Trinidad and Tobago

In the High Court of Justice

Port of Spain

CV2009-04386

Between

Thomas Simon	Applicants
Ramesh Persad Maharaj	

And

First Citizen Bank	Defendant
Taurus Services Limited	
Harry Ramadhar	

Before The Honourable Mr. Justice Devindra Rampersad

Appearances:

Mr. Orrin Kerr for the 1st and 2nd Claimants
Mr. Deonarine for the 1st and 2nd Defendants
Mr. Raphael for the 3rd Defendant

Oral decision delivered on 26th May 2010

JUDGMENT

Contents

Dismissal of the Claimants application of 23 April 2010

1. On the 26th May 2010 I dismissed the Claimants' application made on the 23rd April 2010 to set aside my order of the 31st of March 2010 made in the absence of the Claimants or their attorney whereby I granted leave to the first and second named Defendants to file and serve their defence by 1st April 2010. On 26th May, I gave brief reasons for my decision and, consequent upon the appeal of that decision to dismiss the application, I now deliver fully written reasons for doing so.

A brief history

2. Because of the circumstances of this case, it is necessary to consider the history of this matter and of the subject of the proceedings to come to a better understanding of the issue before the court and the reasoning involved. The Claimants brought this action against the Defendants by way of claim form and statement of case filed on 23rd November 2009 for the following reliefs;

2.1. A declaration that the Claimants are not indebted to the 1st named Defendant in respect of the lands described in deed of conveyance registered as number 10475 of 1980;

2.2. A declaration that deed of mortgage registered as number 113 of 1982 and to put it to be made between the Claimants as tenants in, and after one part and the Workers Bank of Trinidad and Tobago the other part was fully repaid and satisfied;

2.3. A declaration that the 2nd named Claimants portion of the said lands was never encumbered by any interest, overdraft, agreement, document and/or instrument held by the 1st and 2nd named Defendants over the said lands subsequent to the repayment of the mortgage registered as number 113 of 1982;

2.4. A declaration that Defendants are statute barred from maintaining any claim against the Claimants to forfeit that certain piece or parcel of land more particularly described in Deed of Mortgage registered as 113 of 1982;

2.5. A declaration that the sum of $350,000.00 borrowed by the Claimants from the Workers Bank of Trinidad and Tobago under and by virtue of the said mortgage was paid off in full;

2.6. A declaration that any sum borrowed or advanced to the 1st named Claimant purportedly by way of overdraft was not secure by way of the

2nd named Claimant's undivided portion of the said lands and/or encumbered by same;

2.7. A declaration that the 1st named Defendant never upstamped the deed of mortgage registered as 113 of 1980 with knowledge, approval, consent and/or request of the second named Claimant;

2.8. An order that the Defendants physically remove themselves and or their agents and/or servants and/or employees from that certain piece or parcel of land described in deed of conveyance registered as No. 10475 of 1981;

2.9. An order that the executed deed of mortgage registered as No. 113 of 1982 was executed to secure the repayment of the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00) and which sum was paid by the Claimants and the Claimants are entitled to possession of the mortgage property;

2.10. An order that the 1st named Defendant execute a release of deed of mortgage registered as No. 113 of 1982;

2.11. An injunction restraining the Defendants from dealing in any way with the property more particularly described in the schedule to the deed of conveyance registered as No. 10475 of 1981;

2.12. An injunction restraining the Defendants from selling or attempting to sell or advertise for sale of the said property more particularly described in schedule of deed of mortgage registered as 113 of 1982;

2.13. Damages;

2.14. Cost;

2.15. Such further and other reliefs as the court may deem fit.

The statement of case

3. By the statement of case filed on 23 November 2009, the Claimants claimed to be the owners as tenants in common of the subject lands comprising 10 acres 2 roods and 29 perches which is situated in the Ward of Cunupia and more particularly described in deed of conveyance registered as number 10475 of 1981. **This deed was not annexed to the statement of case.** The 2nd named Defendant was described as the receiver of the 1st named Defendant in whom was vested all the liabilities and assets of the former Workers Bank of Trinidad and Tobago. The 3rd named Defendant was named as the agent and/or servant and/or agent of the 2nd named Defendant. On or about 10th December 1980, the Claimants say that they jointly borrowed the sum of $350,000. 00 by way of mortgage from Workers Bank secured by deed of mortgage registered as number 113 of 1982.

