THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-00031

BETWEEN

VENISE PARKINSON

Claimant

AND

SHELDON QUASHIE-BOXHILL

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Wednesday 20 January 2021

Appearances:

Ms. Kim T. Berkeley for the Claimant

Mr. Joseph Sookoo instructed by Mr. Egon Embrack for the Defendant

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DECISION ON THE CLAIMANT'S NOTICE OF APPLICATION FILED ON 21 JUNE 2019

I. Introduction

[1] On 4 January 2019, the Claimant filed a Fixed Date Claim against the Defendant seeking the following relief:

1. An order prohibiting the Defendant by himself or his agents or servants or workers or otherwise howsoever from attempting to enter the premises of No. 35 Syringa Drive, La Florissante, Arima in the island of Trinidad.
2. An order prohibiting the Defendant by herself *(sic)* or her *(sic)* agents or servants or workers or otherwise howsoever from threatening, assaulting or otherwise interfering with the Claimant in the peaceful use and enjoyment and occupation of No. 35 Syringa Drive, La Florissante, Arima.
3. Cost.

4. Such further and/or other relief as this Honourable Court may seem just and/or expedient.

[2] The Claimant filed an affidavit in support on even date. The Claimant also filed a Certificate of Urgency for the matter to be heard during the Court's vacation period. However, the Court wishes to highlight that the Fixed Date Claim filed on 4 January 2019 did not identify a substantive cause of action but merely sought injunctive relief.

[3] Nonetheless, the matter was heard before Madam Justice Gobin on 4 January 2019. Gobin J granted one aspect of the injunctive relief sought by the Claimant with a return date 9 January 2019. The relief granted was "*an order prohibiting the Defendant by herself (sic) or her (sic) agents or servants or workers or otherwise howsoever from threatening, assaulting or otherwise interfering with the Claimant in the peaceful use and enjoyment and occupation of No. 35 Syringa Drive, La Florissante, Arima.*"

[4] On 7 January 2019, the Claimant filed an Amended Fixed Date Claim now claiming against the Defendant, possession of No. 35 Syringa Drive, La Florissante, D'Abadie and damages for assault. The relief sought were as follows:

1. A declaration as to the beneficial interest held by the parties in the premises of No. 35 Syringa Drive, La Florissante, Arima.
2. The Claimant wishes to seek a declaration to determine the beneficial interest held respectively by the parties in order to purchase the Defendant's equitable share in the property.
3. Damages for assault.

[5] The Claimant also filed an Amended Notice of Application for injunctive relief for the Orders stated in paragraph [1] above.

[6] On 9 January 2019, the Claimant filed a Notice of Application requesting permission to re-amend the Amended Fixed Date Claim to include a certificate of value as well as permission to file and serve a Statement of Case in support of the Re-Amended Fixed Date Claim.

[7] On 9 January 2019, this Court heard the Application for Injunctive Relief as well as the other Applications filed and ordered as follows:

1. ***Permission is granted to the Claimant to re-amend the amended Fixed Date Claim filed on 7th January 2019 to include a certificate of value on or before 14th January 2019.***
2. ***Permission is also granted to the Claimant to file and serve a Statement of Case in support of the Re-Amended Fixed Date Claim on or before 23rd January 2019.***
3. ***Defendant to file and serve response affidavit to the application for injunctive relief on or before 21 January 2019.***
4. ***Permission is granted to the Claimant to file and serve reply affidavit to new matters raised only on or before 28 January 2019.***
5. ***The injunction granted on 4 January 2019 to continue until further order.***
6. ***In addition, the Defendant undertakes not to enter the subject premises until the full hearing and determination of the application for injunctive relief filed on 7th January 2019.***
7. ***The application for injunctive relief is adjourned to 13th February 2019 at 1:30pm in Courtroom POS04.***

[8] The Claimant filed her Re-Amended Fixed Date Claim on 10 January 2019 against the Defendant now claiming possession of No. 35 Syringa Drive, La Florissante, D'Abadie and damages for harassment and intimidation with the same relief sought at paragraph [4] above. The Claimant, thereafter, filed her Statement of Case in support of her Re-Amended Fixed Date Claim on 23 January 2019. However, in her Statement of Case, she claimed against the Defendant, the following relief:

1. A declaration as to the beneficial interest held by the parties in proportion to their respective financial contributions to the acquisition of the said property at No. 35 Syringa Drive, La Florissante, Arima.
2. A declaration as to the value of the equitable shares of the No. 35 Syringa Drive, La Florissante, Arima held by both parties.
3. An order for specific performance that the Defendant do convey his equitable share in property at No. 35 Syringa Drive, La Florissante, Arima to the Claimant.

[9] The Defendant entered his appearance on 23 January 2019 and filed his Defence and Counterclaim on 22 February 2019. In his Counterclaim, he claimed against the Claimant, the following relief:

1. A declaration as to the proportions of the parties' interests and/or value of same in the subject property.
2. Leave for sale of the subject property in lieu of partition.
3. Damages, being for mesne profits based on the Claimant's sole occupation of the subject property from the date 28 June 2018 to the determination of this Claim.
4. Interest.
5. Costs.
6. Any further or other relief as the Honourable Court may think fit in the circumstances.

[10] On 8 April 2019, the Claimant, by consent, applied to the Court for an order that a date be fixed for the Case Management Conference (hereinafter "CMC") and an order for relief from sanction. By Order dated 18 April 2019, the Court ordered that the Claimant be relieved from sanction for failing to apply for a CMC. The first CMC was fixed for 28 May 2019.

[11] At the first Case Management Conference on 28 May 2019, the Court ordered as follows:

1. **Proposed application for relief from sanction and for an extension of time to put in a Defence to the Counterclaim as well as a Reply to the Defence to be filed and served on or before 21st June 2019.**
2. **The Case Management Conference is adjourned to 25th July 2019 at 10:15am in Courtroom POS16.**

[12] The Claimant complied with this Order and on 21 June 2019, she filed a Notice of Application seeking (i) an extension of time for the filing of a Defence to Counterclaim, (ii) permission to file a Reply to the Defence, and (iii) an Order for relief from sanction. The Claimant filed an affidavit in support on 21 June 2019 and a supplemental affidavit on 27 August 2019.

