

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(SUB-REGISTRY, TOBAGO)

CV2008-1986

BETWEEN

CLIFFORD HENRY

Claimant

VS

ELDICA SHARPE

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Lennox Phillip for the claimant

Ms. Samantha Lawson for the defendant

Oral Ruling

**Thursday 22nd April 2010
TG01 T1**

Objection was taken on the morning of trial to the late filing of witness statements, on the 22nd of May 2009 by Attorney at law for the claimant. The objection taken was two fold:

- (i) that the filing was beyond the date set, the 30th of April 2009, by the Honourable Justice Bereaux

- (ii) that there was no exchange of witness statements until April of this year, approximately two weeks prior to the trial date set for this matter.

The objections taken are that no application has been made for relief from sanctions, and in those circumstances that the claimant should not be entitled to use a witness statement that has been filed in clear and flagrant violation of a court order and in respect of which no application for relief from sanctions has been made.

Civil Procedure Rules

The following rules were cited in support of this proposition: Civil Procedure Rules Part 26 (7), Part 11 (4), Part 11 (5), Part 11 (8), Part 29 (13).

In addition, the court invited assistance from attorney at the bar and Civil Procedure Rule Part 29.4 as drawn to the court's attention in response to which Mr. Phillip pointed out Part 29.7 (2) which appeared to be slightly inconsistent with Part 29.4

The court also had the assistance of the Court of Appeal's decision in the case of **Trincan Oil Limited & Ors v Chris Martin**, Civil Appeal No.65/2009, in particular the judgment of the Honourable Justice of Appeal Jamadar and is mindful of the tests and principles set out therein.

Chronology and Background

Certain other matters in the chronology need to be set out:

- (i) this matter came up for pretrial review on the 1st of June 2009. The court's note as to what transpired then is that the parties have filed witness statements and are ready to proceed to trial, the trial date was fixed for the 14th of January 2010 and subsequent to that, a request was made for rescheduling the trial date which was acceded to and resulted in the trial date of the 22nd of April 2010.

- (ii) there is some dispute of fact as to whether on the 1st of June 2009 attorney for the claimant and attorney holding for the defendant were both present in court at the same time.

There is also some dispute as to what was actually indicated to the court by attorney at law for the claimant. Suffice it to say that it is clear from the court's note on that date that:

- (a) there was no objection taken to the late filing of the witness statement of the claimant; and

- (b) that a trial date in those circumstances was set and no interlocutory applications were indicated to the court on that date. It is possible that the attorneys at law for each party were not in court at the same time.

(c) I note that attorney for the claimant indicates that she further explained the reason for the late filing of the witness statement and was under the impression that the late filing was therefore waived in the circumstances.

Her contention therefore is that she was taken by surprise by the application this morning and there is no indication that any such application was intimated prior to today's date.

Certainly the court is taken by surprise by an application at this stage that the claimant needs to apply for relief from sanctions when this in fact is the second trial date that has been fixed.

Bearing that chronology in mind, the court therefore takes into account the requirements of Part 26(7) of the Civil Procedure Rules as well as **Trincan** which the court has before it.

First requirement

Application must be made promptly Part 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 promptly.

I consider that promptitude is a question that must be considered in relation to the circumstances, and on a balance of probabilities I consider that up to today's date attorney for the claimant could have been under the impression that no such application for relief from sanctions was required because late filing of the witness statements, three weeks after the time set, had been not objected to by attorney for the defendant and the matter came up for trial today. That is contested, but on balance I think that would be a not unreasonable impression for the claimant to have been under.

In those circumstances therefore the fact that an application was not made before today's date is explicable. I note that the witness statements were only exchanged within the last two weeks. That is less explicable and is not in compliance with the spirit of the rules but I do not lay that entirely at the door step of the claimant. The requirement for witness statements to be exchanged is a requirement that falls upon both claimant and defendant and more so in the context where a fixed trial date is adjourned at the request of the attorney at law for the defendant or at least jointly applied for without objection by attorney at law for the defendant.