This deed of mortgage was not annexed to the statement of case. According to the Claimants, sometime in the year 1983 the said mortgage was fully repaid and Workers Bank failed to execute a release in favor of the Claimants. **No evidence of this was annexed to the statement of case**. The Claimants allege that there was an oral agreement on or about **July 1983** between the 1st named Claimant and the assistant general manager of the Workers Bank that the Bank would completely finance the development of a portion of the said lands into a housing development project. According to the terms of the agreement:

3.1. Moneys advanced by Workers Bank would be repaid out of the proceeds of sale of the dwelling houses to be constructed per phase;

3.2. The 1st named Claimant would have an unlimited overdraft facility enabling the said Claimant to commence the housing development project;

3.3. At the end of each sea, Workers Bank would grant partial releases for a mortgage to be created on each premises situated on each lot of land so it could be sold to purchasers.

In pursuance of this agreement, the Claimants say that the 1st named Claimant was granted a purported unlimited overdraft facility on or about July 1983 under account number 015003804 and that, consequently, the 1st named Claimant embarked upon the said housing development project utilizing the 1st tranche of the unlimited overdraft facility. According to the 1st named Claimant, Workers Bank limited the 1st named Claimant's overdraft to the sum of $500,000.00 at the end of March 1983 -- although this seems rather strange in light of the fact that the agreement apparently, as pleaded, took place in July of 1983. By the end of March 1983, Workers Bank had advanced to the 1st named Claimant the sum of $295,452.29 and alleged that the remaining sum totaling $500,000.00 was interest on the overdraft facility - again in seeming contradiction to the date of the agreement in July of 1983. On or about 27th October 1983, Workers Bank appointed its own project manager to supervise the project. By early 1986, the 1st named Claimant was able to complete a certain number of houses by way of deposits from contracted purchasers and credit obtained from several suppliers and subcontractors. The 1st named Claimant allegedly made numerous oral requests and wrote several letters to the Workers Bank for partial release to enable prospective purchasers to finance the purchase agreements which Workers Bank allegedly refused and/or field and/or neglected to do. **None of these several letters were annexed to the statement of case**. The Claimants say that Workers Bank initiated High Court Action number 3958 of 1987 with the intent of compelling the 1st named Claimant to pay the sum of $1,546,054.57 and that a compromise on the said action was entered into by consent order to execute partial releases for certain lots. The Claimants say that the said Bank never honored the said consent order dated 24th of February 1995. **The papers in that said action and the said consent order were not annexed to the statement of claim.** The Claimants say that the

2nd named Claimant as owner of an undivided half share of the said lands made several attempts to ascertain the status of transactions on agreements between the Workers Bank and the 1st named Claimant with no success. **No correspondence or documentation in this respect were annexed to the statement of claim**. After the alleged repayment of the mortgage registered as number 113 of 1982, the 2nd named Claimant says that he took no further loan from Workers Bank using his share as security. 2nd named Claimant contended that the Defendants were wrongly seeking to have possession of and/or seeking to exercise up all of sale over his undivided half share in the said lands and Claimants went on to say that:

3.4. The 1st named Defendant appointed the 2nd named Defendant to act as a receiver on its behalf to take possession of the said lands wrongfully and without due process of law -- **no documents in this regard were annexed to the statement of claim**;

3.5. The 3rd named Defendant has held himself out as an agent and/or servant and/or employee of the 2nd named Defendant -- **no details of this was given as to when or how he did so**;

3.6. The 3rd named Defendant has illegally occupied building situated on the said lands -- again, **no details of when or how he did so was given**;

3.7. The 3rd named Defendant unlawfully demolished several buildings located on the said lands without lawful authority -- once again **no details of when this was done was pleaded**;

3.8. The 3rd named Defendant has illegally used and excavator caused damage to roads and other infrastructure the lawful property of the Claimants -- once again, **no details of this was given**.

Service on the Defendants and the due date for their defences

4. Appearances were entered for the Defendants on 4th December 2009, by Messrs. Girwar and Deonarine in relation to the 1st and 2nd named Defendants, and on 23rd December 2009 by Gerard Raphael in relation to the 3rd named Defendant.