[13] On the basis that the Defendant was objecting to the Court granting relief from sanction to the Claimant for failing to file a Defence to his Counterclaim and for an extension of time to file her Defence to Counterclaim, at the adjourned CMC on 25 July 2019, the Court ordered that written submissions be filed and exchanged in relation to the Notice of Application filed on 21 June 2019 on or before 27 September 2019 and reply submissions if any on or before 18 October 2019.

[14] The parties complied with this Order. Both parties filed their written submissions on 27 September 2019. However, only the Claimant filed reply submissions on 18 October 2019.

II. Factual Background

[15] In or around 16 December 2016, the Claimant and the Defendant became joint owners in fee simple of the property located at No. 35 Syringa Drive, La Florissante, D'Abadie, (hereinafter "the said property") valued at $750,000.00 subject to the covenants and restrictions mentioned in the Memorandum of Transfer registered as instrument No 61 in Volume 5966 Folio 314 *(sic)*[1]. The said property is secured by a Memorandum of Mortgage granted by the Trinidad and Tobago Mortgage Finance Company and registered as No. 62 in Volume 5966 Folio 319 in the sum of $775,000.00.

[16] According to the Defendant, the parties had been in an intimate relationship since on or about December 2014 and had resided at separate properties. In late 2015, the parties discovered the said property, which was in an abandoned state and required substantial renovations. The parties thereafter agreed to pursue its purchase on the basis that it would be jointly and equally owned for their benefit, and in the event of the parties' separation or death, the said interest would accrue for their respective children's benefit.

[17] Prior to purchasing, the parties inspected the said property. At the time of inspection and in light of the parties' intention to obtain same for their children's ultimate benefit, the parties agreed that if they were successful in obtaining the said property, a fourth

[1] The Claimant incorrectly cited the Folio number. It ought to be the Memorandum of Transfer registered as instrument No 61 in Volume 5966 Folio 315

bedroom would be built to accommodate the parties and their combined three children in separate bedrooms. By September 2016, the parties had entered into an informal agreement with the vendors of the said property whereby they agreed to purchase the said property for the price of $700,000.00. This agreement was reduced into writing on 18 September 2016.

[18] A deposit of 10% in the amount of $70,000.00 was paid towards the purchase of the said property. According to the Claimant, she paid the full sum of the deposit. However, the Defendant denied this and averred that he contributed approximately $5,000.00 of the deposit by way of a direct payment to the Claimant.

[19] The mortgage facility included a bridging loan of $125,000.00. The bridging loan was paid in two tranches by cheque, each for $62,500.00, to the Defendant's personal bank account as a trustee for both parties on his request. The bridging loan payments were effected by direct debit from the Claimant's personal bank account held at Republic Bank Limited on a monthly basis. The direct debit deductions in service of the bridging loan facility were for an initial period of 8 months. The total deductions from January 2017 to August 2017 totalled $29,987.77. The Defendant gave the Claimant cash contributions totalling $14,700.00 towards the interest payments whilst the Claimant made contributions totalling $15,287.77.

[20] According to the Claimant, the bridging loan facility was used to carry out repairs and renovations to the property inclusive of building materials, labour and furnishings. The Defendant, however, denied that the bridging loan was used only to effect repairs and renovations. According to the Defendant, the parties went to Miami, USA to purchase various items to renovate and outfit the said property. Therefore, part of the bridging loan facility was used to pay for incidentals of the trip, including a rental car and the shipping costs. A further $10,000.00 was withdrawn from the bridging loan facility to purchase furnishings, household appliances and décor items from various retail outlets in Miami, USA.

[21] It is the Claimant's case that her mother gifted her $12,000.00 to assist in the purchase of items from various outlets in Miami, USA. The total expenditure amounted to $19,500.00 plus shipping costs and she paid same. The Defendant, on the other hand,

averred that the Claimant's mother gifted the sum of $12,000.00 to both parties. Further, the total expenditure was $19,500.00 plus shipping costs in the sum of $3,404.00 and that he paid the shipping costs.

[22] The Claimant and the Defendant assumed possession jointly in or around 27 July 2017. However, in or around 25 November 2017, the Defendant ended the relationship with the Claimant and moved out of the said property. The Defendant returned to reside at his former residence in Belmont.

[23] The amortised mortgage repayments inclusive of the principal amount owing on the loan facility resumed in or around September 2017 in the amount of $5,084.93 which was deducted from the Claimant's salary. The bridging loan of $125,000.00 was amortized for a period of 8 months for interest repayments only and the principal is currently subsumed with the mortgage repayments at the monthly rate of $5,084.93.

[24] According to the Claimant, the Defendant contributed to the amortised mortgage repayments inclusive of the principal outstanding for the loan facility for a period of seven months. This 7-month period included the four months that he resided at the said property and for three months thereafter. The Defendant's contribution amounted to $17,500.00. The Claimant pleaded that she continues to maintain the repayments solely since April 2017. However, the Defendant averred that he contributed towards the mortgage payments during the period September 2017 to March 2018. The Defendant added that the Claimant only began to repay the mortgage herself from April 2018.

[25] It is the Defendant's case that after the relationship ended, he agreed with the Claimant to continue paying his share of the mortgage up to April 2018. By that time, the parties would determine the value of the Defendant's half share in the said property and the Claimant would purchase same by obtaining a new mortgage. The deadline of April 2018 was fixed as the Claimant was set to and ultimately did leave the jurisdiction for three months to attend a course of study in Maryland, USA.

[26] Apart from the monies held on trust by the Defendant for both parties which was spent on repairs, renovations and the purchase of furnishings and the Defendant's financial

contributions to the facility and amortised mortgage ($14,700.00 + $17,500), the Defendant agreed that he made the following economic contributions:

a. Rentokil - $1,646.00
b. Miscellaneous repairs to the property inclusive of labour - $9,956.00
c. Valuation fee (at acquisition) - $3,650.00
d. Legal fees - $12,898.00

[27] The Defendant, however, added that he made additional contributions to the purchase and/or renovation of the said property as follows:

a. Miscellaneous fixtures and repairs – an additional $10,000.00
b. The additional cost of Keith Samuel's labour for the entire period of renovation - $51,800.00
c. Transport to and from the said property of various construction materials and rubble from demolition - $6,900.00.

