THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-04203

BETWEEN

VIOLET ROSELYN BANMALLY also called ROSIE BANMALLY

Claimant

AND

RICHARD RADHAY

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: **Thursday 3 October 2019**

Appearances:

Ms Akilah J Paul for the Claimant

Mr Shane Patience for the Defendant

DECISION ON DEFENDANT'S APPLICATION FOR EXTENSION OF TIME TO FILE APPLICATION TO SET ASIDE JUDGMENT

I. Introduction

[1] On 22 November 2016, the Claimant initiated proceedings against the Defendant by way of a Fixed Date Claim Form pursuant to **Part 68 of the Civil Proceedings Rules 1998 ("CPR")** seeking summary possession of land situate at 124 St. Charles Road, St. John's

Village, San Fernando (hereinafter "the said property"). The Claimant filed an affidavit in support of her Fixed Date Claim on the same date.

The Claimant claims that she is the *bona fide* owner of the majority share of the said property by virtue of a Deed of Conveyance registered as Deed Number 201202416896 (hereinafter "the said Deed") and that the Defendant, the Claimant's nephew, has no claim, right and/or entitlement to the said property.

[2] An affidavit of service was sworn and filed on 5 December 2016 in which the deponent, Anthony Ramnath, deposed to personal service on the Defendant on 3 December 2016. He stated that the Fixed Date Claim Form, affidavit and exhibits filed on 22 November 2016 together with the Notes for the Defendant, Appearance Form to Fixed Date Claim, Application to Pay by Instalments Form and Defence and Counterclaim Form were personally served on the Defendant. He further deposed that at the time of service the Defendant answered to his name when called and accepted service of the said documents. [Just by way of information on procedure, it is to be noted that for this case type, which is a non-monetary claim, there is no requirement nor is it appropriate to serve on the Defendant an Application to Pay by Instalment Form].

[3] The matter was fixed for hearing on 10 January 2017. On this date, the Claimant was present and represented while the Defendant was absent and unrepresented. At the hearing, the Court noted that no appearance to the Fixed Date Claim was entered for the Defendant nor was an affidavit in response filed on behalf of the Defendant. In effect, there was no response or defence to the Claim. The Court was satisfied that from the evidence deposed in the affidavit of service filed 5 December 2016 by Anthony Ramnath, Law Clerk, that the Defendant, on 3 December 2016, was duly served with the Fixed Date Claim and all supporting documents.

The Court further noted that the Defendant was not present in Court at the first hearing of the Fixed Date Claim and that no one appeared on his behalf to show cause why the Court should not enter judgment against him pursuant to **Part 68.7 of the CPR**. The Claimant

was called as a witness and was examined by her attorney-at-law. The Court subsequently questioned the Claimant on her evidence presented before the Court.

[4] Thereafter, judgment was granted in favour of the Claimant pursuant to **Part 68.7 of the CPR**. The Court ordered as follows:

1. Pursuant to **Part 68.7 of the Civil Proceedings Rules 1998** this Court grants judgment in favour of the Claimant as follows:

(i) It is declared that the Claimant under and by virtue of Deed of Conveyance dated the 16th day of July 2012 and registered as Deed Number 201202146896 (hereinafter referred to as "the said Deed") is the *bona fide* owner of the majority share and/or entitled to possession of ALL AND SINGULAR that certain piece or parcel of land situate at St. John's Village, South Naparima, San Fernando, in the Ward of Naparima, in the Island of Trinidad more particularly described in the Schedule hereto (hereinafter referred to as "the said property"):

THE SCHEDULE ABOVE REFERRED TO

ALL AND SINGULAR that certain piece of parcel of land situate at St. John's Village, South Naparima, San Fernando, in the Ward of Naparima, in the Island of Trinidad comprising (464.5 metres) FIVE THOUSAND SQAURE FEET and bounded on the North by lands of Beharry on the South by St. Charles Road on the East by lands of Niamath Meah and on the West by lands of Manson and more fully described in Deed No. 13544 of 1957, together with the building thereon.

(ii) It is declared that the Defendant has no claim, right and/or entitlement to the said property.

(iii) The Claimant do recover possession of the said property from the Defendant.

(iv) The Defendant to deliver vacant possession of the said property to the Claimant on/or before the 10 March 2017.