5. In their appearance, the 1st and 2nd named Defendants acknowledge receipt of the claim form on 30th November 2009 which would have made their defence due on 29th December 2009. The 3rd named Defendant acknowledged receipt of the claim form on 18th December 2009 which meant that his defence would have been due on 16th January 2010.

The 1st and 2nd named Defendants' application:

6. On 20th January 2010, the 1st and 2nd named Defendants' filed an application supported by an affidavit of Susan Moolchan in which she said at paragraph 6 *et al* that

> *"6. The Defendant's attorney at law on 22nd December 2009 sought verbal consent from the Claimant's attorney for time to be extended for filing of their defence to the 4th day of February 2010 and the Claimant's attorney verbally consent to same."*
>
> *7. The Defendants attorney is confirmed that the said agreement by letter dated 22nd December 2009 and requested same to be executed. A true copy of the letter dated 22nd December 2009 is hereto annexed and marked "SM1".*
>
> *8. The Claimants' attorney omitted (sic) to return the executed letter as same is necessary when filing the defence.*
>
> *9. The Defendants' attorneys contacted the Claimants' attorneys on the 18th day of January 2010 via telephone with respect to returning the executed letter wherein the Claimant's attorney informed that he was no longer consenting to the extension of time.*
>
> *10. The extension of time is required since the claim relates to matters that occurred in 1983 and for the Claimant has not annexed any documents in support of their claim. As a consequence thereof the Defendants require time to collate all the documentations relevant to this matter and is currently in the process of so doing."*

7. This application was apparently served on the Claimant's attorney at law on 21st January -- the very next day after filing -- but no date was stated on the application.[1] The matter came up for hearing on 31st March 2010 before me and there was no appearance on behalf of the Claimants. Considering, amongst other things, the fact that:

7.1. The application was filed within 2 days of the alleged conversation with the Claimant's attorney at law on 18th January;

7.2. There was no affidavit in response despite the fact that it had been served albeit without a date of hearing notified on it;

7.3. There was no opposing evidence contradicting the allegation of the conversation between the parties' attorneys at law in December 2009;

[1] See paragraphs 4 of the affidavits of the Claimants sworn to and filed on 23 April 2010 in these proceedings.

7.4. There was **no pre-action protocol letter** referred to in the pleadings forewarning these Defendants of the impending action with the resulting consequences as provided for in the practice directions of the CPR;

7.5. There were no documents whatsoever annexed to the pleadings;

7.6. The matters complained of dated back to 1983 -- some 27 years ago -- when the mortgagee existed in a different incarnation;

7.7. No CMC had as yet been fixed and there was as yet no possibility of these Defendants being in default of any other orders or directions save for their failure to file their defence;

7.8. There was uncontroverted evidence of the Claimant's attorney's failure to respond to a request for an extension dated 22nd December 2009 which had endorsed on its face that it was sent by fax and by mail - although no date of mailing or of faxing was given. The Claimants, however, admitted that this letter was received by the Claimants' attorney on or about 28th December 2009[2]. No response was sent nor is there any evidence that the Claimant's attorney indicated any change of heart or any failure to obtain instructions to consent;

7.9. The failure to file the defence did not seem to me to be intentional;

7.10. The request for the extension seemed quite reasonable to me in light of the length of time involved and the age of the incidents referred to in the statement of case as mentioned above along with the fact that Workers Bank is no longer in existence;

7.11. The explanation, coupled with the failure to oppose the affidavit in support of the application, seemed to sufficiently explain the failure to comply with the rules;

7.12. The matter was not yet anywhere close to a trial date;

7.13. Up to that time there was no application by the Claimants for judgment in default on defence against any of the Defendants - and in the light of the several declarations sought, the Claimants would have been hard-pressed to have obtained judgment over the counter in any event;

7.14. The interests of the administration of justice and the overriding objective warranted an extension of time to allow these Defendants to respond to this aged matter;

[2] See paragraph 3 of the affidavit of the 1st named Claimant sworn to and filed on 23 April 2010 in these proceedings

7.15. I was informed by these Defendants' attorney at law that the Claimants' attorney at law had notice of the hearing since the 23rd February 2010 and was served with the application since the 21st January 2010;

I granted the application sought.

