REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2012-01753

Between

URBAN DEVELOPMENT CORPORATION OF TRINIDAD AND TOBAGO

Claimant

And

JOHN CALDER HART

First Defendant

KRISHNA BAHADOORSINGH

Second Defendant

RICARDO O' BRIEN

Third Defendant

NEELANDA RAMPAUL

Fourth Defendant

Before The Honourable Justice David C. Harris

Appearances:

Mr. D. Punwasee instructed by Mr. Daryll Allahar **for the** Claimant
Dr. Lloyd Barnett instructed by Ms. Annabelle Sooklal **for the** First Defendant
Mr. Colin Kangaloo instructed by Ms. Daniel Nieves **for the** Second Defendant
Mr. Anthony Bullock instructed by Mr. Imran Ali **for the** Third and Fourth Defendants

DECISION

INTRODUCTION

1. This is a decision on the two(2) applications filed by the Claimant on the 19th February 2019, pursuant to the judgment order of 11th February 2019, for:
    a) An extension of time to apply for relief from sanctions; and
    b) The Relief from sanction.

Background

2. On the 11th September 2017 and 16th October 2017, the Second and First Defendant respectively, filed Notices of Application for the claim herein to be deemed struck out pursuant to Rule 27.3(4) of the Civil Proceedings Rules 1998 as amended (the "**CPR**"). After hearing Counsel for the Claimant and the Defendants/Applicants (the 3rd and 4th Defendants having an interest in the outcome of the applications) and considering their submissions, both oral and written the court ordered on the 11th February 2019 that:

   i. The claim stands automatically struck out pending the application for relief from sanctions;
   ii. That the Claimant is permitted to file and serve an application for an extension of time to apply for relief from sanctions;
   v. That the said two (2) applications be filed and served on all relevant parties on or before 3pm on the 17th Day of February 2019;
   vi. That the Claimant do file and serve its written submissions in support of the said two applications on or before 3pm on the 20th February 2019;
   vii. That the four (4) Defendants (or any of them as they see fit) are permitted to file their Affidavits in response to the said Applications and Affidavits in support, on or before the 1st March 2019;
   viii. That the Defendants (or any of them) do file their written submissions in opposition to the two (2) applications on or before the 13th March 2019.

3. The Claimant filed the relevant applications and submissions as ordered, together with affidavits in support. The Defendants (all four Defendants) filed their submissions in opposition to the applications as directed in the order along with affidavits in response, to which the Claimant filed submissions in reply. Further submissions were requested by the court on the issue of refiling or reinstating the same claim (suit number) should relief from sanctions be granted; these submissions were duly filed by the parties.

4. It is prudent to first deal with the application for extension of time to apply for relief from sanctions (see 'A' below); if the court does not grant this application, then this process goes no further and the claim remains struck out. On the other hand, if the court grants the application,

then it follows that due consideration must be given to the second limb; whether the relief from sanctions sought (see 'B' below) ought to be granted and the claim reinstated.

(A) NOA FILED 19TH FEBRUARY 2019 FOR EXTENSION OF TIME TO APPLY FOR RELIEF FROM SANCTIONS

THE CPR

5. The CPR at Part 27.3(as amended) provides as follows:

(3) If the court does not—

(a) dispense with a case management conference under rule 27.4(1) and give directions under rule 27.4(2); or

(b) give notice of a case management conference within—

(i) 14 days of the filing of a defence, where there is only one defendant;

(ii) 14 days of the filing of the last defence, where there are two or more defendants; or

(iii) 14 days of the expiration of the period for the filing of the last defence, where there are two or more defendants, the claimant shall within 28 days of the relevant period identified in subparagraph (b) apply for a date to be fixed for the case management conference.

(4) If the claimant does not so apply, the claim shall be automatically struck out.

(5) The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4).

(6) In considering whether the court grants relief, the court shall have regard only to whether the defendant has suffered any prejudice and rule 26.7 shall not apply. [Emphasis added]

6. The claim having been deemed to be struck out pursuant Part 27.3(4) and the 3-month period within which the Claimant could apply to the court for relief from the strike-out sanction as provided in Part 27.3(5) having passed, the court's discretion to extend time under Part 26.1(1)(d)

is relevant in this matter. In the second limb however, the court must be minded of the considerations under Part 26.7[1] and the overriding objective at CPR rule 1.1 and more particularly 1.1(2)[2], when exercising its discretion to grant an extension of time.

SUBMISSIONS

The Claimant

7. The Claimant recounted the procedural history in its submissions filed on the 23rd February 2019. This history formed part of the court's decision delivered on the 11th February 2019; it is therefore not necessary to reproduce it here.

8. In its submissions and affidavits in support of the applications, the Claimant stated that due to the changes in the Claimant's personnel and attorneys over the years, its current attorneys were unable to verify whether a notice of Case Management Conference ("**CMC**") had been issued by the court office or whether a CMC had been held. Further, certain records in the Claimant's possession indicated that a CMC had been held.

9. The procedural history, as outlined in the Claimant's submissions, shows that subsequent to the claim being issued 1st May 2012, amended pleading were filed by the Claimant; applications were made and determined; appeals against orders were lodged; all these events consuming a considerable amount of judicial time. At the 'CMC' on 28th July 2017 the Defendants indicated their intention to file applications to have the claim deemed struck out pursuant to the CPR Part 27.3; this, after the High Court decision in ***CV2015-04374 Rain Forest Limited and Super Industrial***

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[1] **26.7** (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made <u>promptly</u>. (2) An application for relief must be <u>supported by evidence.</u> (3) The court may grant relief only if it is satisfied that— (a) <u>the failure to comply was not intentional</u>; (b) there is a <u>good explanation for the breach</u>; and (c) the party in default has <u>generally complied with all other relevant rules, practice directions, orders and directions</u>. (4) In considering whether to grant relief, the court must have regard to— (a) the interests of the administration of justice; (b) whether the failure to comply was due to the party or his attorney; (c) whether the failure to comply has been or can be remedied within a reasonable time; and (d) whether the trial date or any likely trial date can still be met if relief is granted.