[28] According to the Claimant, her total economic contributions amounted to $171,622.28 whereas the Defendant's total economic contributions amounted to $60,350.00. However, the Defendant denied this and instead averred that the Claimant's total economic contributions amounted to $159,622.28 whereas his total contributions amounted to at least $109,050.00. The Defendant, in his Defence, admitted that the Claimant made a larger contribution towards the said property. However, as of April 2018, the parties had made equal or near equal contributions to the said property and it is only by virtue of the Claimant's mortgage payments after said date that the Claimant obtained a larger share.

[29] According to the Claimant, she currently maintains and pays all utilities, taxes and outgoings in the said property since residing there and to date. However, the Defendant denied this and averred that the Claimant has only been solely responsible for these payments since her sole occupation of the said property from 25 November 2017. Prior to that time, they both made equal contributions to the outgoings of the household.

[30] According to the Claimant, she had been pre-approved for a mortgage facility under the Employee Housing Assistance Programme at her employment for $850,359.45 for a term of 21 years at a monthly instalment of $4,552.35. However, the Defendant induced her on the promise of marriage to forego this opportunity and to instead obtain a mortgage facility via Trinidad and Tobago Mortgage Finance Company Limited (hereinafter "TTMF") so that his name can be put on the Title Deed as a joint legal owner. She averred that although she was induced to apply for a joint mortgage with the Defendant in order for him to be a joint legal owner, there was no discussion as to the manner in which the beneficial interest was to be held notwithstanding the unequal economic contributions by the parties.

[31] The Defendant, in response, contended that the Claimant had been conditionally pre-approved for the said mortgage facility but was unable to access same on her own due to having a high debt service ratio. Furthermore, at no time did the Defendant make any offer of marriage to the Claimant nor was marriage within the contemplated future at the time of obtaining any mortgage. The Employment Housing Assistance Programme only permitted a married couple to obtain a joint loan together on the basis of joint ownership. Accordingly, the parties obtained financing from TTMF as joint owners but not as a married couple, reflecting their earlier agreement to purchase and own the said property in equal shares.

[32] After the Defendant left the said property, he ceased all financial contributions to the amortised mortgage and loan facility repayments. However, the Claimant pleaded that the Defendant embarked upon a course of conduct to demand a beneficial share of the said property on the basis as joint legal owner notwithstanding that the beneficial interests were not settled between the parties.

[33] The Claimant pleaded that any implied agreement or common intention that the acquisition and investment in the said property was to be considered a matrimonial home and/or that the parties would share the beneficial interest equally on the promise of marriage was changed when the Defendant terminated the relationship. The Claimant added that she acted to her detriment when she made more significant economic contributions, namely: the deposit for the purchase; renovations; repairs and furnishings; her ongoing economic contributions to the amortised mortgage and loan

facility repayment; and also having changed her position to allow the Defendant as a joint legal owner.

[34] On the other hand, the Defendant averred that he embarked upon a course of conduct to obtain compensation and/or a return relative to his equal share in the said property after the Claimant failed to act in accordance with the agreement. According to the Defendant, the Claimant made no discernible effort to determine and/or negotiate the value of the Defendant's half share or to purchase same at any time before the deadline. Nonetheless, the Defendant attempted to advance the said purchase by offering to obtain, at a shared cost, a valuation of the said property. However, the Claimant refused to do so and the Defendant ultimately paid for same at his sole cost in the sum of $2,912.50.

[35] It is the Claimant's case that the Defendant embarked upon a course of conduct which was unfair to the Claimant in not only unsubstantiated allegations as to his beneficial interest but also conduct in which he perpetrated and did commit the tort of civil assault upon the Claimant. The Particulars of Assault were set out as follows:

i. In or around 29 June 2018, the Defendant made a threat against the Claimant by sending a message via a third party, Major Julia Charles, by uttering the words "*If ya friend know what good fuh her tell her sleep by her mother tonight cause I will come and shoot her in her head*".
ii. The Defendant by virtue of his employment is a holder of a firearm and has access to firearms.
iii. The Defendant knew that those words were a message to the Claimant to be relayed to the Claimant which would put her in fear of physical harm.
iv. The Claimant was in fear of her physical harm and wellbeing.
v. The Claimant suffered great distress and anxiety as a result of same.
vi. The Defendant also sent a series of emails 17-19 August 2018 which were of an offensive nature with the effect to cause further distress and anxiety to the Claimant.

[36] The Defendant denied the particulars of assault against the Claimant. In response, the Defendant averred that upon the Claimant's failure to perform the obligations and the Defendant's return from his course of study, the parties had discussions between them

at the said property on 27 June 2018. The Claimant agreed to purchase the Defendant's half share in the said property and obtain a mortgage. The parties also agreed that pending the said purchase, the Defendant would have access to part of the said property for his use when convenient.

[37] On 28 June 2018, the Claimant emailed the Defendant indicating to him that he would no longer be allowed to access the said property unless she was present. The Defendant responded by email complaining of the Claimant's dishonesty. Following these emails, the Defendant complained to Julia Charles, a mutual friend, that the Claimant was dishonest, manipulative and untrustworthy. During the conversation, the Defendant highlighted that "*the Claimant's behaviour towards him was the kind of behaviour that, as he could now then understand, often lead to women getting shot in the head*". At no time did he make the threat as described by the Claimant or intended his words to be relayed to the Claimant in any manner as alleged or at all.

[38] The Defendant added that the emails dated 17-19 August 2018 were only offensive in nature to the Claimant in that the Defendant complained to her that based on her interaction with him regarding the said property, she was dishonest, deceitful and untrustworthy. The emails were by their nature angry exchanges and did not cause the Claimant any actionable distress or anxiety as alleged or at all. Further, it was only after the alleged emails that the Claimant proceeded to falsely accuse the Defendant of threatening her life by reporting same to the Police and to the Defendant's employer and immediate supervisor.