The Claimants' application pursuant to part 11.17 (1) of the CPR

8. On 23rd April 2010, 23 days after the making of the order on the 1st and 2nd named Defendants application, the Claimants filed an application supported by affidavits of the both Claimants which were both sworn to and filed on 23rd April 2010. The application was to set aside the order of 31st March 2010 under part 11.17 of the CPR.

The Claimant's affidavits

9. After setting out the record of these proceedings, the 1st named Claimant admits that his attorney at law received the letter dated 22nd December 2009 from the 1st and 2nd named Defendants' attorney at law. This, he said at paragraph 3, was received on 28th December 2009. It is interesting to note that there is no allegation that his attorney did not give the oral consent referred to in the affidavit of Susan Moolchan aforesaid so that issue in respect of the grant of the verbal consent remains uncontroverted. In paragraph 3, the 1st named Claimant said that he specifically instructed his attorney at law that the time requested was too long and "*to refuse to consent to the time period suggested by the other side*". The 1st named Claimant went on to say as follows:

> "*4. That on or about the 21st day of January, I was informed and verily believed, that a Notice of Application requesting an extension of time to file and serve the 1st and 2nd Named Defendant's Defense was served on my lawyer. That on the said application no time or date of hearing was endorsed thereon.*
>
> *5. That without my knowledge and or notification thereof, the said Notice of Application came up for hearing on the 31st day of March 2010 before the Honourable Justice Mr. Devindra Rampersad. I am informed and verily believe, that the learned judge **in error** of the rules of the CPR 1998, granted the application ex parte.*
>
> *6. That I am informed and verily believe that counsel for the 1st and 2nd Defendants on the 31st of March 2010 acted in breach of part 26.7 by failing to make a written application for relief from sanctions in keeping with the rules of the CPR 1998 and on decided case law.*

7. That since the existence of the said Order came to my knowledge I have made diligent efforts to obtain a copy thereof and which came to past on the 22nd of April 2010 at the hour of 1:15 PM in the afternoon.

8. I say that had I been present some other order would have been made."

[Emphasis mine]

10. The 2nd named Claimant's affidavit was an exact replica of 1st named Claimant's affidavit suggesting that they both gave the instructions to refuse to the extension and they both obtained the copy of the order of 31st March on the 22nd of April 2010 and they both had been aware of the existence of the said order although the circumstances and date when they both became aware of the existence of the order was not stated.

The 1st and 2nd named Defendants' affidavit

11. Attorney at law, Susan Moolchan, deposed to an affidavit on behalf of the 1st and 2nd named Defendant's on 28th April 2010 and which was filed in these proceedings on 29th April 2010. In respect of the issue as to the Claimant's knowledge about the date and time of the hearing, Ms. Moolchan said:

"*6. In respect to paragraphs 4 and 5 of the said affidavits I am informed by my secretary Mrs. Baharoon Ali Mahabir and verily believe that on the 23rd February 2010 she left a voicemail message on Mr. Kerr's cell phone indicating the correct date, time and place of the said hearing.*

7. I am informed by my law clerk Mr. Roger Stewart Williams (who is in charge of service for my firm's Port of Spain offices) and verily believe he has had great difficulty in serving Mr. Kerr in this (and other matters which we have with Mr. Kerr) since Mr. Kerr's office is often closed during ordinary working hours.

8. I am further informed by Mr. Stewart Williams and verily believe that Mr. Kerr's office door, is normally locked with an 'OPEN' sign on it during normal office hours and when he knocks, no one answers. I am further informed by Mr. Stewart Williams that the most effective way which he has found to successfully serve Mr. Kerr is by trying to get in touch with him on his cell phone and making arrangements, at Mr. Kerr's convenience, to serve him with documents or for him to pick them up.

9. I have also personally tried to get in touch with Mr. Kerr many times by his cell phone but I often get his voicemail and most times he does not return my

calls. As a result of this it has been very difficult for us to effect service on Mr. Kerr.