[2] **1.1** (1) <u>The overriding objective of these Rules is to enable the court to deal with cases justly</u>. (2) Dealing justly with the case includes— (a) ensuring, so far as is practicable, that the parties are on an equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate to— (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party. (d) ensuring that it is dealt with expeditiously; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Services Ltd v National Gas Company of Trinidad and Tobago and the resulting appeal ***Civ App P 186 of 2016.*** For ease of reference this matter is hereafter referred to as *"**NGC v SIS**.*"

10. The Claimant submits that CPR rule 26.1 (1)(d) empowers the court to extend or shorten the time for compliance with any rule, practice direction or order of the court. The Claimant relies on the case of ***Dr. Keith Rowley v Anand Ramlogan***[3] and the dicta of Rajnauth-Lee JA (as she then was) at para. 13 on the approach to be adopted in determining an application for extension of time:

> *"In the above cases, the Court of Appeal was disposed to the view, and I agree, that the trial judge's approach in applications to extend time should not be restrictive. In such applications, <u>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.</u> 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."* [Emphasis added]

11. These Rule 26.7 factors were also considered by Charles J in her decision on the 8th February 2019 in the ***NGC v SIS*** case[4] (subsequent to the Privy Council ruling on the NGC appeal) wherein she determined the NGC application for an extension of time to apply for relief from sanctions. The Claimant has adopted this approach which mirrors that enunciated by Rajnauth-Lee JA in the ***Dr***. ***Keith Rowley*** matter[5].

<u>The Part 26.7 factors</u>

Promptness

12. The Claimant maintains that the Judge sitting in the earlier part of the case made an order fixing a CMC more than 4 years after the action was commenced. They therefore reason that by this

[3] Civ. App. P215 of 2014
[4] CV2015-04374 from para. 11
[5] Civ App No. P215 of 2014 at para. 13

action, the Judge, by his own motion, exercised his discretion to extend time and granted relief from sanctions; the claim was therefore active and not struck out.

13. According to the Claimant, the Defendants themselves were uncertain as to the status of the claim, only filing their application for the claim to be deemed struck out in September and October of 2017 when it appeared that Part 27.3 was in play given the Court of Appeal decision in the ***NGC v SIS***[6] matter, delivered on 23rd November 2016. Determination of the instant applications was stayed on the application of the Claimant herein, pending the decision of the Privy Council in the ***NGC v SIS***[7] matter, which was delivered on the 16th July 2018, dismissing NGC's appeal of the Court of Appeal's decision that the claim stood struck out pursuant to Part 27.3(4) of the CPR.

14. The Claimant contends in its submissions that it was only after the court delivered its decision on the Defendants' applications on 11th February 2019, that the Claimant became aware that the sanction to automatically strike out the claim had been triggered.

15. Having awaited the outcome of the appeal to the Privy Council in the ***NGC v SIS*** matter as agreed and the subsequent ruling on the Defendants' applications in the instant claim, the Claimant contends that the application for extension of time was made promptly in all of the circumstances.

Whether the failure to comply was intentional and was there a good explanation for the breach.

16. The Claimant relies on the overall circumstances of the matter in support of its position that the failure to comply with Part 27.3(5) was not intentional; that the court, by order of 31st March 2017 fixed the First CMC for 3rd July 2017; that the said order was not challenged or appealed by the Defendants; that the case was active – applications were determined, orders for disclosure made on 4th December 2014; decisions/orders of the court appealed; parties were pressed by the court at a hearing on 16th April 2014 to set a trial window in October 2014.

17. The Claimant further relies on the judgment of Charles J[8] at para. 30 to this contention and the submission that there is a good explanation for the breach:

[6] CA Civ P186 and P190 of 2016

[7] [2018] UKPC 17

[8] NGC v SIS and Rain Forest Resorts CV2015-04374

"The explanation for the breach as explained above is a good one. As submitted by the Claimant, this was the first occasion that the interpretation of this Rule had engaged the attention of the Court foursquare. Their, as well as this Court's erroneous interpretation of the Rule, account in some measure for the delay in applying for the extension within the stipulated timeframe. I take into account the opinion of Rajnauth JA[9] that "a good explanation does not mean the complete absence of fault…what is required is a good explanation not an infallible one." In my view the Claimant's failure to comply with CPR 27.3 (5) amounts to an excusable oversight"

General compliance

18. The Claimant submits that there was general compliance with rules, orders and directions of the court. They made great efforts to comply with orders for disclosure and their inability to produce certain documents should not be viewed as a failure to comply with the order.

Interests of the administration of justice

19. The interest of the administration of justice weighs in its favour, the Claimant submits. Not granting the Claimant's application for the extension would result in the Claimant's claim to recover substantial public funds being dismissed without any consideration of the merits of the case but rather, being disposed of on a technicality. Further, the Claimant relies on the judgment of Mendonça JA in **Roland James v Attorney General of Trinidad and Tobago**[10].

Failure to comply due to party or attorney

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[9] Rowley v Ramlogan Civ App No. P215 of 2014

[10] Civ app No. 44 of 2014 at para. 40:

The factors outlined at rule 26.7(4), begin with the interests of the administration of justice. This involves consideration of the administration of justice between the immediate parties but it is also necessary to consider the needs and interests of other court users. Clearly as between the parties, the administration of justice would favour the grant of the extension. To refuse the application would mean the defendant would lose by default and be liable to pay damages to the claimant, which will be met by public funds, without a trial and therefore without an opportunity to put forward evidence in support of the defence and to challenge the claimant's claim no matter how weak or unfounded it might be. So far as other court users are concerned, the practical effect is that time has been spent in dealing with the application in the Court below and the appeal before this Court. Had the application not been opposed and the order of the Judge appealed I do not think it would have had any significant impact on the Court's time, nor any significant impact on other court users. What has considerably enlarged the time is the claimant's decision to vigorously oppose the application and subsequently appeal to this Court. I do not think that the claimant should be able to rely on time taken up in that way. As the Court remarked in Kaneria v Kaneria [2014] All ER (D) 30 (at para 71): "...I do not think Dilip can rely on the fact that he has chosen to oppose the application as itself a reason for refusing it. To do so would simply increase the temptation for those asked to consent to extensions to refuse to do so and argue at length why they should not be granted."