[39] The Defendant, in his Counterclaim, repeated the paragraphs of his Defence. He further contended that the Claimant failed to purchase his half share at any reasonable price as agreed between them and/or to take any reasonable steps towards same as agreed between them on or about 24 November 2017 and again later on 27 June 2018. The Claimant has entirely excluded the Defendant from the said property from 27 June 2018 to date and has enjoyed sole occupation of the said property at a value of $5,000.00 monthly to the detriment of the Defendant. The Defendant as a party with an interest in the said property seeks an order for sale in lieu of partition pursuant to the Partition Ordinance.

[40] The Defendant claims interest on any damages if found due to him at the rate of 2.5%. The basis for such claim for interest is that the Defendant would not be able to recover his monetary compensation until judgment herein is satisfied. In the premises, the Claimant[2] *(sic)* would have been denied the use of the said money since the date of loss whereas the Defendant[3] *(sic)* has enjoyed the use of the said property throughout the period.

III. Notice of Application

[41] By Notice of Application filed on 21 June 2019, pursuant to **Parts 10.3(5), 10.10 and 26.7 of the Civil Proceedings Rules 1998 ("the CPR")**, the Claimant applied for the following:

1. An extension of time for the filing of a Defence to Counterclaim pursuant to **Part 10.3(5) of the CPR**;
2. That permission be granted under **Part 10.10 of the CPR** for the filing of a Reply to Defence; and
3. An order for relief from sanction under **Part 26.7 of the CPR**.

[42] In the grounds of the Application, it was stated that the attorney-at-law for the Claimant omitted to file a Defence to Counterclaim which was filed and served on 22 February 2019. Therefore, pursuant to **Part 18.9 of the CPR**, the Defence to Counterclaim was due within 28 days (in or around 22 March 2019). Nonetheless, in accordance with **Part 18.9(3) of the CPR**, the Defendant is barred from obtaining default judgment under **Part 12 of the CPR**. Furthermore, the Defendant has not taken any further step in the proceedings since filing the Ancillary Claim.

[43] It was contended that there is no express sanction for non-compliance with **Part 18.9 of the CPR**. On the other hand, **Part 10.3(5) of the CPR** stipulates that a Defendant may apply for an extension of time for the filing of a Defence. Accordingly, the Court may exercise its discretion in accordance with the overriding objective in **Part 1 of the CPR** to allow for an extension of time for the filing of a Defence at any time before a judgment is given in the main proceedings or on an Ancillary Claim.

[2] Reference here should be to the "**Defendant**"
[3] Reference here should be to the "**Claimant**"

[44] Counsel for the Claimant stated that although the Claimant is deemed to admit the ancillary claim and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim (**Part 18.12(2)(a) of the CPR)**, there is no judgment or decision in the main proceedings which is still at the close of the pleadings stage. Additionally, the Defendant has not applied for nor received a judgment under **Part 12** pursuant to **Part 18.12(2)(b) of the CPR**. In any event, the Defendant is barred from doing so since it is not a matter by which a contribution or indemnity is sought: **Part 18.12(4) of the CPR**. Furthermore, the Defendant has not sought summary judgment under **Part 15 of the CPR**.

[45] Counsel for the Claimant contended that the Counterclaim repeats the same remedy, which is sought by the Claimant as to a declaration of interests. Further, the Counterclaim comprises of a mere allegation contradictory to the accepted facts before the Court, as well as, a spurious allegation as to entitlement of mesne profits, which is not substantiated by any facts, or evidence as to valuation. The Counterclaim also pleads a remedy under the **Partition Ordinance**, however, it does not specify which provision the Defendant intends to invoke.

[46] It was stated that an extension of time for the filing of a Defence to Counterclaim shall give both parties sufficient time to review same without affecting any date yet to be fixed for trial. In accordance with **Part 26.7 of the CPR**, the failure to comply was not intentional there being a good explanation for the breach and the Claimant has generally complied with all other relevant rules, practice directions, orders and directions. Further, the failure to comply was due to the Claimant's attorney-at-law for which the Claimant should not be penalised. Furthermore, it is in the interests of the administration of justice that relief be granted given the observations as to the pleadings in the Counterclaim filed by the Defendant.

IV. Law and Analysis

Defence to Counterclaim

[47] Under **the CPR**, a Counterclaim is treated as an Ancillary Claim. This is specified at **Part 18.1(1) of the CPR** which provides as follows:

"18.1(1) An 'ancillary claim' is any claim other than a claim by a claimant against a defendant or a claim by a defendant to be entitled to a set off and includes-

(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;"

[48] The person making the Ancillary Claim is the Ancillary Claimant and the Ancillary Defendant is the Defendant to that Claim: **Part 18.1(2) of the CPR**. **Part 18.2 of the CPR** provides that an Ancillary Claim is to be treated as if it were a Claim for the purposes of **the CPR** with the proviso that **Parts 8.13, 8.14** (which deal with time within which a claim may be served) and **Part 12**, which deals with default judgment, do not apply.

[49] **Part 18.9 of the CPR** permits a person against whom an Ancillary Claim is made to file a Defence, and further provides that the period for filing the defence is **28 days** after the date of service of the Ancillary Claim. As mentioned in **Part 18.2**, **Part 18.9(3) of the CPR** states that the rules relating to a Defence to a Claim apply to a Defence to an Ancillary Claim except for **Part 12** (Judgment for failure to respond).