10. In response to paragraph 7 of the said affidavits, I am informed by the said Mr. Stewart Williams and verily believe that by letter dated 6th April 2010 the said Mr. Kerr was informed inter alia of the contents of the order of the court granted herein on the 31st March 2010 when the said Mr. Stewart Williams handed the said letter to Mr. Kerr on the 12th April 2010 at 11.45 a.m. which the latter then signed a copy of, as having received same. This happened when Mr. Kerr came to our Port of Spain office to serve us and we took the opportunity to serve him with the defence of the first and second Defendants. A true copy of the said letter dated 6th April 2010 containing the terms of the said order and Mr. Kerr's signature as having received same is hereto annexed and marked "S.M.1"."

12. The Claimants filed **no affidavit in answer** to Ms. Moolchan's affidavit. On more than one occasion prior to the commencement of the hearing of the application which came up before this court on 26th May 2010, the Claimant's attorney was asked if he was ready to proceed to the application to which he indicated that he was. Consequently, there was no application made by the Claimants for an opportunity to respond to Ms. Moolchan's affidavit prior to commencement of the hearing of the application and so her claims as to the notification by cell phone and the difficulty experienced in serving Mr. Kerr along with the fact of the notification of the terms of the order by letter dated 6th April 2010 remain uncontested.

The law

13. Part 11.17 of the CPR provides:

"(1) A party who was not present when an order was made may apply to set aside that order.

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

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

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

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

14. The 1st and 2nd named Defendants have also relied upon the following parts of the CPR:

14.1. Part 6.2 (d) of the CPR which provides that a document other than a claim form may be served on any person by:

"facsimile transmission or other means of electronic communication if permitted by a relevant practice direction."

14.2. Practice direction dated the 16th of the of September 2005 entitled "**Service by Electronic Means**" which provides at paragraph 1 that:

"Subject to the provisions of paragraphs 3 and 4 below, where a document is to be served by electronic means --

(a) The party who is to be served all his legal representative must previously have expressly indicated in writing to the parties serving --

(i) that he is willing to accept service of documents by electronic means; and

(ii) the fax number, e-mail address or electronic identification to which it should be sent; and

(b) the following shall be taken as sufficient written indication for the purposes of paragraph 1 (a) –

(i) a fax number or an e-mail address set out on the writing paper of the legal representative of the party who is to be served; or

(ii) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court."

14.3. Part 43.2 (b) which provides that:

> "A party is bound by the terms of the order or judgment whether or not the judgment order is served where --
>
> (b) he is notified of the terms of the judgment or order by facsimile transmission, or otherwise."

15. The court has also seen the relevance of the following parts of the CPR:

15.1. Part 6.1 which provides that:

> "(1) Any order which requires service must be served by the court, unless –
>
> (a) A rule provides that a party must document in question; or
>
> (b) The court orders otherwise.
>
> (2) Any other document must be served by a party, unless --
>
> (a) These Rules provide otherwise; or
>
> (b) The court orders otherwise."

15.2. Part 43.1 which provides that:

> "(1) This part sets out rules about judgments and orders.
>
> (2) They do not apply to the extent that any other rule makes a different provision in relation to the judgment or order in question.
>
> (Rule 6.1 deals with who is to serve a judgment order, part 11 contain truths about orders made in the course of proceedings).

16. The 1st and 2nd named Defendants' attorney at law relied upon the following authorities in support of his submissions in opposition to the Claimants application:

16.1. Civ App No. 132 of 2007:- **The National Lotteries Control Board v Michael Deosaran** - in which Jamadar JA espoused the incremental approach to an application for an extension of time to issue a summons to settle a record of appeal under the old rules (i.e. the RSC) as opposed to looking at the matter holistically and exercising the court's discretion in accordance with the more nebulous concept of "the interest of justice".

16.2. Civ App No. 91 of 2009:- **Trincan Oil Limited v Keith Schnake** (referred to in this judgment as "**Schnake"**);

16.3. Civ App No. 104 of 2009:- **AG v Universal Projects Limited**- which deals with the concept of intentionality in relation to relief from sanctions;

16.4. HCA No. CV08-2475:- **Benny v Benny**

17. The Claimants' attorney at law relied upon the following authorities in support of his submissions in opposition to the Claimants application:

17.1. Civ App No. 158 of 2009:- **Andrew Khanhai v Prisoner Officer Daryl Cyrus and the Atty. Gen. of Trinidad and Tobago** (referred to in this judgment has "**Khanhai"**);

17.2. **Schnake.**

The application must be made within 7 days after the date on which the order was served on the applicant

18. A plain and ordinary reading of this section shows that the section makes it imperative for the application to be made within the time prescribed. The question which arises is when does this time run in the circumstances of this case? The Claimants suggest that the time should run from 22nd April 2010 which is the date when they obtained a copy of the order from the court. If so, then the application filed on 23rd April 2010 is well within the 7 day prescribed time limit. On the other hand, the 1st and 2nd named Defendants wish this court to construe the date as being 12 April 2010 when the Claimants' attorney received their letter of 6th April 2010.

