**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**In the High Court of Justice**

Claim No. CV2015-04245

**TRI-STAR CARIBBEAN INC.**

Claimant

AND

**REPUBLIC BANK LIMITED**

Defendant

**Appearances:**

Claimant: Mark Morgan instructed by Kaveeta Persad for the Claimant

Defendant: Keston McQuilkin instructed by Marcelle Ferdinand Mark Morgan for the Defendant

**Before The Honourable Mr. Justice Devindra Rampersad**

Dated the 17th day of August, 2017.

# EXTENSION OF TIME RULING

## The defendant's application for the extension of time for the filing and service of its witness statement

1. On 13 December 2016, the court directed the parties to file and exchange witness statements to be used as examination in chief by 30 June 2017 and in default no evidence would be allowed in respect of any witness in relation to whom no witness statement had been filed. The court also ordered the claimant to file joint lists of agreed and unagreed documents and agreed and unagreed issues for determination by 15 March 2017. That deadline was extended by consent to 13 April 2017 and then further extended by consent to 3 May 2017. These both joint lists were in fact filed on 3 May 2017.

2. On 30 June 2017, the defendant applied to this court by written application for the extension of time for the filing and exchange of its witness statement.

## The affidavit in support

3. The application was supported by the affidavit of the defendant's instructing attorney, Marcelle Alison Ferdinand, deposed to and filed on 30 June 2017.

4. The salient facts set out therein are as follows:

> *"7. I am advised by counsel that despite his best efforts, he has not been able to complete the preparation of the Defendant's witness in sufficient time for filing today, 30th June, 2017.*
>
> *8. I am also informed by Joel Chadha, Assistant Manager, Legal of the defendant and verily believe that one of the Defendant's principal witnesses, Davi Samaroo-Singh left the Defendant's employment in May to pursue studies abroad.*
>
> *9. I verily believe that Ms. Samaroo-Singh's departure has inevitably resulted in delay in communicating with her as I have experienced some difficulty in making contact with her as she is busily involved in her preparations to leave the jurisdiction in early August.*
>
> *10. Further I have been focusing my attention on complying with the further directions given by the Honourable Judge in relation to the Claimant's Notice of Application filed on 27th April, 2017."*

5. There was no affidavit in opposition filed.

6. The factors for consideration by the court in an instance such as this was comprehensively discussed by the Court of Appeal in the cases of ***Dr. Keith Rowley v Anand Ramlogan*** Civ. App. No. P215 of 2014 and ***Roland James v The Attorney General of Trinidad and Tobago*** Civ. App. No. 44 of 2014**.**

7. Rajnauth-Lee JA in the case of ***Dr. Rowley v Anand Ramlogan*** said at paragraphs 13 – 16:

> *"13. 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, 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. 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. In addition, I wish to observe that this approach should not be considered as unnecessarily burdening the trial judge. In my view, when one examines the principles contained in the overriding objective, it is not difficult to appreciate the relevance of the rule 26.7 factors.*
>
> *14. The following Rule 26.7 factors are therefore applicable without the restriction of the threshold:*
>
> *(a) whether the application was made promptly;*
>
> *(b) whether the failure to comply was not intentional;*
>
> *(c) whether there is a good explanation for the application;*
>
> *(d) whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions;*
>
> *(e) the interests of the administration of justice;*
>
> *(f) whether the failure to comply was due to the party or his attorney;*
>
> *(g) whether the failure to comply has been or can be remedied within a*
>
> *reasonable time; and*
>
> *(h) whether the trial date or any likely trial date can still be met if relief is granted.*
>
> *15. Rule 1.1(1) sets out the overriding objective of the CPR which is to enable the court to deal with cases justly. Dealing justly with the case includes*
>
> *(a) ensuring, as far as practicable, that the parties are on an equal footing;*
>
> *(b) saving expenses;*
>
> *(c) dealing with case 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.*

*16. In addition, inherent in the overriding objective to enable the court to deal with matters justly are considerations of prejudice.* ***It is for the judge to consider on which party lies the greater risk of prejudice if the application is granted or refused. The court will take account of the various disadvantages to the parties should the application be granted or refused****."*

**[*Emphasis added*]**

8. The judgment in ***Ronald James v The Attorney General of Trinidad and Tobago*** was delivered on the same day as that in ***Dr. Rowley v Anand Ramlogan***. Mendonca JA gave the opinion in ***Ronald James*** and at paragraphs 22 to 24 the learned judge said:

*"22. It is relevant to note that the list in 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances. This begs the question, what other circumstances may be relevant. In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.*

*23. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction. Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.*

*24. Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application.* ***However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective***

> ***disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time.***"
>
> ***[Emphasis added]***

