THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2016-00713

BETWEEN

DIPCHAND SEENATH

Claimant

AND

BEATRICE CHARLES

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Yaseen Ahmed instructed by Ms Tara Lutchman and Ms Chantelle Le Gall for the Claimant
Mr Cecil H A Pope for the Defendant

DECISION ON CLAIMANT'S APPLICATION TO STRIKE OUT DEFENCE & DEFENDANT'S APPLICATION FOR EXTENSION OF TIME TO FILE WITNESS STATEMENT

I. Background:

[1] Before the Court are two applications filed by both parties. One is the Claimant's application filed on the 3rd November, 2016 seeking to have the Defence struck out on the grounds that it is non-compliant with this Court's order of the 1st June, 2016. It also

seeks judgment for the Claimant due to, inter alia, the Defendant's non-compliance with the Court's order for the filing of list of documents and witness statements.

[2] In response, the Defendant applied, 5 days later on the 8th November, 2016, for an extension of time to file its witness statement and for relief from sanctions for her failure to comply with the said Court's order. Attendant to her application was a draft of the Defendant's own witness statement that amounted to a mere two paragraphs in length.

[3] The Court made an order for the parties to file their written submissions in respect of both applications. In pursuance thereof, the Claimant dutifully filed his submissions on the 2nd December, 2016. In them, Mr Ahmed sought to, firstly, refute the Defendant's application for relief from sanctions before proceeding to support the Claimant's own application to have the Defence struck out.

[4] The Defendant again was non-compliant with the Court's order and never filed any submissions in support of her application.

Needless to say that, based on the above background, this decision will be relatively short and straightforward.

[5] I agree with the Claimant's strategy of firstly dispensing with the Defendant's application for relief from sanctions, which, if denied, will be dispositive of her application for an extension of time. I proceed with that methodology for this Judgment.

The Defendant's Application for Relief from Sanctions:

[6] 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 requirements for such an application were succinctly laid out 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***

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

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."

[11] 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;

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."

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

[12] The Defendant must satisfy the Court that each of these requirements has been met or else the application will fail. If the Defendant is successful in doing so, then the Court can proceed to consider the other non-mandatory factors contained at **Part 26.7 (4).**

Promptitude:

[13] In **Rowley** v **Ramlogan Civil Appeal No. P215 of 2014**, 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****."*

[14] The subject Court Order of the 1st June, 2016 required that the parties file and serve their list of documents before the 24th June, 2016 and file and exchange witness statements by the **30th August, 2016**. The Defendant failed to file either of these two documents by the specified date or at all. Instead, the Defendant filed her application for relief from sanctions on the **8th November, 2016**, which amounted to just over **2 months** after the due date for both documents and ***after*** the Claimant would have applied for the Defence to be struck out.

[15] The sanction for not serving a witness statement is contained in **Part 29.13**, which prevents the party in default from calling that witness at trial. There is, however, no stated sanction for failing to file a witness statement on time but it stands to reason that a witness statement cannot be served without first filing it. Further, the sanction to be applied to the Defendant in **Part 29.13**, does not appear to take immediate effect. Nonetheless, the Defendant has breached a direct order of the Court and waited over 2 months before attempting to rectify that order by her application. The excuse for that delay, being essentially, counsel's heavy workload, does not suffice as an acceptable one nor does it convince the Court that the application was made promptly or as soon as practicable. Further, it appears to this Court that Mr Pope, the Defendant's counsel, only became aware of the missed deadline when the Claimant filed his application some 5 days earlier seeking to strike out the Defence. Most importantly, the Defendant filed no submissions and therefore, provided no argument to refute the Claimant's submissions on this issue.

In these circumstances, I do not find that the application for relief was made promptly.

[16] Case law suggests that the failure to satisfy any one of the mandatory requirements in **Part 26.7 of the CPR** means that the application for relief from sanction must fail.

Nevertheless, I shall proceed to consider the Defendant's ability to satisfy the other mandatory requirements.

Intentionality:

[17] 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 '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], 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.

[18] In the instant matter, Mr Pope, in his supporting affidavit stated that the failure to file his client's witness statement was not an expression of any lack of interest in defending the Claim, but rather, due to his heavy work commitments. What I must determine is whether a 2-month delay in bringing this application is indicative of an intention not to pursue the Defence.

[2] Civ Appeal No. 91 of 2009, Kangaloo, Jamadar & Bereaux J.J.A.
[3] *ibid*. at paragraph 42.

[19] In **Roland James v the A.G. Civ App No. 44 of 2014**, the matter was assigned to the new attorney on the 8th November, 2013, which was a Friday and the application for an extension was filed on the 14th November, 2013, which was the following Thursday. The time lapse amounted to a mere 6 days. The attorney in that matter advanced that the delay was due to "*administrative error in having the matter assigned to a new attorney*". Mendonca J.A. felt that such an explanation did not suggest intentionality but rather *"administrative bungling*" and he viewed that the new attorney acted diligently and with alacrity and therefore, the reasonable inference was that the failure was not intentional.

[20] In my opinion, the length of the delay in the case at bar is simply inexplicable. When considered along with the failure to file list of documents and most importantly, the decision to attach an unacceptably short and superficial witness statement comprising a mere two paragraphs in length, it does not, to my mind, evince a serious intent to properly defend this Claim.

Thus, I find that the Defendant's non-compliance with my Order of the 1st June, 2016 was intentional.

Good Explanation:

[21] 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 noncompliance with the rules of court****."*

[22] In **Roland James** *supra,* 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."*

[23] Similarly, I find that without more, Mr Pope's bald explanation that he was *"underly (sic) burdened with commitments otherwise",* is not a good explanation for his non-compliance with the Court's order.