20. On this head, the Claimant submits that the failure to comply was due to the belief that there was a CMC which allowed the matter to proceed. Indeed, the Claimant further submits that all parties, attorneys and even the court were not aware of any failure to comply, pursuant to Part 27.3. The Claimant contends that the matter proceeded as if a CMC had been held.

Can failure to comply be remedied within a reasonable time

21. For this element, the Claimant submits that the application for relief from sanctions was filed as ordered and available for the court's deliberation and determination. Should both applications be decided in the Claimant's favour, the claim is reinstated immediately and pursuant to Part 27.3(7) a CMC must be held within 28 days of relief being granted.

Whether trial date can be met if relief granted

22. A trial date has not been fixed for this matter, neither has a trial window been allocated. This factor is therefore not significantly relevant to the determination of this application.

The overriding objective

23. Regarding the overriding objective factors and in particular Part 1.1(2) of the CPR, the Claimant again relies on the dicta of Mendonça JA in ***Roland James*** (supra):

> *"As stated before the Court is to exercise its discretion having regard to the overriding objective. Relevant considerations in addition to the factors at 26.7(1), (3) and (4) obviously include those specifically referred to in rule 1.1(2). <u>I think the focus when having regard to these matters should be on the impact the failure to file the defence in time has had on these factors."</u>* [Emphasis added]

24. The Claimant submits that in relation to the overriding objective factors, that: **(i)** the factor of equal footing does not arise in the instant case; **(ii)** time and expense will be saved by granting the extension as opposed to re-litigation; **(iii)** the nature of the case – recovery of public funds – is deserving of the court's resources in ensuring that it is properly ventilated on its merits; **(iv)** if the order is not granted, the matter stands dismissed, but can be dealt with expeditiously if

reinstated; **(v)** in allotting the court's resources in the instant case, this factor weighs in favour of the order sought.[11]

Prejudice

25. The Claimant submits that the only prejudice to the Defendants in extending time to the Claimant may be the delay in completion of the matter. Even if such a delay exists, the Claimant submits that it does not amount to prejudice for the purposes of this application and, in this regard, relies on the dicta of Mendonça JA in **Jimdar Caterers Limited v The Board of Inland Revenue**[12] at para. 61:

> "….. *Assuming that failure might have delayed the determination of the tax appeal, I do not consider that such delay without more is prejudice the Court should take into account. As was mentioned in* ***Roland James****, if, for example, if the delay caused harm, such as the loss of relevant documents or resulted in the unavailability of a witness so that if the time were extended the appellant would be disadvantaged in establishing its claim, that would be prejudice the Court can take into account. But nothing of this kind was alleged by the appellant."*

26. Further, the prejudice to the Claimant for the extension not being granted is dismissal of the matter at the expense of the taxpayers. "*The court must consider the prejudice to the parties in granting or refusing the application."*[13]

27. In all of the circumstances, the Claimant submits that even if one or more of the factors to be considered is decided against the Claimant, the interests of the administration of justice should outweigh such other factors as in ***Jimdar***.[14]

The First Defendant

28. This Defendant submits that the Claimant committed a serious default by failing to apply for an extension of time before the expiration of the 3-month period pursuant to Part 27.3(5) of the CPR.

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[11] For point (v) see Roland James at para. 42

[12] Civ App No. P256 of 2017

[13] Jimdar at para. 32

[14] Civ App No. P256 of 2017 and see also the Claimant's submissions at paras. 56-60

Further, the rule provides a specific time limit for the exercise of the court's discretion. The First Defendant states that while Part 26 grants general power to the court to rectify matters, this power does not apply where a rule has invalidated any proceedings, as does rule 27.3 and the court has no such power where the consequence of the failure to comply with a rule is specified by any rule as is the position in this case.[15]

29. Further, the First Defendant submits that the Applicant (Claimant) deliberately chose not to make an application for extension of time or relief from sanctions for long after the expiration of the normal three months permissible extension; the Applicant has given no good reason for the delay and clearly none exists; it is no longer possible to remedy the failure to comply within a reasonable time; the protracted litigation in this matter is unfair and disproportionate and is inimical of the court's objective of ensuring that cases are dealt with expeditiously.

30. This Defendant cited various authorities[16] in support of his submitted position, including Hashtroodi v Hancock[17], Super Industrial Services Ltd. v National Gas Co. of Trinidad and Tobago[18], Deloris Thompson and Another v National Development Foundation of Jamaica[19] and H B Ramsey & Associates Ltd et al v Jamaica Redevelopment Foundation Inc and Anor.[20]

31. The above cases bear out the principle that where the application in not made promptly and no (good) explanation is given for the delay or breach, the application to extend time or grant relief from sanctions will be refused.