(v) The Claimant abandons the reliefs sought in paragraphs 5, 6 and 8 of the Fixed Date Claim filed 22 November 2016 namely:

a. An injunction restraining the Defendant whether by himself, his servants and/or agents or otherwise whosoever from entering and/or remaining and/or meddling on the said property.
b. Damages.
c. Interest.

(vi) Costs of this claim to be paid by the Defendant to the Claimant quantified in the sum of Seven Thousand, Seven Hundred Dollars ($7,700.00) on the prescribed scale of costs.

[5] On 10 March 2017, the Defendant filed a Notice of Application seeking, *inter alia*, (i) that the time for filing an application to set aside the judgment of the Court dated 10 January 2017 be extended to 10 March 2017; (ii) that the judgment of the Court dated 10 January 2017 be set aside; and (iii) that leave be granted to the Defendant to file his Defence to the Fixed Date Claim. The Defendant also filed an Affidavit in support on the same date.

[6] The grounds of the Defendant's Application are as follows:

i. The Defendant was served the Fixed Date Claim Form on or around the first week in December.
ii. The Defendant was not represented by an attorney-at-law at the time the Claim was issued and did not retain such representation until after the Order was served on him.
iii. The Defendant is not familiar with the process to defend the Claim and was of the bona fide opinion that any dispute with regards to the land could have been dealt with amicably through discussion with the Claimant.
iv. The Defendant was unable to comprehend the effect of the Claim served on him and the consequences of failing to defend such Claim.
v. The Defendant was not informed of the date of hearing as such date was not present on the Fixed Date Claim Form nor any other document served upon him.
vi. The Defendant's absence from the hearing on the 10th day of January 2017 was not deliberate as he was unaware that any such hearing was scheduled.

vii. The Defendant retained legal representation as soon as reasonably practicable after receiving notice of the Order.

viii. The Defendant has a defence with a realistic prospect of success by virtue of the following collectively or in the alternative:

a. Adverse Possession;

b. Constructive Trust; and/or

c. Proprietary Estoppel

ix. It is likely that had the Defendant attended the hearing some other judgment or order might have been given or made.

II. Issue

[7] The Notice of Application before the Court for decision is two-fold. On the first limb, it is an application requesting an extension of time to file an application to set aside the judgment dated 10 January 2017. If this is successful and the Court grants an extension of time, the Court will then have to consider the second limb, which is the application to set aside the judgment of the Court and grant leave for the Defendant to file his Defence, if appropriate.

[8] Therefore, the live issues for determination on the Defendant's application are as follows:

1. ***Has the Defendant satisfied the requirements of the Rules of Court to justify the granting of an extension of time to file an application to set aside the judgment of the Court dated 10 January 2017? and***
2. ***If the above is answered in the affirmative, should the Court then grant leave to set aside the said judgment and grant leave for the Defendant to file his Defence***?

III. Law and Analysis

[9] The Court has the power to set aside its judgments or orders, which were made in the absence of one party. The party who was not present when that judgment or order was made can apply to set aside the judgment given or the order made pursuant to **Rule 40.3 of the CPR**.

Rule 40.3 of the CPR provides as follows:

"(1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.

(2) The application must be made within 7 days after the date on which the judgment or order was served on the Applicant.

(3) The application to set aside the judgment or order must be supported by evidence showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[10] It is clear and accepted that the Defendant did not file the application within seven (7) days after the date on which the Order was served on him. Therefore, the Court must determine whether the Court can extend the time to hear such an application notwithstanding that the time to do so has expired.

[11] The Court is of the view that even though **Rule 40.3 of the CPR** states that the application **must** be made within seven (7) days after the date the Order was served on the Applicant, the Court retains a discretion to extend the time to comply pursuant to **Rule 26.1(1)(d) of the CPR**. **Rule 26.1(1)(d) of the CPR** empowers the Court to extend or shorten the time for compliance with any rule, practice direction or order or direction of the court. The CPR, however, does not set out what principles or considerations are to be borne in mind by the trial judge when determining an application to extend or shorten time.

[12] On her submissions, the Claimant submitted that the Defendant has to satisfy the mandatory threshold requirements of **Rule 26.7 of the CPR** if he wishes to succeed on his application for an extension of time under **Rule 26.1(1)(d) of the CPR**. However, this submission is clearly flawed.