9. In giving judgment in the case of ***Ronald James***, Mendonca JA noted that the aim of the overriding objective is to deal with cases justly and reasoned:

> *"In this case the delay is not significant and* ***the absence of a good explanation should not outweigh the considerations that favour the grant of the application****."*

## Consideration of the factors

10. Having established the legal sub-stratum, the court will consider the factors *seriatim*.

### Promptitude

11. The application was filed on the last day for the filing and exchange of the witness statements. In that regard, the application appears to have been promptly made. However, the court has no information from the defendant as to when it became obvious that the deadline for the filing and exchange of witness statements could not be met. A suggestion was made that counsel had not been able to complete the preparation of the defendant's witness statements despite his best efforts but that does not assist the court as it must have been obvious to counsel at some date prior to 30 June 2017 that he would not have been able to make the deadline yet that date was not disclosed. This is especially so since, at that time, the trial was at that time fixed for 31 October 2017 and so it must have been obvious that the application for the extension of time had to have been made at the earliest possible opportunity.

12. Nevertheless, for now, the court will accept that the application was promptly made.

### Intentionality

13. There is nothing to suggest that the defendant intentionally failed to meet the deadline for the filing and exchange of witness statements so, in the circumstances, this is not a factor which the court will consider as a negative in respect of the defendant's application.

### Good Explanation

14. To my mind, the affidavit before the court does not go into great detail about the sequence of events since the order was made in December 2016. There is no information, for example, with respect to the taking of any statement from anyone on

behalf of the defendant. It is important to note that Ms. Ferdinand mentioned that Ms. Samaroo-Singh "*was **one** of the Defendant's principal witnesses*". Obviously, there were others but there has been no mention as to what has happened to those other witness statements. Based on what is before the court, it is obvious that the reason for the failure to produce any other witness statements than that of Ms. Samaroo-Singh is because of counsel's inability "*to complete the preparation of the Defendant's witness **statements** in sufficient time for filing*".

15. Lord Dyson, at paragraph 23 of the decision in ***Attorney General v Universal Projects Ltd*** [2011] UKPC 37, said:

> *"….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."*

16. To my mind, counsel's inability to complete the preparation of the witness statements in sufficient time without any explanation as to why he was unable to do so seems to be an administrative inefficiency and does not amount to a good explanation[1]. Further, the information with respect to the defendant's alleged principal witness, Ms. Samaroo-Singh, does not accord to a good explanation. The information does not disclose when in May she left the employ of the defendant and why no efforts were made to attend at her house or make some sort of arrangement during the entirety of the month of June since, according to Ms. Ferdinand's affidavit, she was not due to leave the jurisdiction until August. In any event, there is no explanation as to why steps were not taken since the order was made in December 2016 to secure these statements from this particular witness and the other unnamed witnesses. The issues were agreed upon by 3 May 2017 so that, at the very least, steps should have been taken from then to have secured the witness statements. However, no such steps were mentioned in the affidavit on behalf of the defendant.

17. I do not accept, therefore, that the defendant has a good explanation for the failure to comply with the deadline given by the court.

## General compliance

18. Even though counsel for the claimant has suggested that there has not been general compliance, the court finds that, apart from the failure to file the defence in time which was later remedied, there has been **general** compliance by the defendant. In that

[1] It is well accepted that "good explanation" does not mean an infallible one

regard, the court bears in mind that general compliance does not mean absolute compliance.[2]

## The interests of the administration of justice

19. Rajnauth-Lee JA, in ***Rowley*** said:

> *"34. The interests of the administration of justice involve consideration of the needs and interests of the parties before the court as well as other court users. As between the parties, the interests of the administration of justice would favour the grant of the application to extend time…"*

20. There is no information before the court to suggest that the interests of the administration of justice would in any way be negatively affected if the court were to allow the extension of time. In fact, on the contrary, the administration of justice, in a case such as this where there seems to be no prejudice to the claimant if the witness statements are allowed, craves adherence to a principle that both sides ought to be heard on the issue and, in such an instance, the scales of justice weigh in favour of the allowance of the application.

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

21. As correctly pointed out by the claimant's attorney at law, the duty to comply with the court's order is not restricted to the defendant's attorney at law but also to the defendant and its functionaries, servants and or agents and or representatives[3].

22. In this case, the court can take judicial notice that the defendant is a well-established banking institution in the Republic of Trinidad and Tobago and it is not unreasonable to expect that the defendant has a well-defined departmental organizational structure with competent employees at all levels.

23. In such circumstances, it is difficult to appreciate why a more diligent effort was not made by the defendant to at least have Ms. Samaroo-Singh made available either prior to her departure from its employment or subsequent thereto by some means or the other.