Application must be supported by evidence - 26.7 (2)

With respect to the second aspect of Part 26.7 (2) application for relief must be supported by evidence. Most of the matters that have been raised for the first time this morning, in response to the objection for the first time this morning, are matters of record. For example the filing of the witness statements on the 22nd May 2009, the court's record of the order of the Honourable Justice Bereaux, and the court's record of

what transpired before it on the 1st of June 2009. There are some matters which are not matters of record. They go towards the reason for the late filing of the witness statement, and the impression that Counsel was under as to why such late filing was waived. To the extent that those explanations were delivered from the bar table, the court is minded to accept them because the alternative is the vacation of the trial date.

Though evidence in support of an application, must be contained in an affidavit unless a rule or practice direction or court order otherwise provides (Part 11.4) the matters that are not matters of record are inferences that can be drawn from the court record.

The court is therefore satisfied that there is sufficient evidence in the court record to support, prima facie, an application.

Failure to comply was not intentional

That being so Part 26.7 (3) (a) comes up for consideration. The court has to be satisfied that the failure to comply was not intentional. The court is satisfied that the failure to comply was not intentional. The apparent explanation for that was a misunderstanding of the fact that Justice Breaux's order also included in the time frame for filing of the 30th of April 2009, the requirement to file witness statements also within that time frame. Attorney at law for the claimant has indicated that this was indicated to the court on the 1st June 2009 though there is no record that is so. The court considers it

necessary to accept the word of attorney at law for the claimant unless there is reason not to rely upon it.

Good explanation for the Breach

With regard to Part 26.7 (3) (b), good explanation for the breach, there is a good explanation for why the breach occurred. That's what the rule requires and the court is satisfied that misunderstanding of attorney promptly corrected and rectified, is a good and sufficient explanation for why these witness statements were filed late.

General Compliance with other rules, orders and directions

Part 26.7 (3) (c) to compliance with all other relevant rules practice directions, orders and directions. There is no reason to believe, and the point is not being taken, that this party was in breach of any other orders of this court or its predecessor.

The court therefore turns, having considered that the threshold has been attained to consider whether its discretion to grant relief from sanctions can be invoked, to Part 26.7 (4).

Whether relief should be granted

The Interests of the Administration of Justice Part 26.7 (4) (a)

I take into account the fact that the parties are present and indicated to the court that the parties are ready to proceed, and that this is a matter that comes up for trial for the second time. It is necessary to make a finding, in this court's view, on the merits of

the application, rather than have a party going away from court having a matter determined on a technical basis against that party, which may or may not synchronize with the determination of the matter on the merits after full determination and hearing of the evidence. In this court's view that is a prime consideration in the Administration of Justice. It is difficult to explain to lay clients why a case which they may believe to have merit is disposed of without their having had full and proper opportunity to be heard.

In this court's view the Administration of Justice requires in this case as a fundamental aspect thereof, a proper determination on the merits of a matter with parties, successful and unsuccessful, understanding why a matter has been resolved in favour of one or the other. That is a requirement of the country's Constitution also, the right to a fair hearing It is a fundamental aspect of the rule of law and it is a matter which no rule, - new rule, old rule or otherwise, procedural in nature should interfere with (when the procedural breach is technical in nature and occasions no prejudice to the other party.)

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

With respect to part 26.7 (4) (b) - whether the failure to comply was due to the party or his attorney, I take into account that such failure as there was, was for a limited time, and that at no point in time was it suggested that any lay party was responsible for any failure to comply.

Whether failure to comply has been remedied within a reasonable time

With respect to Part 26.7 (4) (c), whether the failure to comply has been or can be remedied within a reasonable time, I take into account that the failure to comply has been remedied. Witness statements were filed almost a year ago, fixed trial dates were set, witness statements were exchanged more than two weeks ago.

Whether trial date can still be met

Therefore, coming to Part 26.7 (4) (d), whether the trial date can still be met if relief is granted

- (a) the parties were ready, willing, and able to proceed to trial this morning
- (b) the court is clear, and ready, willing, and able to proceed with the hearing and determination of this trial on the merits this morning.

In all of those circumstances that I consider that the claimant is entitled to relief from sanctions and this trial is to proceed.

Dated this 22nd day of April 2010.

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Peter A. Rajkumar
Judge.