In an application for an extension of time, a party would have to satisfy the Court of the mandatory threshold requirements of **Rule 26.7 of the CPR** where a sanction imposed by

a rule, practice direction, order or direction of the Court, has taken effect: **Trincan Oil Limited v Keith Schnake**[1]. If the sanction has not kicked in, the strictures of **Rule 26.7 of the CPR** do not apply.

[13] The Court is mindful that there is no expressed sanction imposed by **Rule 40.3 of the CPR** for failure to apply to set aside a judgment or order within the period specified. The Court is guided by the decision in **Attorney General v Keron Matthews**[2] and so cannot impose an implied sanction within this rule. The Privy Council in ***Keron Matthews*** rejected the notion of an implied sanction and stated as follows:

> *"Rules 26.6 and 26.7 must be read together. Rule 26.7 provides for Applications for Relief from any Sanction imposed for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, "any Sanction for non-compliance imposed by the rule….has effect unless the party in default applied for and obtains Relief from the Sanction"(emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a Witness Statement or Witness Summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert's report)."*

[14] Clearly, therefore, an application for relief from sanctions is appropriate where there is an expressed sanction imposed by any rule, practice direction, order or direction for failure to comply.

[15] In the case at bar, however, the appropriate application to be made is one for an extension of time and not one for relief from sanction since there is no expressed sanction imposed

[1] Civil Appeal No 91 of 2009
[2] [2011] UKPC 38

by the rule for failing to make an application pursuant to **Rule 40.3 of the CPR** within the time specified. Thus, the Defendant appropriately made an application for an extension of time.

[16] Nevertheless, the issue that remains is, what principles or considerations should the Court bear in mind when determining an application to extend time. In **Roland James v The Attorney General of Trinidad and Tobago**[3], the Court of Appeal considered an appeal from the order of the case management Judge granting an extension of time for service of the Defence of the Attorney General. Mendonça JA held as follows:

> *"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….*
>
> *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*

[3] Civil Appeal No 44 of 2014

regard to the factors at rule 26.7(4) in considering whether to grant the application or not."

[17] Consequently, the Court will have to exercise its general discretion as to whether or not, in all the circumstances, an extension should be granted. Rajnauth-Lee JA in **Dr. Keith Rowley v Anand Ramlogan**[4] stated as follows:

"In such applications, there are several factors which the trial judge should take into account, that is to say, the Rule 26.7 factors (without the mandatory threshold requirements), the overriding objective and the question of prejudice. These factors, however, are not to be regarded as "hurdles to be cleared" in the determination of an application to extend time. They are factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for extension of time. The trial judge has to balance the various factors and will attach such weight to each having regard to the circumstances of the case. Of course, not all the factors will be relevant to every case and the list of factors is not exhaustive. All the circumstances must be considered. In addition, I wish to observe that this approach should not be considered as unnecessarily burdening the trial judge. In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors."

[18] In exercising its discretion in granting or refusing the application for an extension of time, the Court is guided by the overriding objecting of the CPR as well as the *"Rule 26.7 factors"* without the mandatory threshold requirements, which would have been applicable in an application for relief from sanctions. This simply means that there is no need to satisfy all the factors in **Rule 26.7(1) and 26.7(3) of the CPR** before moving on to the factors in **Rule 26.7(4) of the CPR**. They are all factors to be considered and weighted by the Court in its determination of the application.

[4] Civil Appeal No P215 of 2014

[19] The following **Rule 26.7** factors are, therefore, applicable without the application of the threshold test:

(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.*

[20] **Rule 1.1(1) of the CPR** sets out the overriding objective of the CPR, which is to enable the court to deal with cases justly. Dealing justly with the case includes –

(a) ensuring, as far as practicable, that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with case 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.

Promptitude

[21] Jamadar JA in **Trincan Oil Limited v Schnake (supra)** on the requirement of promptitude stated as follows:

"Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact."

[22] In the case at bar, the Defendant deposed that on 13 February 2017, he received a letter from the Claimant's attorney-at-law with an order of the Court annexed thereto. Therefore, the deadline for the filing of any application to set aside the judgment was 21 February 2017 (that is, 7 clear days after notification). The Defendant, however, filed his Notice of Application to set aside the judgment on 10 March 2017. This is precisely 25 days after being notified of the judgment of the Court and therefore 18 days after the deadline prescribed by **Rule 40.3 of the CPR**.