19. Part 11 of the CPR deals with the general rules about applications for court orders. Part 11.10 deals with the service of notices of application. Part 11.10 (5) provides that the notice must be served in accordance with part 6. Part 11 does not provide for or require service of any order made under the application nor does it provide

any different provision in relation to that which is set out in part 43.1. This therefore means that part 6.1 (2) applies thereby allowing a party to the proceedings -- in this case the 1st and 2nd named Defendants -- to serve the order made. In this case, it was perfectly acceptable for the order of the 31st of March 2010 to be served by the attorney at law for the 1st and 2nd named Defendants. Consequently, service of the order was possible under part 43.2 (b) which is set out above.

20. By letter dated 6th April 2010, the 1st and 2nd named Defendant's attorney at law wrote to attorney at law for the Claimants. This letter was quite an important bit of evidence for the court's consideration and its full text is now set out:

> "***Re Claim No. CV 2009 – 04386***
>
> ***Thomas Simon & Anor. v. FCB and Taurus Services Limited & Anor.***
>
> *We refer to the above captioned matter, Notice of Application filed on the 20th of January 2010 and served upon you on the 21st of January 2010 at 12:00 noon and voice mail left on 23rd February 2010 informing of the date of hearing of this application.*
>
> *Please be informed that the Notice of Application came up for hearing on 31st March 2010 before the Honourable Mr. Justice Rampersad.*
>
> *After hearing submissions from Ms. Susan Moolchan for the first and second named Defendants, the court granted leave for the said first and second named Defendants' Defence to be filed on the 1st of April 2010 with no order as to costs.*
>
> *The Defence was filed accordingly and our Clerk attempted service on your goodself on the 1st of April 2010 and you refused to accept service.*
>
> *Please find enclosed the first and second named Defendants' Defence for your attention.*
>
> *Please note that as a matter of course the Court Office will inform both parties of the date of hearing with respect to the first Case Management Conference.*
>
> *Yours sincerely,*
>
> *Susan Moolchan"*

21. The copy of the letter filed in these proceedings and attached to the affidavit of Ms. Susan Moolchan carries an endorsement in the handwriting of the Claimants' attorney at law confirming receipt of this letter on 12th April 2010 at 11:45 a.m. As I say this, I bear in mind the fact that this affidavit from Ms. Moolchan has not been opposed by the Claimants so there is no evidence on record before me which contradicts the obvious inference that notice of this letter reached to the Claimants attorneys attention on the date and at the time that he endorsed on the copy of the letter annexed to the affidavit.

22. At the hearing on the 12th of May 2010, the Claimants' attorney produced an unopened envelope and said that even though he signed the letter, he was deceived into doing so by the attorneys at law for the 1st and 2nd named Defendants. This evidence,

quite clearly, was not on an affidavit before this court and, so, did not amount to evidence which this court could have legitimately considered. However, the Court's interest and curiosity was invoked by this startling disclosure by an officer of the Court especially against the background of his refusal to accept delivery of the filed defence on the 1st April as per the said letter. The Claimants' attorney said that he was told by the 1st and 2nd named Defendants' attorney that he had a cheque to receive from them in relation to another unrelated matter and he made arrangements to go in to their office to collect it. When the Claimant's attorney attended to collect the cheque, he was given the brown envelope and asked to sign a copy of the 6th April 2010 letter in the manner shown on the exhibit to Ms. Moolchan's affidavit which he did after reading it. The Claimants' attorney said he then realized that he had been deceived and he did not open the envelope because he did not think that they should have filed a defence and he treated the package as "nonexistent". This seemed to me as if he did not want to compromise his clients' position in relation to his perception that the court's order of 31st March was an invalid order. At the same time, however, he kept the envelope in his possession without returning it to the 1st and 2nd named Defendants' attorney. He showed up in the court with the envelope in his possession still unopened – one month later - and, upon the Court's direction, the envelope was opened revealing the original letter dated 6th April 2010 and the 1st and 2nd named Defendant's defence filed pursuant to the order of 31st March 2010.