24. However, the thrust of the affidavit in support suggests a greater culpability on behalf of counsel since it seems that he was charged with the preparation of the witness statements and, for whatever reason which was not disclosed, he was unable to do so prior to the deadline date. In those circumstances, the court is of the respectful view

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[2] See ***The Attorney General v Miguel Regis*** Civ App No 79 of 2011; ***Roopnarine & Ors v Kissoo & Ors Civil Appeal No: 52 of 2012***

[3] See ***Tiger Tanks Unlimited v Caribbean Dockyard and Engineering Services Limited*** CV 2008 – 0675 at paragraphs 3.3 and 3.4

that the failure was primarily due to the defendant's attorney at law rather than the defendant.

### Whether the failure to comply has been or can be remedied within a reasonable time

25. Ms. Ferdinand filed a supplemental affidavit on 31 July 2017 indicating at paragraph 8 thereof that the witness statements to be filed on behalf of the defendant had been settled and were ready for filing that very day. However, Ms. Ferdinand went on to mention that since the court had not yet ruled on this application, she was unable to file the witness statements.

26. Taking Ms. Ferdinand at her word, it seems that the failure to comply can be remedied within a reasonable time in light of the suggestion that the statements are ready.

### Whether the trial date or any likely trial date can still be met if relief is granted

27. Not having seen the witness statements proposed to be relied upon by the defendant, the court is not in a definitive position to come to a finding that the trial date fixed for 8 November 2017 can still be met if relief is granted. It would be premature to make such a definitive statement without having seen if the witness statements proposed to be relied upon by the defendant contain material which may impact the trial or the claimant's preparedness for trial.

28. Be that as it may, it is more likely than not that the trial date can still be met.

### The Overriding Objective and Prejudice

29. This case raises an important issue for determination. It touches and involves the rights of a banking customer not to be deprived of his/her/its funds without an order of the court against the background of allegations being made in a foreign country by a foreign financial institution. To my mind, it has serious implications in the banking industry and ought to be addressed and determined in a wholesome way. The obvious prejudice to the defendant if this court refuses its application would be to deny the defendant from being heard at the trial with respect to evidence in support of its position. In this scenario, the court is of the respectful view that the overriding objective of the court dealing with the case justly in light of all of the factors under Part 1.1 (2) of the CPR warrants an opportunity being given to the defendant to have its evidence heard. On the other hand, there is no obvious prejudice to the claimant if the court were to extend the time and having regard to the overriding objective, the court is of the respectful view that it should lean in favour of allowing the extension sought.

## Analysis and Conclusion

30. The court has read all of the submissions by the parties and voices its concern that any order in favour the defendant's application may seem to be a license to return to the olden and often maligned days of the failure to adhere to time lines - a return to the *"cancerous laissez-faire approach"* referred to by De Vignes J in ***Soodhoo v Epitome*** CV 2007-01678.

31. The court is also concerned that the claimant has been deprived of its funds and any rescheduling of the trial in this matter would continue to cause prejudice to the claimant. Even though there is no application for the rescheduling of the trial, there is a possibility that any ruling that this court may make could result in an application for a procedural appeal which could potentially impact upon the date of hearing for the trial.

32. However, in keeping with the overriding objective and the need to deal with cases justly, the court has to balance the competing interests using the guidelines referred to above and set out in the authorities. In this case, the court is of the respectful view that it ought to extend the time to 31 July 2017 for the filing of the witness statements and to extend the time for the exchange of witness statements to 18 August 2017. However, the economy of information offered by the defendant's attorney is of concern to the court. The court agrees with the suggestion made by the claimant's attorney at law that the witness statements ought to have been presented to the court for its consideration – to confirm that they were in fact ready and signed, and also to let the court have a prima facie feel of the nature of the evidence to be brought by the defendant. Ultimately, the reason given for the request for the extension lies primarily with counsel and, in the circumstances, the court will consider whether or not the costs of this application ought to be borne, in part or in whole, by the attorneys rather than the defendant.

## The Order:

33. There will therefore be an order in terms of the draft order dated 17 August 2017 as amended and initialled by the court i.e. as follows:

    33.1. That the time for the parties to file their witness statements be extended to 31 July 2017 and that the time for the parties to exchange their witness statements be extended to 18 August 2017;

33.2. That the time for all pre-trial applications including any application in respect of objections to the witness statements and or exhibits thereto be extended to 20 September 2017;

33.3. The claimant would be entitled to the costs of this application and the issue as to who will pay those costs and the quantification of those costs are reserved to be dealt with at the next hearing in default of agreement.

*/s/ Devindra Rampersad J*

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Devindra Rampersad J