[23] Taken in isolation to all other facts, this delay may not be considered abnormally unreasonable. However, the Court wishes to highlight that the application for an extension of time was made on the same date upon which the Defendant was ordered to deliver vacant possession of the said property – 10 March 2017. Thus, it is highly unreasonable to expect the application to be granted on the same date of filing and more so on the same date by which the Defendant was ordered to deliver vacant possession of the said property. Such application has to be served and the Claimant given an opportunity to respond thereto. Furthermore, the Claimant would have been expecting the Defendant to vacate the said property by such date in accordance with the order of the Court. Thus, by filing this application on the same date ordered for vacant possession, the Defendant has prejudiced the Claimant's recovery of the said property.

[24] In these circumstances, therefore, it would be straining the Court's discretion to hold that the requirement of promptitude has been satisfied.

Intentionality

[25] The Court of Appeal stated in **Trincan Oil Limited v Schnake (supra)** and in **The Attorney General of Trinidad and Tobago v Universal Projects Limited**[5] that to establish intentionality a deliberate positive intention not to comply with a rule, practice direction, court order or direction must be demonstrated. This intention can be inferred from the circumstances surrounding the non-compliance.

[5] Civil Appeal No. 104 of 2009

[26] In his affidavit filed on 10 March 2017, the Defendant deposed as follows:

"*The next correspondence I received which was on or around the 13th day of February, 2017 was a letter from the Claimant's attorney with an annexed order by the Honourable Mr. Justice R. Mohammed which stated that I was required to leave the said premises on or before 10th day of March, 2017. I, thereafter, made attempts to seek legal advice and around two weeks later was able to properly retain an attorney-at-law to advise and represent me with respect to the Claim."*

This was the extent of the Defendant's evidence as it relates to what he did after receiving the Order of the Court.

[27] Counsel for the Defendant in his written submissions filed on 16 May 2017 submitted that the Defendant's failure to comply was unintentional since the Fixed Date Claim Form served on the Defendant by the Claimant did not include the date, time and place for a first hearing of the Claim. Counsel further submitted that the Defendant had every intention to attend Court to defend himself but due to lack of notice of the date of hearing and his reasonable assumption that the Claimant would give him such notice he failed to attend.

[28] However, the Court is of the view that the evidence tendered and the submissions made by the Defendant under this factor of intentionality concerns the Defendant's failure to attend the first hearing of the Fixed Date Claim on 10 January 2017. This does not concern the reason for the delay in making the application for extension of time to apply to set aside the judgment. The Defendant must first succeed on the application for extension of time before the Court can consider the application to set aside the judgment.

The issue under consideration is the Defendant's failure to comply with **Rule 40.3(2) of the CPR** that is, making the application to set aside the judgment within 7 days after the date on which he received the Order. The failure to attend the first hearing ought to be considered in the application to set aside the judgment, if necessary.

[29] Nonetheless, Counsel for the Defendant submitted that the delay in retaining legal advice and representation, once notified of the Order, was due to the Defendant's limited finances. The Court finds that the inability to afford an attorney-at-law is not a good reason and that the Defendant had the option of visiting the Legal Aid & Advisory Authority (LAAA), which provides free legal advice and representation to deserving citizens of Trinidad and Tobago who may not be able to afford the services of an attorney-at-law. Once the Court had evidence much earlier of the Defendant's efforts to secure legal representation, including any application to the LAAA, the Court would have been more than willing to afford the Defendant sufficient time to make his application to set aside the judgment. In this regard, the Court must be satisfied that the Defendant was vigilant in attending to this matter and that his attempts were genuinely made to secure legal advice for the purposes of advancing his defence to this Claim.

[30] In this Court's view, the Defendant has fallen far short of convincing the Court that his failure to comply was not intentional.

Good Explanation

[31] Lord Dyson at paragraph 23 in **The Attorney General v Universal Projects Limited**[6] said as follows:

> *"To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."*

[32] In **Dr. Keith Rowley v Anand Ramlogan (supra)**, Jamadar JA stated at paragraph 24 as follows:

> *"An explanation that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach.*

[6] [2011] UKPC 37

Further, a good explanation does not mean the complete absence of fault: see Mendonça J.A. in ***Rawti Roopnarine and another v Harripersad Kissoo and others*** *Civil Appeal No. 52 of 2012, paragraph 33. What is required is a good explanation not an infallible one. Mendonça J.A. went on to observe that when considering the explanation for the breach, it must not be subjected to such scrutiny as to require a standard of perfection."*

[33] As stated above in paragraph [25], when the Defendant received the Order of the Court, he sought legal advice and was able to retain the services of an attorney-at-law to advise and represent him around two weeks later. This was the extent of his evidence as it relates to what he did after receiving the Order of the Court.