32. The First Defendant further submits that since the three months allowed by the CPR 27.3(5) has expired before the application for extension was made, there is no room for any further extension.[21] But if CPR 26.7 applies in this case, all the conditions of that rule would have to be satisfied by the applicant.[22]

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[15] The First Defendant relies on Part 26.8 (1) and (2) of the CPR

[16] See submissions of the Second Defendant at para. 5

[17] [2004] 1 WLR 3206

[18] [2018] UKPC 17

[19] CLT039 of 2002

[20] [2013] JMCA Civ 1 (Jan 18, 2013)

[21] See sub-para. 6.3 of the First Defendant's submissions

[22] See sub-para. 6.5 of the First Defendant's submissions

Second Defendant

33. This Defendant submits that the Claimant's application for an extension of time to file an application for relief from sanction imposed by CPR 27.3(4) should be dismissed[23] because:

(i) It was not made promptly[24]

In July 2017 the First and Second Defendants indicated to the court that they both intended to put forward to the court that the matter was dismissed because a CMC was not fixed within the timelines as laid out in the CPR. At that time, the Claimant was put on notice of the seriousness of the situation and chose not to file an application for extension of time for making this application and the relief from sanctions application, even after this Defendant's application to strike out the matter was made on 11th September, 2017 and the subsequent Privy Council decision in **NGC v SIS** was given on 16th July 2018.

(*ii) The failure to make such an application was intentional and there is no good reason for the failure to make same*[25]

For the reasons highlighted in (i) above, the Claimant's failure to comply was intentional, having been aware of the Defendant's intention at a hearing in July 2017, the subsequent application to strike out filed September 2017 and thereafter the Privy Council decision on 16th July 2018.

(iii) UDECOTT has a history of not complying with all the relevant rules, practice directions, orders and directions in this action[26]

The Second Defendant submits that the Claimant's handling of the matter has been well below the standard expected; they failed to comply with order of the then presiding Judge for disclosure of certain documents and failed to comply with Part 27.3(3) CPR. Further the conduct of the Claimant throughout the matter is one of delay and a total lack of efficiency in pursuing this claim.[27]

[23] See Second Defendant's submissions from paras. 22-53 and Civ App No. P215 of 2014 Keith Rowley v Ramlogan
[24] See Second Defendant's submissions from paras. 24-35.
[25] See Second Defendant's submissions from para. 36
[26] See Second Defendant's submissions from para. 37
[27] See affidavits of Calder Hart (March 8, 2019) at paras. 6-26; Imran Ali (March 8, 2019) at paras. 5-16; Dr. Bahadoorsingh (February 26, 2019 and February 27, 2019)

(iv) The interest of the administration of justice mandates that the application should be dismissed[28]

The Defendant states in his submissions that the matter has been in the court system since 2012 and is still at the pleadings stage and questions why it should be allowed to continue and, in effect, be given a second chance in a situation where there are thousands of matters before the court, a system overburdened and oversubscribed with matters requiring judicial time and expense, and where there is no good explanation from the Claimant for its failure to handle this matter properly. Further, any serious handling of the backlog of matters mandates that this matter should not be allowed to proceed.

(v) Whether the fault is with the Claimant or its Attorneys-at-law[29]

The Defendant contends that for the reasons set out under the issue of *promptitude*, the requirement for an extension of time is the fault of both the Claimant and its attorneys-at-law; they should have followed the example of the NGC lawyers in the ***NGC v SIS*** case and filed the appropriate applications prior to the Privy Council ruling in July 2018.

(vi) *Likely effect on trial date*[30]

No trial date has been fixed in this matter due to the Claimant's lax approach to the prosecution of this matter, and even after 7 years in the court system, the Second Defendant submits. The Defendant therefore suggests that no benefit should accrue to the Claimant because of the lack of a trial date.

(vii) *The overriding objective of the CPR – to deal with cases justly and expeditiously and allotting the courts resources*[31]

The Defendant submits that the parties are not on an equal footing as the Claimant has the entire state apparatus deployed against them; that dismissal of the Claimant's application for an extension of time would be a cost efficient way of dealing with the matter; that the matter is not being dealt with expeditiously and the Claimant has not acted in such a manner as to ensure that

[28] See Second Defendant's submissions from paras. 38-41

[29] See Second Defendant's submissions from paras. 42-43

[30] Second Defendant's submissions at para. 44

[31] Second Defendant's submissions at paras. 45-48

the matter has been dealt with expeditiously. The Defendant cites the Claimant's failure to file the requisite applications until the court order to do so. Refusal to grant the application would not be disproportionate in all of the circumstances of the case, and the on-going legal expenses for this Defendant.

(viii) Prejudice[32]

The submissions of the Second Defendant suggest grave prejudice should the extension of time application be granted. Further, the Claimant's claim does not annex all the documents relevant to issues raised against the Defendant, neither have all these documents been disclosed as ordered by the court. This has hampered the preparation of the Amended Defence. Additionally, public funds expended to prosecute this matter and/or at stake should not receive any exceptional treatment and be allowed to continue given the Claimants lack of action prior to the court's order of February 2019.

Third and Fourth Defendants

34. These Defendants submit that the discretion found in rule 26.1(1)(d) of the CPR to extend time for compliance is not subject to any threshold in the rules and accordingly is to be exercised in accordance with the overriding objective and established principles.

35. To support this view, the Defendants cited the case of ***Jimdar*** (supra), a case relied upon by the Claimant, and quote in part:

> *"However as was stated in **Rowley** and **Roland James** cases, the requirement that the applicant must satisfy the criteria at 26.7(3), which are necessary to obtain relief from sanction, is not applicable to an application for an extension of time. An applicant may succeed notwithstanding, for example, that his application is not prompt or he does not provide a good explanation. What is necessary is the weighing and balancing of the relevant criteria."*[33] [Emphasis added]

[32] Second Defendant's submissions at paras. 49-50

[33] See submissions of Third and Fourth Defendants at para. 6 generally and page 4.

36. Further, the Defendants submit that having made the application for extension of time on 19th February 2019, a delay of 4 years and 5 months is not a prompt application by any standards. Even though the court determined numerous interim applications during this period, it does not mean that a CMC had occurred, nor is it logical to conclude or assume that such an event occurred. The implied extension and relief argument relied on by the Claimant is one that is not available to the Claimant given the court's ruling at para. 14-20 of the 11th February decision.