23. The Claimants' attorney's reason for failing to open the envelope after having signed for receiving it seems rather incomprehensible. Quite interestingly, the events which unfolded tended to confirm in my mind the complaints raised by the 1st and 2nd named Defendant's attorney at law in the affidavits of Ms. Moolchan. I got the impression that the Claimants' attorney was creating a difficulty in respect of service and screening his telephone calls as a result of which a ruse had to be devised to get him to receive the documents filed. The uncontroverted evidence set out in the said letter is that even though there was an existing order of the court, and even though the 1st and 2nd named Defendants had filed their defence in compliance with that order, the Claimants attorney at law still refused to accept service when the 1st and 2nd named Defendant's clerk attempted to do so on 1st April 2010.

24. Following the decision of the Privy Council in the case of **Isaacs v Robertson** [1985] 1 AC 97, [1984] 3 All ER 140, [1984] 3 WLR 705, orders of the court have to be obeyed until set aside and it was not open to the Claimants attorney to consider the document "nonexistent" or even to, in any way, consider the order invalid and to then refuse to accept documents on his assumption that the order was in any way invalid. Further, Part V of the Third Schedule relating to the Code of Ethics of the Legal Profession Act especially in relation to interactions with other attorneys is apposite and it does not seem to be reasonable for an officer of the court to receive documents from another attorney and refuse to open it and also refuse to return the documents or in any

way indicate his refusal unequivocally, frankly or candidly despite receiving correspondence from another attorney – see Civ App No. 172 0f 1999:- **Borde v First Citizens Bank Ltd** in which Sharma JA described similar behavior to be "*highly improper and wholly unethical*". To my mind, the Claimants' attorney seems to have been misguided in respect of this issue i.e. the effect of the order of 31st March 2010 and whether or not he could accept the documents filed pursuant to that order. He quite clearly could have received the documents without compromising his position to challenge the order or to apply to set it aside. What is clear to me, however, is that by 1st April 2010, the Claimants attorney was aware that an order was made for the filing of the defence when attempts were made to serve the filed defence upon him and this was confirmed in writing by letter dated 6th April 2010 which the Claimants attorney had notice of. It is not open to the Claimants' attorney to suggest that he signed the letter without reading it. He is an attorney at law. He has a responsibility to look at documents, especially those delivered to him from another attorney in light of his obligations as an attorney at law with responsibilities and duties under the Legal Profession Act, and to read them and one would be hard-pressed to accept from an attorney at law that the only reason that he signed the letter was because he wanted to receive an unrelated cheque for him to use to pay his rent. I cannot accept that submission and I did not accept it from the Claimants' attorney when made from the bar table.

25. In my judgment, the letter dated 6th April 2010 complies with the provisions of part 43.2 (b) and, in my judgment, amounts to sufficient notice of the terms of the order of the 31st of March 2010. This means that by 12th April 2010, the Claimants' attorney would have had written notice of the order and his failure to read that letter does not prevent time from running against him. That was the chance he took when he decided not to open the envelope. In those circumstances, I find that **the application filed on 23rd April 2010 was not made within the 7 days prescribed by the rules** as it is beyond the mandatory 7 day period prescribed by the rules from 12th April 2010 when the Claimants attorney got notice of the order and there is no application before me by the Claimants to extend that time beyond the 7 day prescribed time limit. In any event, even if such an application had been made, I cannot see how the Claimants could rely upon their attorney's decision not to open a letter containing perfectly legitimate court documents as a reason for the court's exercise of its discretion to extend any such time limit.

26. On this ground alone, this application can be dismissed but, for completeness, I shall proceed to consider the other limbs of part 11.17 using the incremental approach in determining the matter before me.

Was there a good reason for not attending the hearing?