[34] Counsel for the Defendant relied on his submissions made under the factor of intentionality. However, as I stated above, the Defendant's submissions concerned the Defendant's failure to attend the first hearing on 10 January 2017 and not the Defendant's failure to comply with **Rule 40.3(2) of the CPR**, which must first be considered.

[35] Counsel for the Defendant submitted that the Defendant has a good explanation; his absence from the Court was unintentional due to his lack of notice of the hearing and any delay in making the application was due to his limited resources, that is, his lack of legal advice or representation and his limited finances and educational background.

[36] However, the Court is of the opinion that the Defendant ought to have been making serious attempts to retain an attorney-at-law since he received the Pre-Action Protocol Letter from the Claimant in or around September 2016. The service of the Fixed Date Claim ought to have compounded the seriousness of the matter; therefore, the Defendant should have been taking reasonable steps in retaining an attorney-at-law. Furthermore, the Defendant had the option of seeking assistance through the LAAA.

[37] The Court, therefore, finds that there is no good explanation proffered for the Defendant's failure to comply.

General Compliance

[38] There is no dispute that the Defendant received the Fixed Date Claim and the affidavit in support on 3 December 2016. The Defendant did not enter an appearance to the Fixed Date Claim nor did he file an affidavit in response to the Fixed Date Claim nor did he file a Counterclaim against the Claimant. The Defendant also did not attend the first hearing of the Fixed Date Claim, which resulted in the entry of judgment against him. This is what forms the basis of his Application before the Court. In short, the Defendant has not defended nor responded in any way whatsoever to the Claim filed against him until he was served with the judgment pronounced against him, which directed him to deliver up vacant possession of the property in question to the Claimant.

[39] In this regard, the Court finds that the Defendant has not generally complied with the Rules of the Court. The Court is also of the view that the Defendant has not shown that he acted with any alacrity in seeking to defend the Claim or set aside the judgment of the Court. The conduct of the Defendant between receiving the Fixed Date Claim Form and this application for an extension of time to file an application to set aside the judgment is important to consider. The Defendant has not attributed to the Court process the significance and seriousness which it deserves. In fact, he admitted in his affidavit filed on 10 March 2017 that he "*did not appreciate the seriousness of the document nor the consequences of failing to file an appearance or defence to the Claim*." This, in the Court's opinion, is inexcusable oversight.

The interests of the administration of justice

[40] In order to determine whether this factor has been satisfied, the Court has to consider the needs and interests of the parties as well as other Court users. As between the parties, the interests of the administration of justice would favour the refusal of the Application to extend time. Both parties are likely to be affected in a negative way if the Court were to allow the extension of time.

[41] The Defendant has stated that he is a man of limited means and he has limited finances. Therefore, if the matter is to proceed, it is likely that the Defendant would not be able to

satisfy any order of costs made against him or even pay for the further services of his attorney-at-law. This will eventually lead to a further delay of the matter and would no doubt frustrate the Claimant, who has been diligently complying with the Rules and directions of the Court, in her bid to secure a timely resolution of her Claim. If the Court were to allow the Defendant's application, then the effect of the costs rules would be that all costs thrown away thus far would have to be borne by the Defendant.

Whether the failure to comply was due to the party or his attorney

[42] It is undisputed that the failure to comply rests on the Defendant. The Defendant retained an attorney-at-law two weeks after receiving the Order of the Court on 13 February 2017. The Court is of the opinion that the Defendant failed to act swiftly after receiving the Order of the Court.

Whether the failure to comply has been or can be remedied within a reasonable time

[43] This factor is of no practical relevance to the application at hand.

Whether the trial date can still be met if relief is granted

[44] This factor is also moot since no trial date was ever scheduled. Pursuant to **Rule 27.2(3) of the CPR**, however, the Court may treat the first hearing of a Fixed Date Claim as the trial if it is undefended or if it considers that the claim can be dealt with summarily. In this instance, the Court treated the hearing on 10 January 2017 as the trial since the Claim was undefended.