37. The Defendants contend that the Claimant had ample opportunities to file its application for an extension of time – after the hearing in July 2017 when the first two Defendants indicated that the sanction had taken effect; November 2017 when the Claimant applied for a stay of proceedings pending the outcome of the Privy Council appeal in the **NGC-SIS** matter; after the delivery of the Privy Council decision on 16th July 2018.

38. Further, Part 27.3 was adjudicated in the High Court by Seepersad J on 26th July 2013 in **CV2011-04480 Holder v Attorney General** at pages 6 and 7 of the judgment.

39. In all of the circumstances, the application for an extension of time was not made promptly.

40. The Defendants are not of the view that the breach was intentional.

41. Regarding the explanation for the breach, the Defendants submit that the Claimant's attorneys having the mistaken belief of a CMC having occurred, is an explanation, but not a good one. Reliance is placed on the dicta in the Court of Appeal decision in **Trincan Oil v Keith Schnake**[34] **"……** *except in exceptional circumstances, default by attorneys will not constitute a good explanation for noncompliance with the rules of the court."*[35]

42. Further, there is no evidence that the court office issued a notice of a CMC, neither can the determination of applications affect the need for the court to fix a CMC or for the Claimant to apply for the court to fix a date for a CMC.

[34] Civ App No 91 of 2009

[35] See para. 45 of the judgment

43. The Claimant's explanation is not enough to constitute a good explanation.

44. The Defendants contend, through submissions and the affidavit of Imran Ali, that the Claimant did not comply with the order for specific disclosure by the deadline of 10th March 2014; even after several extensions were sought and obtained by the Claimant, they remained non-compliant. The Defendants further contend that the Claimant has repeatedly failed to meet timelines set by the rules and/or the court – to file its procedural appeal or file submissions relating to the said appeal. Several extensions were sought and obtained in this regard. The Defendants therefore submit that the Claimant has not been generally compliant with the rules, practice directions, orders and directions of the court.

45. In considering the interests of the administration of justice, the Defendants submit that the court needs to consider how the parties are affected and importantly, how other users of the court are affected.[36] Given the tremendous resources already expended by the court, and to be expended should the application be granted, the long period to be covered by the extension of time which the Claimant is asking and its history of procedural non-compliance and the lack of a good explanation for not seeking an extension of time at an earlier opportunity, the Defendants submit that the interests of the administration of justice do not favour the grant of the extension of time.

46. The application to fix a date for the CMC and relief from sanction within the relevant 3-month period should have been made by the Claimant's attorney. The Defendants contend that a CMC date may not be fixed within a reasonable time; conduct of the first CMC is contemplated by the CPR to be within a short period of time from the commencement of the claim and the entry of a defence.

47. The Defendants submit further that the issue of prejudice to the parties is relevant to the court's discretion to extend time. One aspect of prejudice which they will suffer is effectively the loss of any limitation defence. They contend that the causes of action against these Defendants all accrued in 2008 and prior to that year and were statute barred at the commencement of the

[36] See submissions of the Third and Fourth Defendants (citing Jimdar paras. 55 and 56) at para. 41 and the affidavit of Imran Ali at paras. 17-19.

action. Further, in principle, the courts require a very good reason to extend time for a Claimant to take procedural steps where such extensions may deprive Defendants of limitation defences.[37]

48. They contend further, that the claim having been ruled automatically struck out by the court on 11th February 2019, the claim is certainly barred by limitation 7 years after commencement.

FINDINGS AND CONCLUSIONS

49. In **Jimdar** at para. 30, Mendonça JA, referring to the previous Court of Appeal decisions of **Roland James** and **Rowley v Ramlogan** (supra), held:

> *"…..in exercising its discretion whether or not to extend time, the court must also do so as to give effect to the overriding objective of the CPR which is identified at rule 1.1(1) and is to enable the court to deal with cases justly."*

And at para. 31:

> *"Rule 1.1(2) of the CPR identifies some of the considerations relevant to dealing justly with the case……other relevant considerations may be found at rules 26.7(1), (3) and (4) of the CPR…….The requirement that the applicant must satisfy the criteria at 26.7(3) which are necessary to obtain relief from sanction, is not applicable to an application for extension of time. Any applicant may succeed notwithstanding, for example, that his application was not prompt, or he does not provide a good explanation. What is necessary is the weighing and balancing of the relevant criteria."* [Emphasis added]

50. And in ***Roland James*** at para. 43:

> *"As stated before the Court is to exercise its discretion having regard to the overriding objective. Relevant considerations in addition to the factors at 26.7(1), (3) and (4) obviously include those specifically referred to in rule 1.1(2). I think the focus when having regard to these matters should be on the impact the failure to file the defence in time has had on these factors…"* [Emphasis added]

[37] See CV2016-03836 TT Housing Development Corporation and Attorney General v Jearlean John et al, the Defendants' submissions at paras. 51-53 and the affidavit of Imran Ali at paras. 8-10

51. For clarity, the dicta as quoted from ***Jimdar*** at para. 31 is contrary to the submissions of the First Defendant[38] regarding the Claimant satisfying thresholds in CPR 26.7. Additionally, this Defendant's reasoning is not in line with the Privy Council ruling in ***NGC v SIS*** which states:

> *"….a claimant who delays beyond the three months before making an application for relief from the automatic striking out sanction, under rule 27.3(5), will have to seek an extension of time, for which the court has a more general discretion (in furtherance of the overriding objective) under rule 26.1(1)(d)."*[39]

52. What is required for promptitude in this matter? In **Trincan Oil Ltd v Keith Schnake**[40] Jamadar JA (as he then was) stated:

> *"Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact. <u>'Prompt' must be considered in relation to the date when the sanction was imposed.</u>"*[41] [Emphasis added]

53. The Claimant did not file the relevant applications until the decision was given on the Defendants' applications to strike out the claim on 11th February 2019 and the court made its order. The Defendants contend in essence that notwithstanding its pursuance of several interim applications between the deemed striking off date and the filing of the instant applications and the other reasons provided by the Claimant, it was not logical that the Claimant was of the view that a CMC had occurred. This court notes, that it appears both parties and dare I say, the court, laboured under the belief that a CMC had taken place or, in any event, that the matter was proceeding along without breach of the rule now invoked. The issue surrounding the interpretation of part 27.3 was not entirely straight forward and was ultimately clarified by the court of Appeal in other matters and the Privy Council, both of which took time to consider the point. These are exceptional circumstances in the ***Trincan*** sense.

