THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-04974

Between

GAURA RAMJATTAN

Claimant

And

GLYNIS WINT-LAWRENCE

Defendant

Appearances:

Claimant: Mr. Abdel Ashraph.

Defendant: Mr. Ken Winfield Wright.

Before the Honourable Mr. Justice Devindra Rampersad

Date of Delivery: November 25, 2019.

Ruling on Application to be relieved from Sanctions

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Introduction

1. On the 25 February 2019, upon this matter coming up for case management conference, and in the presence of attorneys representing both parties, this court made the following orders:

    1.1. The parties to file and exchange witness statements to be used as examination in chief by the 26 July, 2019 and in default no evidence would be allowed in respect of any witness in relation to whom no witness statement has been filed;

    1.2. All Pre-Trial Applications including any Application in respect of objections to the witness statements and/or any exhibits thereto are to be made by the 6 September, 2019, failing which no such Applications will be entertained.

    1.3. The Trial is fixed for 22 January, 2020 at 10:00am in SF04, Supreme Court, Harris Street, San Fernando.

    1.4. A Pre -Trial Review is fixed for 27 September, 2019 at 9:30 am in SF09, Supreme Court, Harris Street, San Fernando

2. Pursuant to this order, on the 24 July, 2019 the defendant filed witness statements of Neville Emmanuel Wint (Jr.), Glenise Wint-Lawrence and witness summaries of Glenn Parmassar, Dr. Helene Marceau-Crooks and Marilyn D'Heureux.

3. The claimant did not file her witness statements by the 26 July, 2019 but filed the witness statements of Gaura Ramjattan and Richard Sirjoo on the 16 August 2019.

4. Since the order of the court at paragraph 1.1. above contained a default clause, and the claimant was late in filing her witness statements, it became necessary for the claimant to file an application for relief from sanctions, which she did on the 29 July 2019.

5. At the pre-trial review of this matter on the 27 September, 2019 the court informed the parties that it would rule on the Claimant Notice of Application filed on 29th July, 2019 in chambers and notify the parties of its decision by 25 October, 2019 and would give further directions at the same time as necessary. However, this court was unable to do so on the 25 October, 2019. The court now gives it decision and directions.

The Application

6. The claimant filed a Notice of Application on the 29 July 2019 seeking the following reliefs:

   6.1. That the claimant be relieved from sanctions.

   6.2. That the time for filing and exchange of the Parties Witness Statements be extended to 16th August 2019; and

   6.3. That there be no orders as to costs.

Grounds of the Application

7. The claimant listed the grounds of this application as follows:

   7.1. By order of the Honourable Mr Justice Rampersad dated the 25th February 2019 it was ordered, inter alia, that the parties do file and serve their respective Witness Statements on or before the 26th July 2019;

   7.2. Despite his best efforts, Attorney At Law for the Claimant has been subject to the pressures of work including the preparation and conduct of several trials and submissions and was unable to finalise the Witness Statements of the Claimant on or before the 26th July 2019.

   7.3. The failure to comply with the order of the court was not intentional and is no way the fault of the claimant herein.

   7.4. The claimant has a good explanation for the breach and has generally complied with all other relevant Orders, Rules and/or Directions.

   7.5. The extension sought would not affect the trial date, that is the 21st January 2020 nor will it affect the next date of hearing being the 27th September 2019.

Rule 26.7, CPR, 1998

8. Rule 26.7, CPR, 1998 is the provision in the Civil Proceedings Rules, which guides the court in its determination of applications for relief from sanctions. The claimant must first satisfy the threshold requirements of promptness,

intentionality, good reasons and general compliance before the court can embark on its exercise of discretion under Rule 26.7(4).[1]

9. Rule 26.7, CPR, 1998 provides:

> *(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.*
>
> *(2) An application for relief must be supported by evidence.*
>
> *(3) The court may grant relief only if it is satisfy that –*
>
> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the breach; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*
>
> *(4) In considering whether to grant relief, the court must have regard to –*
>
> *(a) the interest of the administration of justice;*
>
> *(b) whether the failure to comply was due to the party or his attorney;*

[1] See **Trincan Oil Limited v Martin,** Civil Appeal No. 65 of 2009, Jamadar JA explained the procedural machinery for the grant of relief from sanctions, as follows:

> "13. The rule is properly to be understood as follows. Rules 26.7(1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7(3) and (4) are distinct. Rule 27.3 prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these conditions are satisfied. Rule 26.7(4) states four factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3). Consideration of these factors does not arise if the threshold pre-conditions at 26.7(3) are not satisfied."

(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.