[50] However, **Part 18.12 of the CPR** contains provisions that are applicable where the Ancillary Defendant fails to file a Defence to an Ancillary Claim, which includes a Counterclaim. **Part 18.12(2)(a) of the CPR** is relevant which states as follows:

"18.12(2) The party against whom the ancillary claim is made -
(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings insofar as it is relevant to any matter arising in the ancillary claim;"

[51] In **Satnarine Maharaj v The Great Northern Insurance Company**[4], the Court of Appeal considered the same provision in **Part 18.12 of the CPR**. The panel found that the failure to file a Defence to a Counterclaim meant that the Claimant was deemed to have admitted the averments and reliefs sought therein. The Court stated thus:

[4] Civil Appeal No. P198 of 2015

"It is clear from the submissions that there is no issue between the parties that by having failed to defend the counterclaim the appellant is deemed to admit it. The parties were ad idem that this meant that the appellant was deemed to admit not only the relief claimed in the counterclaim but the averments contained in counterclaim as well. We think that the parties were correct to adopt that position as that is so from the plain wording of rule 18.12(2)(a). Where they part company however is on the effect of the admissions in this case. That is of course the crux of the dispute and lies at the heart of determining this appeal."

Mendonça J.A. continued to comment on the effect of the provision in **Part 18.12(2)(a)** as follows:

"When faced with an application such as the respondents' in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim."

Eventually, Mendonça J.A. concluded that if the effect of admitting the counterclaim would be a dismissal of the claim then permitting the claim to continue would be an abuse of process:

"It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim… We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in

those circumstances would be an abuse of process. The respondents submitted that that was this case."

[52] As stated in **Part 18.12(2)(a)**, by failing to file her Defence to the Counterclaim, the Claimant is deemed to have admitted the Counterclaim. Thus, the Claimant is said to have admitted the following facts:

(i) The parties had been in an intimate relationship since on or about December 2014 and had resided at separate properties.

(ii) In late 2015, the parties discovered the said property, which was in an abandoned state and required substantial renovations. The parties thereafter agreed to pursue its purchase on the basis that it would be jointly and equally owned for their benefit, and in the event of the parties' separation or death, the said interest would accrue for their respective children's benefit.

(iii) Prior to purchasing the said property, the parties inspected same. At the time of inspection and in light of the parties' intention to obtain same for their children's ultimate benefit, the parties agreed that if they were successful in obtaining the said property, a fourth bedroom would be built to accommodate the parties and their combined three children in separate bedrooms.

(iv) By September 2016, the parties had entered into an informal agreement with the vendors of the said property whereby they agreed to purchase the said property for the price of $700,000.00. This agreement was reduced into writing on 18 September 2016.

(v) The Defendant contributed approximately $5,000.00 of the deposit by way of a direct payment to the Claimant.

(vi) The parties went to Miami, USA to purchase various items to renovate and outfit the said property. Therefore, part of the bridging loan facility was used to pay for incidental of the trip, including a rental car and the shipping costs.

(vii) The Claimant's mother gifted the sum of $12,000.00 to both parties.

(viii) The total expenditure on items purchased in the USA was $19,500.00 plus shipping costs in the sum of $3,404.00 and that the Defendant paid the shipping costs.

(ix) The Defendant made additional contributions to the purchase and/or renovations of the said property, $10,000.00 towards miscellaneous fixtures and repairs, $51,800.00 for Keith Samuel's labour for the entire period and $6,900.00 for

transport to and from the said property of various construction materials and rubble from demolition.

(x) The Defendant contributed towards the mortgage payments during the period September 2017 to March 2018 and that the Claimant only began to repay the mortgage herself from April 2018.

(xi) After the relationship ended, the Defendant agreed with the Claimant to continue paying his share of the mortgage up to April 2018. By that time, the parties would determine the value of the Defendant's half share in the said property and the Claimant would purchase same by obtaining a new mortgage. The deadline of April 2018 was fixed as the Claimant was set to and ultimately did leave the jurisdiction for three months to attend a course of study in Maryland, USA.

(xii) The Claimant's total economic contributions amounted to $159,622.28 whereas the Defendant's total contributions amounted to at least $109,050.00.

(xiii) As of April 2018, the parties had made equal or near equal contributions to the said property and it is only by virtue of the Claimant's mortgage payments after said date that the Claimant obtained a larger share.

(xiv) The Claimant has only been solely responsible for the payments of all utilities, taxes and outgoings on the said property since her sole occupation of the said property since 25 November 2017. Prior to that time, they both made equal contribution to the outgoings of the household.

(xv) The Claimant had been conditionally pre-approved for the said mortgage facility but was unable to access same on her own due to having a high debt service ratio.

(xvi) At no time did the Defendant make any offer of marriage to the Claimant nor was marriage within the contemplated future at the time of obtaining any mortgage. The Employment Housing Assistance programme only permitted a married couple to obtain a joint loan together on the basis of joint ownership. Accordingly, the parties obtained financing from TTMF as joint owners but not as a married couple, reflecting their earlier agreement to purchase and own the said property in equal shares.

(xvii) The Defendant embarked upon a course of conduct to obtain compensation and/or a return relative to his equal share in the said property after the Claimant failed to act in accordance with the agreement.

(xviii) The Claimant made no discernible effort to determine and/or negotiate the value of the Defendant's half share or to purchase same at any time before the deadline. Nonetheless, the Defendant attempted to advance the said purchase by offering to obtain, at a shared cost, a valuation of the said property. However, the Claimant refused to do so and the Defendant ultimately paid for same at his sole cost in the sum of $2,912.50.

(xix) Upon the Claimant's failure to perform the obligations and the Defendant's return from his course of study, the parties had discussions between them at the said property on 27 June 2018. The Claimant agreed to purchase the Defendant's half share in the said property and obtain a mortgage. The parties also agreed that pending said purchase, the Defendant would have access to part of the subject property for his use when convenient.

(xx) On 28 June 2018, the Claimant emailed the Defendant indicating that he would no longer be allowed to access the said property unless she was present. The Defendant responded by email complaining of the Claimant's dishonesty.

(xxi) Following said emails, the Defendant complained to Julia Charles, a mutual friend, that the Claimant was dishonest, manipulative and untrustworthy. During the conversation, the Defendant highlighted that "the Claimant's behaviour towards him was the kind of behaviour that, as he could now then understand, often lead to women getting shot in the head". At no time did he make the threat as described by the Claimant or intended his words to be relayed to the Claimant in any manner as alleged or at all.