[45] Additionally, in accordance with **Rule 68.7 of the CPR,** the Court is obliged to give judgment for the Claimant unless the Defendant attends and satisfies the Court that he has a defence with a realistic prospect of success. Consequently, in the Defendant's absence and no form of document defending the Claim filed into Court, judgment was granted against him.

The overriding objective and prejudice

[46] In addition to the Rule 26.7 factors, the Court must bear in mind the overriding objective in **Rule 1.1 of the CPR**[7] and the question of prejudice. As stated by Madam Justice Rajnauth-Lee JA in **Rowley v Ramlogan** (supra) *"These factors, however, are not to be regarded as "hurdles to be cleared" in the determination of an application to extend time. They are factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for extension of time…Of course, not all factors will be relevant to every case and the list of factors is not exhaustive…In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors."* In this Court's opinion, all of these factors are intricately intertwined to the extent that having considered all of the rule 26.7 factors, this Court would have necessarily taken into account the principles enunciated in the overriding objective and the question of prejudice to the parties. So that the principles of equality (placing parties, as far as possible, on an equal footing); economy (saving expense); proportionality (dealing with the matter in ways which are proportionate to the importance and complexity of the case and the financial position of the parties); and expedition/timeliness, have all been borne in mind and rationalized in determining this application to extend time.

[47] The Court finds that the material considerations that favour the refusal of the application far outweigh those that favour the grant of the application. I am of the view that the application was not promptly made; the failure to comply was intentional; the Defendant did not proffer a good explanation for the breach and the Defendant did not generally comply with the Rules of the Court. The issues of the administration of justice, proportionality and prejudice do not weigh in the Defendant's favour.

[48] The Court, therefore, finds that the Defendant's Application for an extension of time to file an application to set aside the judgment dated 10 January 2017 ought to be dismissed with an order for costs in the Claimant's favour.

[7] The overriding objective as stated in Part 1.1 CPR 1998 is set out in paragraph 20 of this judgment

[49] Consequently, there is no need to consider the substantive application to set aside the judgment of the Court dated 10 January 2017 and thus, that relief ought to be refused. However, for the purposes of completeness, I shall consider the submissions made by the Defendant's attorney on the application to set aside the judgment.

[50] The requirements to be satisfied in granting such an application are stipulated in **Rule 40.3(3) of the CPR**. They are:

> *"a) The Applicant has shown there is a good reason for failing to attend the hearing; **and***
>
> *b) It is likely that had the Applicant attended the hearing some other judgment or order might have been given or made."*

No good reason

[51] In **Anthony Harricharan v Wilston Campbell**[8], Devindra Rampersad J cited the case of **Brazil v Brazil**[9] wherein Mummery LJ spoke about what was capable of being "a good reason" as follows:

> "*There has been some debate before us, as there was before the judge, about what is or is not capable of being a "good reason." In my opinion, the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true "reason" for non-attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it*

[8] CV2008-02024
[9] [2002] EWCA Civ 1135

by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non- attendance."

[52] Master Alexander in the case of **Trevor Benjamin v Sumintra Ramsaroop and Felton Edwards**[10] did not accept the Defendant's inability to afford an attorney at law as a good reason. She held as follows:

"*I accept the claimant's submissions that it was not sufficient for the defendants to simply state that they could not afford an attorney; rather they needed to show that they acted with alacrity in seeking to defend the claim. Defendants against whom a judgment has been entered because of their failure to comply with the timelines set in the rules must act swiftly to set aside that judgment and do so in as reasonably practicable a way as possible*".

[53] The Defendant deposed that the Fixed Date Claim Form did not state a date for hearing before the Court. He further deposed that he has a limited educational background and that he was unable to fully comprehend the instructions of the Fixed Date Claim Form. He also stated that he was not familiar with the Court system and did not appreciate the seriousness of the document nor the consequences of failing to file an appearance or defence to the Claim.

[54] The Defendant stated that he was of the belief that he had a good relationship with the Claimant and that any dispute with the land could be resolved through direct discussion. He was of the view that the Court proceedings were unnecessary but that he was prepared to attend Court to defend himself if he was so requested. He deposed that he made attempts to retain an attorney to advise him on the document he received but was unsuccessful.