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[38] See sub-paras. 6.3 and 6.5 of the First Defendant's submissions and paras. 29 and 33 above.

[39] [2018] UKPC 17 at para. 34

[40] Civ App No. 91 of 2009

[41] See para 9 of the submissions of the Third and Fourth Defendants and para. 22 of the judgment.

54. The sanction was imposed on 13th June 2013 – the date that the claim stood struck out. The applications for extension of time and relief from sanctions were filed some 6 years later, but weeks after this court's earlier decision on the applications. Accounting for the stay of proceedings in 2014 some 4 years would have elapsed from the time the sanction was imposed to when proceedings were stayed. It is not entirely unreasonable for the Claimant to await determination of applications before the court and then act on the resulting order of the court, whether by application or other action. Generally applications are made *'because of'* certain actions or inactions and not *'in case'* such actions or inactions; they are not preemptive as it were but reactive. If the action of the NGC in **NGC v SIS** (filing its application before determination of the appeal) is used as the benchmark for promptitude, it ignores the dicta and logic of Jamadar JA; *"Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact…"*

55. At the onset the court notes its findings that the Defendants have not succeeded in persuading the court of the *prejudice*, sufficiently so that it rises to support their opposition to the merits of the application for the extension of time.

56. **Was the failure to comply intentional**? The short answer is 'no.' The Claimant's position is that at all times the matter was conducted by all parties as if the matter was properly before the court; that is, the matter was not struck out but proceeding as directed by the court. Indeed, the Defendants continued to prosecute their defence to the claim prior to their 2017 applications to strike out, filing applications on disclosure and sanctions for non-disclosure on the part of the Claimant and submissions in support thereof.

57. The Defendants' actions lend credence to the Claimant's position that the matter proceeded as if a CMC had taken place (or the effect of rule 27(3) did not exist) if only explained by the fact that some four years had elapsed since the Defendants did make and take the point now taken. Instead, the Defendants sat on their rights as it were for four years. It could only be that the Defendants were themselves not aware of the existence of the factual circumstances that would support the application to strike out, or there was a tactical motive for it. The court concludes that it was ever more likely to have been the former. Either way it does not auger well for support

of the Defendants' contention and the implication, that the Claimant was the substantial if not only culpable defaulter in this saga.

58. The reason for the failure to comply: a good explanation is required for the breach. Charles J found that the reason for the breach in the ***NGC v SIS*** matter[42] was a good one – that it was the first time the interpretation of rule 27.3 had engaged the attention of the court foursquare and the erroneous interpretation accounts in some measure for the delay in applying for the extension of time.

59. The learned judge also took into consideration the opinion of Rajnauth-Lee JA in ***Rowley v Ramlogan*** *"…. a good explanation does not mean the complete absence of fault…. what is required is a good explanation not an infallible one*." Charles J concluded that the Claimant's failure to comply with CPR 27.3(5) amounts to an 'excusable oversight.'

60. Can these considerations be successfully applied here to the Claimant's actions or inactions? Was this an excusable oversight? Does the Claimant's explanation reach the bar? The Claimant maintains and submits[43] that:
    - *a) It was unaware whether a CMC had been scheduled by the court office;*
    - *b) Because of the unavailability of the court file it could not determine whether the court office had issued a notice of a CMC;*
    - *c) The Honourable court could, on checking the file, determine whether the court office had issued a notice; and*
    - *d) In any event, by issuing order dated 31st March 2017 for the First CMC, the judge had exercised his discretion to extend the time for applying for relief and granted relief against the sanction of automatic dismissal.*

61. The impression of the Claimant that a CMC had commenced is not an unreasonable one (albeit wrong), given the conduct of the parties in litigating this matter. At the very least, uncertainty certainly existed as to whether in fact a CMC had occasioned as opposed to whether a sanction

[42] CV2015-04374 ruling of 8th February 2019
[43] See para. 5 of the Claimant's submissions in reply

applied – to strike out the claim. In all of the circumstances of the case, the Claimant's explanation is a good one, though not infallible.

62. The Claimant required several extensions of time to comply with orders (specific disclosure) and rules (filing notice of appeal). Applications for extension of time to comply with an order is not seen in the same light as ignoring the order of the court altogether, which can amount to contempt. I would say the Claimant generally complied with rules, order and directions of the court. Where the Claimant sought and obtained extensions of time to comply with orders, rules and/or directions of the court, this reflects I would think, the Claimant's efforts to comply with the said orders rules and/or directions, albeit requesting additional time to do so. The value judgment as to whether the several applications for extensions of time have, going forward, cumulatively represented failed compliance, can be made at the appropriate time, upon all the considerations there made. On these applications before this court, the said applications for extensions for disclosure, do not reflect sufficient evidence of non-compliance to meet the threshold for the period in time in these two applications now before the court.

63. The interests of the administration of justice are heavily weighted here, I think. This matter has used a lot of the court's time and resources since 2012 and is still at the pleadings stage. To be fair, there have been procedural applications and subsequent appeals, extensions of time to comply with court orders, all of which have had the effect of extending the court life of this claim. The fact is though that after 7 years, there has not been established a timetable for witness statements and documents, or the fixing of a trial window or trial date. This court understands that reality.