(xxii) The emails dated 17-19 August 2018 were only offensive in nature to the Claimant in that the Defendant complained to her that based on her interaction with him regarding the said property, she was dishonest, deceitful and untrustworthy. The emails were by their nature angry exchanges and did not cause the Claimant any actionable distress or anxiety as alleged or at all. It was only after the alleged emails that the Claimant proceeded to falsely accuse the Defendant of threatening her life by reporting same to the Police and to the Defendant's employer and immediate supervisor.

(xxiii) The Claimant failed to purchase the Defendant's half share at any reasonable price as agreed between them and/or to take any any reasonable steps towards same as agreed between them on or about 24 November 2017 and again later on 27 June 2018.

(xxiv) The Claimant has entirely excluded the Defendant from the said property from 27 June 2018 to date and has enjoyed sole occupation of the said property at a value of $5,000.00 monthly to the detriment of the Defendant.

[53] However, the Claimant's acceptance of the above facts in paragraph [52] means that the matter comes to an end and therefore, the provision that the Claimant be "*bound by the judgment or decision in the main proceedings*" is not entirely applicable as the relief sought in the Counterclaim is more or less the same as the Re-Amended Fixed Date Claim. Thus, by this provision, the Court will effectively be giving judgment on the entire matter in the absence of a Defence to Counterclaim.

[54] However, this Court in a previous judgment in **Balgobin and another v Algoo and others**[5], cross-referenced the Rule in **Part 18.12 of the CPR** with the identical provisions in England, from which our Rules of Procedure are derived. This Court was of the opinion that there had been a misapplication in our drafting of the identical provision contained at **Part 20 of the UKCPR** and that such misapplication resulted in a sanction that was draconian and disproportionate and therefore, contrary to the principles of the **Overriding Objective**. In **Balgobin and another v Algoo and others (supra)**, the Court held as follows:

> *"The rule in Part 18.12 of the CPR, does not place the parties on equal footing. Instead, the effect of its provisions places the Defendant in an unjustly advantageous position over the Claimant in the proceedings. This is seen in several ways:*
>
> *For one, it has, since the advent of the Privy Council decision in the **Attorney General v Keron Matthews** **[2011] UKPC 38**, become the law that a defence can be filed out of time without permission from the Court and thus, there is no sanction to be implied for a failure to file a defence on time (Lord Dyson's speech at para 16). Thus, a defaulting defendant can simply apply for an extension of time to file his defence under **Part 10.3(5)**. The only remedy available to the claimant for the defendant's breach is to apply for default judgment under **Part 12** (if Part 12 allows) prior to any application for extension. But this remedy is far from fatal to the defendant's case for he is*

[5] CV2014-04731, judgment dated 19 December 2017

*permitted by **Part 13** to apply to have that judgment set aside. All that need be shown is that he (i) has a realistic prospect of success; and (ii) acted as soon as is reasonably practicable when he learned of the default judgment (see Part 13.3).*

This is indeed a balanced approach because on one hand, it affords some measure of punishment to the defendant for his laxity yet, on the other, allows him the opportunity to correct his error providing the conditions are met. Thus, the defendant's true punishment comes in the way of costs to his client or wasted costs if the attorney is at fault.

*When the tables are turned, however, the sanctions imposed under **Part 18.12** seem draconian in comparison. Firstly, unlike in the example above, when a claimant does not defend a counterclaim on time, he is met with an immediate sanction in **Part 18.12(2)**. Thus, no opportunity is given for any extension of time applications.*

Secondly, the effect of that sanction is dire. The Claimant is deemed to admit the counterclaim and more importantly, is bound by any judgment or decision in the main proceedings. So one asks, what happens if, as in this case, and no doubt, many other cases that involve a counterclaim, the main proceedings is intricately intertwined with the counterclaim to the extent that judgment in the main proceedings would mean judgment on the counterclaim itself and an end to the matter? The Rules seem to say, so be it, the matter has now ended. In fact, not only had it ended abruptly, it has also ended permanently. For on the one hand, there is no provision available to the claimant to seek to set aside the judgment in similar fashion to a default judgment but more importantly, having admitted the counterclaim, there really is no basis on which he can mount a successful appeal.

*Thus, one misstep by the claimant results in his claim being dismissed in perpetuity, regardless of whether he had a valid defence available. When looked at in this way, a literal interpretation of **Part 18.12(2)** leads to an unjust outcome."*

[55] As a consequence of a literal interpretation of a Rule leading to an unjust result especially when persuasive authority implores us to decide otherwise, the Court is of the opinion that in such situations, the Court is permitted to apply the **overriding**

objective in **Part 1.2(2) of the CPR**. The Court is of the opinion that the principles of natural justice weigh in the balance. Such principles frown upon the idea of rendering final and permanent judgment (that cannot be set aside like a default judgment) in a matter without providing each party, namely the party in breach, the opportunity to have her Defence heard.

[56] Accordingly, I had given the Claimant, at the CMC on 28 May 2019, permission to also file an application for relief from sanctions. The Claimant complied with this direction and therefore, followed the proper procedure contained in **Practice Direction on Late Filing of Documents**[6]. In an application for an extension of time, a party would have to satisfy the Court of the mandatory threshold requirements of **Part 26.7 of the CPR** where the sanction imposed, by the rule, practice direction, order or direction of the Court, has taken effect: **Trincan Oil Limited v Keith Schnake**[7]. If the sanction has not kicked in, the strictures of **Part 26.7 of the CPR** do not apply.

Relief from Sanctions

[57] Applications for relief from sanctions are governed by **Part 26.7 of the CPR**. Numerous judgments have been written on the requirements under this Rule and I see no need to set out its provisions in full. In any event, the learning on such applications was succinctly stated by Jamadar JA (as he then was) in the Court of Appeal decision of **Trincan Oil Limited and Ors v Chris Martin**[8] as follows:

> *"The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribed the three conditions precedent that must be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise this discretion granted under Rule*

[6] By Legal Notice 28 dated 25 February 2013
[7] Civil Appeal No 91 of 2009
[8] Civil App No 65 of 2009 at para 13

26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied."