Compliance with Court's orders:

[24] Lastly, I agree with the Claimant that the Defendant's non-compliance with the Court's orders and rules throughout the course of this matter is manifest. For one, although not an order of this Court, the Defendant breached the pre-action protocols by failing to file a response to the pre-action letter. Secondly, in addition to her failure to file the witness statement on time, the Defendant also failed to file her list of documents and/or comply with inspection. Lastly, the Defendant has also failed to file written submissions as ordered.

[25] Based on the above assessment, the Defendant has failed to satisfy the Court of the mandatory requirements contained at **Part 26.7 (1) & (3) (b) of the CPR** and therefore, the Court dismisses the application for an extension of time to file her witness statement and for relief from sanctions.

The Claimant's Application to Strike out:

[26] The Defendant's Defence is certainly non-complaint with **Part 10.5 (4) of the CPR** and with the relevant case law as set out in the Claimant's submissions, both of which warn against pleading "bare denials" in one's Defence and thus, advocate the necessity for properly setting out one's case in the alternative.

[27] Further, as stated in **M.I. 5 Investigation Limited v Centurion Protection Agency Limited Civil Appeal No. 244 of 2008**, if the Defendant wishes to prove a different version of events from that given by the Claimant, he must state his own version. Moreover, Mendonca JA stated that ***"the reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the court's resources in having the allegation proved."***

[28] At paragraph 4 of the Defence, the Defendant admitted to being a tenant yet denies ever entering into any agreement for tenancy with the Claimant's father. She however, does not go on to explain how she became a tenant, if not through any agreement. This pleading becomes even more confusing when the Defendant proceeds, in the following paragraph of the Defence, to admit to meeting the monthly rental payments while maintaining her denial of ever making any payments to the Claimant's father.

Immediately, several questions come to mind. How can one classify oneself as a tenant without describing the authority or agreement under which that tenancy exists? Secondly, if there was no such agreement, as the Defendant wishes the Court to believe, then how is it that the Defendant knows how and when to pay the rental and the amount of the monthly rental payments, which she pleaded she paid in paragraph 5?

[29] Thereafter, the Defendant proceeds to admit to entering into another tenancy for another room in the building for the same rental but yet again, no specifics were pleaded as to with whom she had this rental agreement. Moreover, the pleading in paragraph 8 is entirely confusing. Reference is made to High Court Proceedings **CV2015-01749**, which was allegedly withdrawn by the Claimant. No other connection is made and it is unclear as to how these proceedings are related. Moreover, the Claimant never raised the issue of those proceedings in his Claim.

[30] Most importantly, the Defendant proceeded to deny, again in an unembellished manner, at paragraph 9, that she ever received any Notice to Quit the premises. The Claimant, in response, filed an application on the 2nd August, 2016 seeking permission to file a witness summary of Mr Selwyn Mark, a process server, who deposed that he, indeed, served the Notice to Quit on the Defendant in the presence of Ms Irma Seunath since the 21st January, 2016. Leave was given for this application by order dated the 28th September, 2016. Mr Mark's witness summary was thereafter filed on the 1st November, 2016. Thus, it appears to this Court that the Defendant's bare denial on this particular allegation is not, given Mr Mark's evidence to the contrary and given the absence of any filed witness statement for the Defendant, cogent enough to warrant the expense of having this allegation proved at trial.

[31] Thus, considering these gaping lacunas, contradictions and superficial pleadings in the Defence, I find that the Defence ought to be struck out pursuant to **Part 26.2 (1)(a) & (c) of the CPR** on the grounds that it is non-complaint both with **Part 10.5(4) of the CPR** and with the **Court's Order dated the 1st June, 2016** and discloses no grounds for defending the Claim.

In these circumstances, the Court finds it appropriate to award Judgment without trial after striking out of the Defence pursuant to **Part 26.4 of the CPR**.

II. Disposition:

[32] Accordingly, having considered the parties' applications, the attendant affidavits in support and the Claimant's written submissions, the order of the Court is as follows:

ORDER:

1. **The Defendant's Notice of Application filed on the 8th November, 2016 be and is hereby dismissed.**
2. **The Defence filed on the 19th May, 2016 be and is hereby struck out pursuant to Part 26.2 (1) of the CPR 1998.**
3. **Judgment be and is hereby entered for the Claimant on the Claimant's Claim filed on the 10th March, 2016 without trial after striking out pursuant to Part 26.4 (1) of the CPR 1998.**
4. **Accordingly, an order is granted entitling the Claimant to possession of the two rooms situate on the western side of the building inclusive of a bedroom, bedroom/living room, small kitchenette located downstairs and contained within the said building situate at #59 Prizgar Road, San Juan comprising one thousand, one hundred and seventy-six point eight square metres (1176.8m^2) with buildings better described in Deed No. 201102354563.**
5. **Damages for trespass.**
6. **Mesne profits.**
7. **Interest.**
8. **The Defendant shall pay the Claimant's costs of these proceedings inclusive of the two Applications dealt with herein to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.**

9. **In the event that there is no agreement, the Claimant to file and serve a Statement of Costs for assessment on or before the 21st May, 2018.**

10. **Damages for trespass, mesne profits, interest and costs as ordered herein are to be assessed and quantified before a Master in Chambers on a date to be fixed by the Registrar of the Supreme Court.**

11. **There shall be a stay of execution for 42 days from the date of this order.**

12. **Accordingly, the Defendant is allowed 6 weeks (42 days) from the date of this order to vacate the said premises at #59 Prizgar Road, San Juan.**

Dated this 21st day of March, 2018

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Robin N. Mohammed
Judge