64. The Third and Fourth Defendants and the Claimant cited ***Jimdar*** when considering the interests of the administration of justice. The Court of Appeal stated at para. 55 and 56 of the judgment:

> *"…. this involves consideration of not only the parties in this appeal but other court users. I f the extension of time for filing the statutory bundle of documents and the statement of case were not granted, it is likely, though I cannot say it is inevitable, that the Tax Appeal will go no further and the appeal should be determined in the appellant's favour…….this has implications for the public as the non-payment of tax impacts on the public purse.*

Looked at this way, this would seem to be a factor that would lean in favour of the respondent…..Given the long period of default by the respondent in complying with its obligations and the poor explanation for so doing, it is not unreasonable to expect that the applications would have been opposed, so the whole of the time taken up by the applications before the Board should count against the respondent."[44] [Emphasis added]

65. What then are the considerations in this matter? How much of the delay is due to the actions or inactions of the Claimant? The Claimant, in deferring filing the application to extend time until this date has contributed somewhat to further delay, should the application be granted. However the timelines/procedural history of this matter suggests that both Claimant and Defendants contributed to the delayed status of the claim, outside of these applications by the Claimant.

66. In ***Roland James*** the Court of Appeal held:

> *"Clearly as between the parties, the administration of justice would favour the grant of the extension. To refuse the application would mean the defendant would lose by default and be liable to pay damages to the claimant, which will be met by public funds, without a trial and therefore without an opportunity to put forward evidence in support of the defence and to challenge the claimant's claim no matter how weak or unfounded it might be…….."*[45]

67. The claim stood struck out as at 13th June 2013. Almost 6 years after time began to run for the Claimant, their applications are made pursuant to Part 27.3(5) of the CPR. The English Court of Appeal in Hashtroodi v Hancock[46] held that "*…if the party simply overlooked the requirement of the rules, that would be a strong reason to refuse an extension of time…"*

68. Of relevance here is the fact that the Claimants and Defendants all pursued the matter after the deemed striking out date as if Part 27.3 of the CPR did not exist or was not relevant to the matter.

[44] See para. 41 of the submissions of the Third and Fourth Defendants.
[45] Civ App No. 44 of 2014 at para. 40
[46] [2004] 1 WLR 3206 and First Defendant's submissions at sub-para. 5.2

To *'overlook the requirements of the rules'* is to be first aware of the rules and all the parties did not exhibit such awareness until 2017 when the Defendants filed applications to strike out.

69. The claim is for damages, quantified in one instance at para. 6 of the Re Amended Claim filed 20th November 2012 in excess of $65M. This represents public funds that the Claimant seeks to recover. It can therefore be said that the claim is in the public's interest as taxpayer's funds were used in the project. Further, if the application is not granted and the claim remains struck out, a question of the prosecution of the law may arise, given the public perception on 'waste of public funds,' 'corruption and non-accountability,' the amount claimed in damages and the claim being dismissed on a procedural point or 'technicality.' Under this limb, the authorities lean towards granting the extension.

70. Can the default be cured within a reasonable time? What is a reasonable time in all of the circumstances? The default is that a CMC was not fixed by the court, neither did the Claimant nor the Defendants apply for a date for a CMC to be fixed within 28 days of 29th May 2013 or at all.[47] In giving this decision, the court must fix a date for the First CMC. The timeline to cure the default runs from the date that the CMC should have been fixed (28 days of 29th May 2013) to when this decision takes effect to fix the CMC date 28 days after the court order.

71. This matter has endured delays throughout and the fault and causes on these delays as between the Claimant and Defendants often times are indistinguishable, whether through the filing and determination of applications, appeals on orders granted and extensions of time to comply with directions of the court.[48] In all of the circumstances of this case, the reasons stated earlier when considering the various factors under rule 26.7 and the fact that none of the parties were aware or mindful that the claim was deemed struck out on 13th June 2013 (the Defendants filing applications to strike out in September and October of 2017), the timeline is not an unreasonable one.

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[47] See decision of Harris J dated 11th February 2019 at para 9

[48] See paras. 9 and 16 of this decision and the Claimant's submissions at 4 and 5

72. The court's discretion to extend time is also guided by the overriding objective. Following ***Roland James***, the court must consider what effect the Claimant's delay in filing its application has had on dealing with this case justly.

73. The first factor is ensuring the parties are on an equal footing; the Claimant wrongly submitted that this factor is not relevant here. The aim of this factor is to ensure as far as possible that there is a level playing field between the litigants of unequal finances or resources.[49] The late filing of the applications by the Claimant may have the effect of shining a light on the potential inequality as between the parties with regard to finances and resources and the effect of this inequality if these proceedings move forward. Given the resources available to the Claimant in comparison to the Defendants, the 'unequal footing' becomes more pertinent the more protracted the claim. However, outside of the generic claim and understanding by the court, of the costly nature of funding high court litigation, there is no proved specifics presented by the Defendants of incapacity to fund litigation at this time.

74. The next factor is saving expense. The Second Defendant submits that it will be cost effective to dismiss the claim. The Claimant on the other hand, is of the view that time and expense will be saved by reinstating the claim. The Defendants have experienced additional expenses, having opposed the Claimant's applications. However, if these applications to dismiss the claim were filed earlier, say on time in 2013, the Claimant would have filed for the extension of time perhaps just months after the claim stood struck out. An application for the extension of time would have been required nonetheless, increasing expenses for the Defendants. Either way therefore, the Defendants stood to experience these specific increased expenses due to the delay.

75. Next is dealing with cases in ways which are proportionate to **(i)** the amount of money involved; **(ii)** importance of the case; **(iii)** the complexity of the issues; and **(iv)** the financial position of each party. This matter involves a substantial amount of money and is an important case, given the public interest aspect. UDECOTT is a state-funded company. However, the court has shown previously, by sanctioning the Claimant through striking out certain parts of the Statement of Case, its aim is to deal proportionately with this matter.