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

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

b. Saving expense;

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

i. the amount of money involved;

ii. the importance of the case;

iii. the complexity of the issues; and

iv. the financial position of each party;

d. ensuring that it is dealt with expeditiously; and

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

[59] Accordingly, this Court must first consider whether the mandatory threshold requirements of (i) **promptitude**; (ii) **intentionality**; (iii) **a good explanation** and (iv) **compliance with other rules** have been met in accordance with **Parts 26.7(1) & (3) of the CPR**. The Claimant must satisfy the Court that each of these requirements has been met or else the Application will fail. If she so satisfies, then the Court can proceed to consider the other, non-mandatory factors, provided for by **Part 26.7(4) of the CPR** and the overriding objective of the CPR.

The Threshold Test in an Application for Relief from Sanctions

Promptitude

[60] In **Dr. Keith Rowley v Anand Ramlogan**[9], Justice Rajnauth-Lee J.A. said:

"Where an application for an extension of time is made before the sanction takes effect, it should be regarded generally as a prompt application. I am mindful however that there may be circumstances where

[9] Civil Appeal No P215 of 2014

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."

[61] In the instant case, the Counterclaim was filed and served on the Claimant on 22 February 2019. Therefore, the deadline for the Claimant to file her Defence to the Counterclaim was 28 days after the date of service. The time-period for the Claimant to file her Defence would have expired on 22 March 2019. At this date, the sanction imposed in **Part 18.12(2)(a) of the CPR** would have taken effect. However, the Claimant first sought to make an oral application for an extension of time at the first CMC on 28 May 2019. On that date, the Court ordered that the Claimant file her proposed application for relief from sanction and an extension of time to file a Defence to Counterclaim and specifically gave her until 21 June 2016 as a deadline. The Claimant complied with this direction and filed the Application on 21 June 2016. In this regard, the Application is considered prompt.

Intentionality

[62] The Court of Appeal has provided guidance in **Trincan Oil Limited v Keith Schnake**[10] and **The Attorney General of Trinidad and Tobago v Universal Projects Limited**[11] that to establish intentionality what must be demonstrated is a deliberate positive intention not to comply with a rule or direction. This intention can be inferred from the circumstances surrounding the non-compliance. The Court of Appeal in **Trincan Oil Limited v Keith Schnake (supra)** 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

[10] Civ Appeal No. 91 of 2009
[11] Civil Appeal No. 104 of 2009

to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied."

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

[64] Ms. Berkeley, in the grounds of the application in the case at bar, stated that the failure to comply was not intentional. The Claimant, in her supplemental affidavit, stated that the failure to file a Defence to Counterclaim was not intentional and was as a result of inadvertence/omission on the part of her attorney-at-law.

[65] According to the Claimant, Ms. Berkeley emailed the Court on 12 February 2019 to vacate the hearing on 13 February 2019 and to enquire about scheduling a Case Management Conference. The Court replied indicating that the court date for 13 February 2019 was vacated. However, there was no indication about the Case Management Conference. The Claimant stated that the Defendant filed his Defence and Counterclaim on 22 February 2019 even though there were no directions to that effect. Accordingly, she would have been obliged to file a Defence to Counterclaim by 22 March 2019.

[66] However, Ms. Berkeley advised her that she had some personal difficulties on 19 March 2019 but in any event was focused on obtaining a date for the CMC whereby she would request to file a Reply and Defence to Counterclaim. Ms. Berkeley on 4 April 2019 enquired about fixing a CMC to which she received no reply. Nonetheless, on 8 April 2019, Ms. Berkeley filed a Notice of Application with consent requesting the fixing of a CMC. Pursuant to that application, Ms. Berkeley sent two further emails on 15 and 24 April 2019 enquiring about the application, however, she received no reply. In or around 21 May 2019, Ms. Berkeley spoke with the Assistant Registrar Mr. Roberts for assistance. On 22 May 2019, Ms. Berkeley received notice from the Court that the application was granted and that a CMC was fixed for 28 May 2019. At the CMC, Ms. Berkeley requested to file a Reply and Defence to Counterclaim for which the Court gave directions.

[67] From the explanation given above, it appears that Ms. Berkeley was more concerned with scheduling a CMC than defending the Counterclaim. Nowhere in **Part 18 of the CPR** is it stated that permission from the Court is required to file a Defence to Counterclaim. However, permission from the Court is only required for the filing of a Reply to a Defence, which must be given at a CMC: **Part 10.10 of the CPR**. Accordingly, there was therefore nothing preventing Ms Berkeley from preparing and filing a Defence to Counterclaim in the interim.

[68] Nonetheless, as stated in the learning above, while such reasoning for the non-compliance advanced by the Claimant may not be persuasive and/or be premised on a faulty understanding of the rules, it does not necessarily evince a lack of intention to defend the Counterclaim. Rather, the question is whether the Claimant's explanation is one that is consistent with an intention to defend the Counterclaim. In my opinion, it is. Just as occurred in **Trincan Oil (supra)**, where the explanation, though not good, nevertheless indicated an intention to comply with the Rule, I similarly find that though premised on a mistaken belief, the Claimant's explanation shows that she has always intended to defend the Counterclaim.

[69] I am of the view that the explanation given does indicate an intention to defend the Counterclaim. Consequently, the Claimant's failure to comply with **Part 18.9(2) of the CPR** was not intentional.

Good explanation

[70] Lord Dyson at paragraph 23 in **The Attorney General v Universal Projects Limited**[12] 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."*

[12] [2011] UKPC 37

[71] In **Dr. Keith Rowley v Anand Ramlogan (supra)**, Jamadar J.A. 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. Further, a good explanation does not mean the complete absence of fault: see Mendonca 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. Mendonca 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."*

[72] The Court finds that the explanation given by the Claimant – Ms. Berkeley had some personal difficulties on 19 March 2019 but in any event, was focused on obtaining a date for the Case Management Conference – is a reasonable explanation for the non-compliance with the rules.

[73] Consequently, I accept that the Claimant has a good explanation for the failure to comply with the CPR.