(5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

10. It is important to note that a consideration of the section is not a ritualistic application of steps only but it is one shaped by judicial discretion. As the Court of Appeal said in ***The Attorney General of Trinidad and Tobago v Miguel Regis*** Civil Appeal No.79 of 2011 it was noted:

"46. Nothing is further from the truth than to assert that Part 26.7 somehow removes judicial discretion. Such a suggestion is rather disingenuous. In fact, as has been indicated above, at every level of consideration in Part 26.7 there is the necessity for the exercise of judicial evaluation, analysis and discretion. The fact of a threshold does not remove judicial discretion or force judges to 'mechanistically apply rules to shut litigants out'. All that a threshold does is to structure the weighing and balancing of values and consequently the exercise of judicial discretion. This structuring (weighing and balancing) of values is a normative act designed to assign to values their appropriate place at this 2 The Attorney General of Trinidad and Tobago v Miguel Regis Civil Appeal No.79 of 2011 3 Pursuant to Parts 25 and 26 CPR Page 3 of 10 time in the scheme of Part 26.7. It is purposeful. It does not negate the exercise of judicial discretion, though it does regulate it.

47. What is prompt, whether there is intentionality or good explanation or general compliance, all involve the engagement of the judge in the judicial process of sifting, weighing and evaluating fact and circumstance before arriving at a decision. These judicial functions all constitute the exercise of judicial discretion.

48. Judicial discretion implies a power to choose, decide and determine according to one's own judgment. It is a power to be exercised, not arbitrarily or according to the subjective whims of a judicial officer, but, in accordance with the will of the law. From this general proposition it follows that there are many aspects of judicial discretion. However, what is common to all is choice."

Discussion and Analysis

Promptitude

11. In considering whether an application is made promptly depends on the facts of each case.[2] The application was made on the 29 July 2019, that is, two (2) days after the deadline date for filing the witness statements. In this court's view, two (2) days is not inordinately late. This court finds that the application was made promptly.

Good Explanation for the Breach

12. In the grounds for the relief from sanctions, the claimant explains that failure to comply with the order of the court was not intentional and is no way the fault of the claimant. However, the only uncorroborated and unsubstantiated explanation given for the failure to comply with the order is that:

"Despite his best efforts, Attorney at Law for the Claimant has been subject to the pressures of work including the preparation and conduct of several

[2] See **The Attorney General of Trinidad and Tobago v Miguel Regis**, Civil Appeal No 79 of 2011, paragraph 13. See also, **Rawti Roopnarine v Harripersad Kissoo** Civil Appeal No 52 of 2012, paragraph 24.

trials and submissions and was unable to finalise the Witness Statements of the Claimant on or before the 26th July 2019."

13. Is this a good explanation? In determining this issue, the court is guided by the decision of the Court of Appeal in **Rawti Roopnarine v Harripersad Kissoo** Civil Appeal No. 52 of 2012 which postulates that the reasons advanced for the delay need not be perfect, the reasons need only be good and acceptable.[3]

14. Also of assistance is the case of **Reed Monza (Trinidad) Limited and Ors v Pricewaterhouse Coopers Limited and Ors,** CA Civ 15 of 2011 in which Kangaloo

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[3] In **Rawti Roopnarine v Harripersad Kissoo,** Mendonca J.A stated the following on what can qualifies as a good explanation, at paragraph 32 and 33:

> "32. In the AG v Universal Projects Limited [2011] UKPC 37, the Privy Council rejected a submission that a good explanation is one which properly explained how the breach came about, but which may involve an element of fault, such as inefficiency or error in good faith. The Privy Council in its judgment stated (at para. 23):
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> > "The Board cannot accept these submissions. First, if the explanation for the breach, i.e. the failure to serve a defence by March 13th, connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances.
> >
> > But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."
>
> 33. An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in Regis, supra, what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection."

JA accepted the reasons advanced by the appellants and stated the following, at paragraphs 12 and 13:

> *"12 In considering whether there was any good reasons for the failure to comply with Delzin J's order, the affidavit of Robert John Gransaull which was filed in support of the application of 26 November 2009 becomes critical. Whilst this affidavit cannot be considered as the best example of particulars, it does set out the efforts made by the Appellants to obtain finances including attempts to obtain a loan from James W. Sneddon Limited, which failed to materialize and the mortgage of Mrs. Gransaull's land on Monos Island, which required certain approvals from the State and the Chaguaramas Development Authority. It can reasonably be inferred from this affidavit that the Appellants were experiencing great difficulty in complying with the order of Delzin J owing to their precarious financial position. It would have been more helpful to the court if the Appellants had specifically stated that they delayed in making the application until 26th November 2009 because up to that time they were unable to say when they were likely to be able to arrange their financial affairs in order to raise the $450,000 required to be paid into court. Indeed they should have been expected to make an application seeking an extension without knowing from where they would be able to source the finances to satisfy the court for security for costs…."*
>
> *"13. It is always a judgment call as to whether the reason advanced for the delay in an application seeking relief from sanctions is good enough. In this regard each case must be considered in its own context. … I want to make it abundantly clear that I am by no means lowering the standard set by previous decisions of the Court of Appeal with respect to the adequacy of the reasons which must be advanced by a person applying for relief from sanctions. In the context of this case the Appellants have advanced a good reason, albeit one that is not perfect, which it goes without saying, it need not be."*

15. In **Trincan Oil Limited v Keith Schnake** Civil Appeal No. 91 of 2009, Jamadar J.A observed:

> *"45. The Court of Appeal has been consistent in stating that, except in exceptional circumstances, default by attorneys will not constitute a good explanation for noncompliance with the rules of court."*

16. From the explanation in the instant case, it is clear that the failure to comply with the order of the court was as a result of the default of the attorney and not that of the claimant. The attorney explained that because of the pressures of work including the preparation and conduct of several trials and submissions he was unable to finalise the witness statements of the claimant on or before the 26th July 2019.