[10] **CV2007-04004**

[55] The Court is of the opinion that the Notice to the Defendant and Notes for the Defendant attached to the Fixed Date Claim are clear, concise and in simple language. Thus, the Defendant would have been aware of the consequences for failing to make an appearance, that is, that the Judge may deal with the Claim in his absence and that judgment may be entered against him.

[56] As it relates to there being no notice of the first hearing, the Court is of the view that the Defendant did not attempt to find out the date fixed for the first hearing. He had three options available to him: (i) call the Court Office (the number and office hours are stated on the Fixed Date Claim); (ii) visit the Court Office (the address is stated on the Fixed Date Claim); or (iii) call the Claimant and/or the Claimant's attorney at law.

[57] Nevertheless, based on the affidavit evidence, the Court is of the view that the Defendant did not act with alacrity in seeking to retain an attorney-at-law to assist him in understanding the significance of the documents served on him.

[58] The Court finds that the requirement to provide a good reason for failing to attend the hearing was not satisfied by the Defendant.

Different Order

[59] **Rule 68.7 of the CPR** mandates that the Court ***must*** give final judgment at the first hearing unless there is a defendant who appears and satisfies the Court that he has a defence with a realistic prospect of success.

[60] In that regard, had the Defendant attended the first hearing, it is unlikely that the Court would have made a different Order since the Claim was undefended. There was no appearance, response affidavit, defence nor counterclaim filed by the Defendant. Thus, the Court would have had no basis upon which to disapply Rule 68.7 of the CPR.

[61] The conditions in **Rule 40.3 of the CPR** are conjunctive: they must both be satisfied in order to be successful in an application to have an order/judgment of the Court set aside.

There is, therefore, no merit in the application to set aside the judgment. Accordingly, this Court has no other option but to dismiss the said application.

[62] Again, for the sake of completeness, and giving full consideration to the submissions of the parties, in particular, those of the Defendant's attorney, I shall proceed to consider the merits of the application to set aside the judgment as if I had granted leave to do so. In that premise, having regard to the Defendant's affidavit filed in support of his application on 10 March 2017, I will consider whether he had a defence with a realistic prospect of success.

[63] In determining whether the Defendant has a defence which has a realistic prospect of success I have considered the established principles laid down in the Court of Appeal decision of **Western Union Credit Union Co-operative Society Ltd v. Ammon**[11] outlined as follows:

*"(i) The court must consider whether the defendant has a '**realistic'** as opposed to a 'fanciful' prospect of success: **Swain v Hillman [2001] 2 All E.R. 91**;*

*(ii) A 'realistic' defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: **ED & F Man Liquid Products v Patel [2003] E.W.C.A. Civ 472 at [8]**;*

*(iii)In reaching its conclusion the court must not conduct a 'mini-trial': **Swain v Hillman**;*

*(iv)This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel at [10]**;*

*(v) However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] E.W.C.A Civ 550**;*

[11] Civil Appeal No.103 of 2006 [3] per the judgment of Kangaloo JA

*(vi)Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case**: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 ltd [2007] F.S.R. 63**."*

[64] On an application of these principles, I cannot find that the Defendant has any defence, which has a realistic prospect of success in this claim for recovery of possession of land. The three defences proffered were: (a) adverse possession; (b) constructive trust; and (c) proprietary estoppel. I shall consider each proposed defence in turn.

(a) Adverse Possession

[65] To succeed in his defence of adverse possession, the Defendant must establish that he had been in continuous possession of the said property for at least 16 years from the date that the Claimant's right to bring an action for its recovery first arose. Such is the law as contained in **Section 3 of the Real Property Limitation Act, Chap 56: 03**.

[66] It is settled law that adverse possession is possession, which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner: **Ramnarace v Lutchman**[12].

[67] It is undisputed that the Claimant has a five-sixth (5/6) share in the said property by virtue of Deed of Gift dated 16 July 2012 and registered as Deed Number DE201202416896. Thus, the Claimant is the majority owner of the said property.

[68] In that regard, the Defendant has to show that he had exclusive possession of the property without the consent of the Claimant. However, from his affidavit dated 10 March 2017,

[12] [2001] UKPC 25 at para 10

it is evident that the Defendant at all times relied on the permission of the Claimant in his occupation of the said property. These instances are as follows:

(i) In paragraph 17, he stated "*The Claimant and her other siblings also requested that I stay to protect their interest in the said premises*."