Compliance with other Rules

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

Other considerations in Part 26.7(4) of the CPR

[75] The non-compliance of the Claimant will not affect the trial date in this matter as no trial date has yet been set. Further, considering that a draft of the Defence of the Counterclaim has been filed with the Application, the Claimant's non-compliance would be immediately remedied upon granting of the Application. However, it is noted that the non-compliance was due solely to the attorney's oversight and no blame can be placed on the client. Nevertheless, given my rationale in paragraphs [54] and [55] above, it is in the interests of the administration of justice to have the Application granted. This is especially so considering that it is evident that the Claimant has

significantly contributed to the property and it would be unfair for the Claimant's case to fail on account of a mere procedural misstep, more particularly, on the part of the attorney at law.

[76] In light of the above, the Claimant ought to be relieved from the sanction imposed in **Part 18.12(2) of the CPR** for failing to file her Defence to Counterclaim within the prescribed period and be granted an extension of time to file her Defence to Counterclaim.

Reply to Defence

[77] The Claimant, in her Application filed on 21 June 2016, also sought permission from the Court to file a Reply to the Defence. The Court would now consider that aspect of the Application. **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited**[13] is the locus classicus in local common law in relation to the test for considering an application for permission to reply. The test is set out at paragraph 18 of the judgment of Pemberton J as follows:

> *"What must a reply contain? I wish to associate myself with BLACKSTONE'S statement of the learning on this matter:*
>
> *'... a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence. ... Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to a defence'."*

[78] An application for permission to put in a Reply cannot therefore succeed if the proposed Reply responds to matters which should have been dealt with in the

[13] CV2007-002865

particulars of claim (i.e. in the statement of case). It should deal with **"new" matters** that are raised by the defence and should not be drafted as a **"defence to a defence"**: **Mayfair Knitting Mills; Raymatie Mungroo v Andy Seerattan and Ors**[14]**;** and **Rohit Seekumar (trading as "Copying Express" v McEnearney Business Machines Limited**[15].

[79] The draft Reply as attached to the Claimant's Affidavit in support of the Application contains 6 paragraphs. In paragraphs 1, 2, 3 and 6 of the Reply, the Claimant joins issue with the Defendant on his Defence. However, in paragraph 1 of the Reply, the Claimant also responds to new issues raised in the Defence – that both the Claimant and the Defendant discovered the property together and had discussions as to the joint ownership of the property in the event of any separation or death; the property would accrue to their children – which warrants a response. Therefore, paragraphs 1, 2, 3 and 6 of the Reply are permissible.

[80] Paragraph 4 of the Reply is permissible in part. The words "In reply to paragraph 12 the invoice produced by the Defendant is now shown for the first time as exhibit "A" in these proceedings" are struck out on the basis that it is immaterial in a Reply to a Defence. The Defendant is not obligated to disclose any documentary evidence he intends to rely on to the Claimant before filing his Defence; exhibiting his intended documentary evidence to his Defence is sufficient. The remainder of paragraph 4 is permissible since it responds to new issues raised – an arrangement with Keith Samuel and the use of vehicles for transport from the Trinidad and Tobago Regiment – which warrants a response.

[81] Additionally, paragraph 5 of the Reply is not permissible on the basis that it is a material fact which ought to have been pleaded in the Statement of Case.

[82] Nonetheless, the Court is of the opinion that the Reply as drafted is of no substance, especially in assisting in setting out the Claimant's case against the Defendant. Moreover, the new issues raised by the Defendant are issues that can be dealt with at

[14] CV2013-04801
[15] CV2015-03969

the trial in cross-examination. Accordingly, permission is not granted to the Claimant to file and serve a Reply to the Defence.

VII. Costs of Application

[83] The question arises as to who is entitled to the costs of the application. In this instance, the Claimant is partially successful on the application; the Claimant was relieved from sanction imposed by **Part 18.12(2)(a) of the CPR** and an extension of time was granted to file a Defence to the Counterclaim, however, the Claimant was unsuccessful in getting permission to file a Reply to the Defence.

[84] The general rule relating to assessed costs on procedural applications is that the unsuccessful party must pay the costs of the successful party: **Part 67.11(2) of the CPR**. However, having regard to the nature of the application before the Court, the Court is of view that the Claimant ought to be liable for costs to the Defendant pursuant to **Part 67.11(3)(b) and (d) of the CPR**. **Part 67.11(3) of the CPR** states as follows:

> *67.11(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 Part 26.7,***
>
> *the Court **must** order the applicant to pay the costs of the respondent unless there are special circumstances.*

[85] The Court finds that there are no special circumstances arising in the matter at bar which warrant a departure from **Part 67.11(3)(b) and (d) of the CPR**. In that regard, the Claimant shall be ordered to pay the Defendant's costs of the Application to be assessed in accordance with **Part 67.11(1) of the CPR**.

VIII. Disposition

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

ORDER:

1. **The Claimant be and is hereby relieved from the sanction imposed in CPR Part 18.12(2)(a) for failing to file her Defence to the Counterclaim within the prescribed period provided for by CPR Part 18.9(2).**
2. **The time for the Claimant to file a Defence to the Counterclaim be and is hereby extended to 3 February 2021.**
3. **Permission sought by the Claimant to file and serve a Reply to the Defendant's Defence be and is hereby refused.**
4. **Pursuant to CPR Part 67.11(3)(b) and (d), the Claimant shall pay to the Defendant costs of the Claimant's Application filed on 21 June 2019 to be assessed in accordance with CPR Part 67.11(1), in default of agreement.**
5. **In the event that there is no agreement on the issue of costs, then the Defendant to file and serve a Statement of Costs for assessment on or before 10 March 2021.**
6. **Thereafter, the Claimant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 24 March 2021.**
7. **Decision on quantification of costs to be given without a hearing on a date to be announced.**
8. **The injunction granted against the Defendant on 4 January 2017 to continue until further order.**
9. **This matter is adjourned to 25 March 2021 at 11:30 am via MS Teams Virtual Platform.**

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Robin N. Mohammed
Judge