17. Following on from the guidance given by the Court of Appeal, in light of the source of the default, then the burden was on the attorney to show exceptional circumstances. In that regard, there is absolutely no supporting evidence. There is no cogent reference to, or corroboration in respect of, particular submissions or particular trials. There was no explanation as to what happened from 25 February 2019 until the deadline date of 26 July 2019 – a period of five months – which would have altered a proper plan or schedule for compliance with the court's order. There was no suggestion that the trials or submissions that got in the way of the 26 July witness statement deadline were unexpected, unduly onerous or suddenly imposed. There was no suggestion that the five-month schedule was in any way interrupted by illness, unexpected travel or some other unforeseen factor that rendered the deadline for the preparation of the witness statements unmaintainable.

18. Without that evidence of exceptional circumstances, the court is left in the precarious position to exercise its discretion without proper evidence in a manner which may leave the door open for a return to the pre-CPR malaise which the post-CPR jurisprudence has strove to eliminate.

19. In Claim Nos CV 2012-00997 and CV2017-02598 ***Mona Sookram & Ors v Vishnu Mungal,*** Justice Eleanor Donaldson-Honeywell stated quite appositely:

> *"58. The introduction of automatic sanctions was intended as an antidote to prior maladies of delay in civil proceedings. The concern that there not be a return to the pre CPR litigation landscape has been addressed in many Judgments. In a Ruling cited by Counsel for the Claimants, delivered on August 17, 2017 in CV2015-04245* ***Tri-Star Caribbean Inc. v Republic Bank Ltd*** *at para 30 Rampersad J voiced the concern that "any order in favour of the defendant's application may seem to be a license to return to the olden and often maligned days of failure to adhere to timelines – a return to the 'cancerous laissez-faire approach' referred to by Des Vignes J in* ***Soodhoo v Epitome*** *CV 2007-01678"*
>
> *60. Similarly, it is my view that, as unpalatable as the results of a sanction may be, upholding its automatic effect in appropriate circumstances is necessary to prevent a slip back to pre CPR inefficiencies that caused great hardship to litigants and their Attorneys."*

20. That was a similar view taken by this court in its decision in CV2014-01527 ***Francis Ramlal v Suresh Ramlal*** delivered on 13 May 2016.

21. If the court is to accept the explanation rendered in this matter without anything more, it would be in danger of opening the floodgates for empty, uncorroborated, unexceptional circumstances to be relied upon and it would be difficult to draw the line and then identify when an attorney in default has in fact crossed it. That could cause the approach by courts on explanations such as this to be arbitrary and would be a sad return to the pre-CPR days.

22. In the circumstances, the court is of the respectful view that the explanation given, as is, is not a good explanation and therefore the court cannot sanction the application on this ground.

General Compliance

23. It is clear, from the history of this matter that the claimant has generally complied with all other relevant orders, rules and directions in this matter.

Intentionality

24. Obviously, the attorney for the claimant made a conscious decision to prioritize submissions and trials in other unnamed matters. In such an instance, the court, without any further evidence, is of the view that the breach was intentional. A mere statement that the breach was not intentional does not absolve the applicant from the consequences of what is obviously a conscious decision, albeit a decision made when faced by competing deadlines.

The other factors

25. Having regard to this court's finding that there was no good explanation given and that there was intentionality, it is unnecessary to proceed to the next step. However, out of deference to the applicant and in the event that the court is wrong with respect to the explanation given, the court will proceed to consider it.

Breach Remedied within Reasonable Time

26. Having regard to the fact that the claimant filed her witness statements on the 16 August 2019, which is twenty-one (21) days after the time expired to file witness statements and six (6) weeks before the next hearing of the matter, which was the 27th September, 2019, it is this court's view that the failure to comply with the order of the court has been remedied within a reasonable time.

Trial Date Met

27. The trial date is fixed for the 22 January, 2020, that is, approximately two (2) months from the date of this order. This date can still be met if relief from sanctions is granted. Any pre-trial applications can still be dealt with before the close of this law term.

Administration of Justice

28. It is in the interest of the administration of justice to grant this application. The claimant is seeking *inter alia* a declaration that she is the owner of property in Union Village, in the Ward of Chaguanas and she is seeking possession of the said property/lands. This is a matter which involves family and is heavily contested and even has an expert witness. It is in the interest of justice to bring certainly and finality to this matter, so that the parties can move on with their lives and continue to have confidence in the administration of justice.

Conclusion

29. Accordingly, if the court is wrong on the explanation and intentionality, then the application must succeed.

The Order

30. In the circumstances the court makes the following orders:

30.1. The claimant's application filed on the 29 July 2019 is dismissed.

30.2. The claimant shall pay the defendant's costs of the claim to be quantified by the court in default of agreement.

30.3. A Pre-Trial Review is fixed for 3rd December, 2019 in SF04 at 9:00 a.m.

/s/ D. Rampersad J.