(ii) In paragraph 19, he stated, "*The Claimant encouraged me on each occasion to stay and live on the premises as if it was my home*."

(iii) In paragraph 21, he stated, "*The Claimant, again convinced me to stay on the said property and assured me that I could live there…*"

(iv) In paragraph 27, he stated, "*the Claimant agreed that I should put up a gate to secure my home…*"

(v) At paragraph 29, he stated that he informed the Claimant of a letter which he received and that the Claimant's attorney at law responded to the letter. He annexed the letter dated 22 November 2010 of the Claimant's attorney, which stated as follows: "*To date Richard and his family, the son of Pearl (deceased) continues to reside with the permission of Monica, Lyndon, Roselyn and Juliet.*"

[69] Accordingly, it is without doubt that the Defendant resides at the said property with the permission of the Claimant and regards the Claimant to be the true owner. When the Defendant was served with a letter from Ricardo Banmally requesting that he remove the gate on the said property, he informed the Claimant of the issue who in turn responded to the letter. This letter dated **22 November 2010**, in fact, confirms that the Defendant's occupation of the said property is pursuant to the Claimant's and her siblings' permission.

[70] In this regard, the evidence put forward by the Defendant is not supportive of a claim for adverse possession since the Defendant cannot be said to be in exclusive possession of the said property without the consent/permission of the owner. Thus, this defence of adverse possession is not likely to succeed as a defence to the instant claim.

(b) Constructive Trust

[71] Lord Diplock in **Gissing v Gissing**[13] stated:

> "*A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."*

[72] In **Harrygin-Singh and others v Harrygin,**[14] it can be gleaned that in order for the Defendant to establish a constructive trust there must be a common intention shared between him and the Claimant that the Defendant is to have a beneficial interest in the said property and the Defendant acted to his detriment upon the basis of this common intention.

[73] From the Defendant's affidavit, there is no evidence of any common intention shared between himself and the Claimant that he would have a beneficial interest in the said property. It is clear from his affidavit that the Claimant only gave him permission to occupy the said property so as to protect ***her*** interest in the said property since she was fearful that other family members would occupy the said property to the exclusion of others. There was no mention made in respect of the Defendant ever having a beneficial interest in the said property.

[74] In that regard, the defence of constructive trust is also not likely to succeed as a defence since there is no evidence of a common intention shared between the Claimant and the

[13] [1971] AC 886
[14] CV2010-1371

Defendant that the Defendant would have a beneficial interest in the said property, which was relied upon by the Defendant to his detriment.

(c) Proprietary Estoppel

[75] In **Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd**[15], Oliver J provided the following statement of the elements of estoppel as follows:

" If A, under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation."

[76] The three main elements of the doctrine of proprietary estoppel were further highlighted by Lord Walker in **Thorner v Major**[16] as:

i. *a representation or assurance made to the claimant;*
ii. *reliance on it by the claimant; and*
iii. *detriment to the claimant in consequence of his (reasonable) reliance.*

[77] From the Defendant's affidavit, there is no evidence on which this Court can deduce any representation or assurance made by the Claimant (and her siblings) to the Defendant in relation to any right to possession or interest in the said property. The Claimant (and her siblings) only gave the Defendant permission to stay on the said property.

From his affidavit at paragraph 14, he deposed that it was in fact his mother who assured him that the said property was their family home and that her children would always be allowed to stay there. However, the assurance was only in respect of permission to stay on the property and not to have an interest in the said property.

[15] (1979) [1982] Q.B. 133n
[16] [2009] UKHL 18

[78] Consequently, the defence of proprietary estoppel is also likely to fail since I am not satisfied that there is any evidence of a promise made by the Claimant to the Defendant that was relied on by the Defendant to his detriment.

IV. Disposition

[79] **Accordingly, in light of the analyses and findings above, the order of the Court is as follows:**

ORDER:

1. **The Defendant's Notice of Application filed on 10 March 2017 be and is hereby dismissed.**

2. **The Defendant shall pay to the Claimant the costs of the Defendant's Application filed on 10 March 2017 to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.**

Post Script: On delivering the above judgment, the following additional order was agreed between the parties and their respective attorneys-at-law, all of whom were present in Court:

ORDER:

3. **Costs of the said Application have been agreed in the sum of $4,800.00.**

4. **The Defendant shall vacate the said property on or before the 3 January 2020.**

Robin N. Mohammed
Judge