pre-action conduct in this matter, while not having a great bearing on the discretion of the Court to grant this extension of time (given the other more relevant circumstances in this matter), will indeed be taken into consideration when this matter is determined and the issue of costs arises. However, outside the issue of the Defendant's pre-action conduct, the Defendant cannot be said to be in breach of any other relevant rules, practice directions and orders of this Court.

[66] In light of the foregoing, it is the view of this Court that there are sufficient grounds for the grant of the extension of time to file the defence and having considered **Part 26.7(4) CPR**, it is also the opinion of this Court that the grant of same is in the interest of the administration of justice. Further, based upon the affidavit evidence of Ria Ramdeen, the Defendant should now be in a position to remedy the situation and file the defence if granted a short extension of time.

V. The Question of Costs of this Application as well as the prior Oral Application in respect of the Defendant's Affidavit in Reply

[67] Regarding the question of costs, it was the Defendant's submission that this Court should order the Claimant to pay to the Defendant its costs of both the Defendant's application for a further extension as well as the costs of the oral application of the Defendant to file an affidavit in reply. The Defendant also submitted that a wasted costs order ought to be made against the Claimant pursuant to **Part 66.8 CPR** on the basis that the Claimant's opposition to the application was unreasonable. On the other hand, the Claimant was adamant that the Court should order the Defendant to pay the Claimant's costs of both applications.

[68] In determining the entitlement to costs, the general rule is that if the Court decides to make an order for costs of any proceedings it must order the unsuccessful party to pay the costs of the successful party as provided for by **CPR Part 66.6(1).** The Court, however, has the power to order a successful party to pay the costs of the unsuccessful party in appropriate circumstances: **CPR Part 66.6(2)**. In deciding who should be liable to pay costs the ***Court must have regard to all the circumstances of the case***: **CPR Part 66.6(4)**, in particular, those provided for in **CPR Part 66.6(5) and (6).**

[69] **Part 67.11 of the CPR** provides the rules in respect of the assessment of costs for procedural applications. The relevant parts of **Part 67.11** provide:

> *"(2)* ***In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.***
>
> *(3) The court must, however, take account of all the circumstances including the factors set out in rule 66.6(5)* ***but where the application is—***
> *(a) one that could reasonably have been made at a case management conference or pre-trial review;*
> *(b)* ***an application to extend the time specified for doing any act under these Rules or an order or direction of the court****;*
> *(c) an application to amend a statement of case; or*
> *(d) an application for relief under rule 26.7,*

the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable." [Emphasis added]

[70] **Parts 66.8 and 66.9 of the CPR** set out the rules in respect of wasted costs orders and the procedure the Court should adopt in making such orders, respectively:

*"**Wasted costs orders 66.8***

(1) In any proceedings the court may by order—

(a) disallow as against the attorney's-at-law client; or

(b) direct the attorney-at-law to pay, the whole or part of any wasted costs.

(2) "Wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; or

(b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

Wasted costs orders—procedure 66.9

(1) This rule applies where the court is considering whether to make an order disallowing wasted costs or for ordering that an attorney-at-law pay wasted costs to another party.

(2) The court must give an attorney-at-law notice of the fact that it is minded to make a wasted costs order.

(3) The notice to the attorney-at-law must state the grounds on which the court is minded to make the order and state a date, time and place at which the attorney-at-law may attend to show cause why the order should not be made.

(4) The court must give the attorney-at-law at least 7 days' notice of the hearing.

(5) The court must also give notice directly to the attorney-at-law's client —

(a) of any proceedings under this rule; and

(b) of any order made under it against his attorney-at-law.

(6) The notice to the attorney-at-law should be in writing unless made at the trial or hearing of the proceedings."

[71] It is clear that the procedure for an order of wasted costs in this matter has not been met, nor is the Court in the circumstances of this matter minded to grant an order as to wasted costs. The Court is satisfied that this is not an appropriate case, in all the circumstances, in which an order for wasted costs should be made against any of the attorneys-at-law for either of the parties.

[72] Regarding the assessed costs of the instant application as well as the costs of the oral application to file an affidavit in reply which was incidental to the instant application, I am of the view that this is an appropriate case for both parties to be made to bear their own costs of both applications. Both parties ought to be held responsible for the great delay in advancing this matter.

[73] This Court has found that the Defendant has approached this matter with a degree of inefficiency which has delayed the efficient advancement of this matter and ought not to be condoned. The Claimant too, has added to that delay by opposing the further application for extension in circumstances where a short extension was being considered by the Court from 22 June 2015 to 31 July 2015, and further in circumstances where one of the reasons for the extension was that attempts were being made by the Defendant to contact two key witnesses mentioned in the Statement of Case of the Claimant. This was opposed to the overriding objective of the CPR to deal with matters justly, in particular, to ensure, so far as is practicable, that the parties are on an equal footing; to deal with the matter in a manner proportionate to large sum of money being claimed; the complexity of the issues likely to arise; and to ensure that the matter is dealt with expeditiously.

VI. Disposition

[74] In the premises, this Court hereby:

(i) Grants the Defendant an extension of time to file its defence by the 6 February 2017; and

(ii) Orders that each party bears its own costs in respect of the Defendant's application of the 22 June 2015 as well as the incidental oral application of the Defendant to file an affidavit in reply.

Dated this 16th day of January, 2017

_____
Robin N. Mohammed
Judge