[49] Roland James at para. 43

76. I now come to the other factor – ensuring that the case is dealt with expeditiously. First off, the case is at the pleadings stage 7 years after filing and it is now established that a date has not been fixed for a CMC; the earliest CMC date will be 28 days after this decision order. The Claimant's applications, filed out of time, have of course engaged the Defendants' opposition. If the applications are granted, then this case will continue to utilize the court's time for an extended period. The case can now move expeditiously after this decision if it is reinstated. The court is also minded that during the 7 years since filing, the matter has been actively, albeit labouriously litigated by all the parties up to 2017 when the Defendants filed applications to strike out and the matter was stayed, pending the Privy Council decision in ***NGC v SIS*.**

77. Next, is allotting an appropriate share of the court's resources to cases, while considering the need to allot resources to other cases. This matter is set to use up more of the court's resources given that the First CMC is yet to be held[50]. As the matter proceeds in this vein, and bearing in mind the nature of the case, court resources will be consumed, given the nature of the case.

78. Now to Prejudice: the last, broadest and indeed fundamental factor to be considered. The prejudice to the Claimant if the application is refused is clear. If the claim is dismissed, they pay the Defendants' costs and the damages claimed remain unrecovered. *Limitation of action* issues would not allow the claim to be refiled and adjudicated upon.

79. If the claim is reinstated, the Defendants submit that their limitation defence will be lost as the causes of action accrued in 2008 and prior to that year; that they would continue to be constrained in putting an adequate Amended Defence before the court as the Claimant's claim did not annex documents very relevant to the issues raised against the Defendants; that there would be a drain on the Defendants' resources. In support of the submissions on the limitation defence, the Defendants rely on **Trinidad and Tobago Housing Development Corporation and the Attorney General v Jearlean John et al**[51] where an order permitting an extension of time to serve a claim was set aside because, inter alia, the extension had the potential to deprive the Defendants of limitation defences and no sufficiently good reason had been advanced by the

[50] Although several case management type advances were made along the way.

[51] CV2016-03836

Claimants for requiring an extension of time to serve the claim.[52] See also *Hashtroodi v Hancock [2004] 1 WLR 3206* at para. 18 and *Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806* at para. 52.

80. The court has already determined that the Claimant's explanation for the breach was a good one, although not infallible. Further, I accept the Claimant's position on the limitation defence. At the time of filing, such a defence was not available to the Defendants. At the time of this decision, that defence is not available to them (the Defendants) unless the extension of time and/ or relief from sanction is not granted. It is not for the court to create a limitation defence for the Defendants that did not exist at the time of commencement.

81. For all of the reason stated above, including the limited proof of threshold-prejudice to the Defendants, the weighty consideration of the public interest factor and in all of the circumstances of this case, the court is minded to **grant the Claimant's application for an extension of time to file an application for relief from the sanction imposed by rule 27.3(4) of the CPR and the claim is reinstated.**

(B) NOA FILED 19TH FEBRUARY 2019 FOR RELIEF FROM SANCTION

82. The court having granted the application for extension of time, it now moves to consideration of the second limb: the application to consider the grant to the Claimant of relief, from the automatic striking out sanction. Pursuant to rule 27.3(6) of the CPR, the only consideration here is whether the Defendants have "suffered any prejudice" by reason of the Claimant's failure to fix a date for the CMC.

83. Prejudice is defined as detriment or harm caused to a person, especially in a legal case. In **Jimdar Caterers Limited v The Board of Inland Revenue**, which was cited at para. 25 of this decision, Mendonça JA quoted from ***Roland James*** in stating, in effect, that if the delay caused harm, that would be prejudice the court can consider.

84. These considerations under the umbrella of 'prejudice' are in many respects similar to that which the court has considered in the application for the extension of time. The court's conclusions

[52] See paras. 76-78 of the Second Defendant's submissions and para. 52 of the Third and Fourth Defendants' submissions.

there, to the extent they become applicable in the relief from sanction application here, remain the same.

85. Not to diminish the fundamental character of the term of art; *prejudice,* alleged, the Defendants have set out what the court considers as largely generic items of prejudice, including the incurrence of expense, past (and prospective even) non-disclosure issues, absence of the existence of CMC directions toward trial and a further reliance on the limitation defence not being available to the Defendants. In relation to the non-disclosure issues, the rules provide the requisite solutions, with sanctions if necessary, to dispose of that specific issue and move on toward trial.

86. The court concluded in the first limb – for an extension of time - that these items in the paragraph above and all the other non-*threshold requirements* of part 26.7 dealt with by this court, do not individually or collectively even, rise to the threshold to defeat the relief sought then, neither do they do so now pursuant to rule 27.3(6) as amended. Again, the fundamental test here is one of *prejudice.* That is, having regard to the myriad considerations, do the Defendants suffer prejudice sufficient to warrant the court not granting the relief sought by the Claimant? The short and terminal answer to that question is 'no.'

87. For all the reasons stated above, **IT IS HEREBY ORDERED THAT**:

I. The Claimant's application filed 19th February, 2019 for an extension of time to file an application for relief from sanction is granted;

II. The Claimant's further application filed 19th February, 2019 for relief from sanction pursuant to Part 27.3(5) of the Civil proceedings Rules 1998 as amended is granted;

III. The Claimant's substantive claim is reinstated with immediate effect;

IV. A Case Management Conference is fixed for the 27th February, 2020 at 9:30 a.m. in Courtroom POS8 at the Hall of Justice, Knox Street, Port of Spain before a Judge in chambers;

V. The Claimant is entitled to 50% of its costs, to be paid by the First and Second Defendants, to be assessed before a Master if not agreed.

VI. There is no order as to costs in relation to the Third and Fourth Defendants.

DAVID C HARRIS

HIGH COURT JUDGE

JANUARY 31ST, 2020