27. Having regard to the practice direction issued on 16th September 2005, which was referred to above, the Claimants attorney at law stated address and cellular telephone number for service on the claim form and a statement of case is sufficient written indication of his willingness to accept service by electronic means in accordance with the practice direction. The fact of the notification of the date time and place of the hearing of the 1st and 2nd named Defendants' application by way of cellular telephone call on 23rd February is not in contention on the evidence before me. The fact of the notification by cellular phone fact was further confirmed in the 1st and 2nd named Defendant's letter dated 6th April 2010 to which no response was ever sent negating this contention. In those circumstances, and bearing in mind the uncontroverted evidence otherwise as to the difficulty in serving documents on the Claimants' attorney at law, I found that the Claimants' attorney was notified of the time, date and place of the hearing and, as such, cannot rely on that contention to justify the failure to attend. There is no other reason given for the failure to attend and, in all the circumstances, I find that the Claimants have provided no good reason for failing to attend the hearing on 31st March 2010.

Is it likely that had the applicant attended some other order might have been made?

28. In respect of this limb of part 11.17, the Claimants sought to place much reliance on the Court of Appeal decision in Civ App No. 158 of 2009:- **Andrew Khanhai v Prisoner Officer Daryl Cyrus and the Atty. Gen. of Trinidad and Tobago** which dealt with the exercise of the court's discretion to extend the time for the filing and service of the defence pursuant to part 10 of the CPR. Uppermost in the Claimants attorney's mind and foremost in his submissions was the need for the 1st and 2nd named Defendants to have made an application for relief from sanctions pursuant to part 26.7 of the CPR rather than a mere application for extension of time for the filing of the defence since the time for the filing had expired.

29. In response, the 1st and 2nd named Defendant's attorney submitted, in essence, that there is a difference between not filing an application and filing an erroneous application. In respect of the latter, an amendment could be sought to remedy the error and, given the circumstances, it is likely that such an application to amend may have been granted. This is especially so since, at the time of the filing of the application in January 2010, **Khanhai** had not been delivered to clarify the law in respect of applications for the extension of time for the filing of a defence made after the expiry of prescribed time limit, as in this case.

30. The use of the word "might" in the rule connotes a possibility that the particular outcome would have happened. The extent of that possibility, to my mind, cannot exceed the civil standard of proof which is on a balance of probabilities.

31. I must say that, having regard to the way this matter has been conducted and to the facts before me and my considerations referred to at paragraph 7 above which I bore in mind before granting the order, I have grave doubt that the outcome of the application made by the 1st and 2nd named Defendants on 20th January 2010 might have been different. Such a finding that some other order **might** have been made would have had to have been hinged on the fact that the form of the application would have been the paramount consideration as opposed to a purposive approach in considering the factors set out at part 26.7. Inherent in any application to extend the time for the filing of a defence after the expiration of the prescribed time limit would be a consideration of the part 26.7 factors. That would be true whether or not the application specifically sets out the actual words "Relief from Sanctions". If an application is made to the court for the extension of time to put in the defence, the court must act judicially upon established legal rules and principles which determine whether that extension ought to be granted and, in doing so, the court would be bound to consider and apply the relevant legal pronouncements of the Court of Appeal as set out in **Khanhai** and **Trincan**.

32. In this case, I cannot reach to a finding that it is more probable than not that a different order may have been made. In all of the circumstances, I cannot see how a different order **might** have been made had the Claimants attended and I therefore confirm the order made on the 31st of March.

Conclusion

33. I must profess profound disappointment in what seems to me to be a clear instance on the evidence before me of an officer of the court giving verbal consent to a colleague and then reneging on that consent. That, to me, seems the more likely but quite unpalatable reason for the lapse in time in filing the original application for the extension and for the failure to make an application prior to the expiry of the prescribed time limit of 28 days. To have suggested to the court that a voice recording of the conversation of 18th December ought to have been brought and put into evidence [as was suggested by counsel for the Claimants] seems to be quite inappropriate in the circumstances especially where no evidence to the contrary from him was produced by way of affidavit. One's word, once given, must be able to be taken at face value especially in the much quoted and vaunted noble traditions of the profession.

34. I therefore had no reasonable alternative in the circumstances but to dismiss the Claimants' application filed on 23rd April 2010 and to award costs which I assessed in the sum of $7500 based on submissions made by both sides on 26th May.

Devindra Rampersad
Judge (Ag.)