IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2015-00531

Between

KERN COOKE

Claimant

And

POLICE CONSTABLE ADRIAN TOUSSAINT

1st Defendant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2nd Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Chris Seelochan for the Claimant

Kelisha Bello for the 1st and 2nd Defendant

Decision

BACKGROUND

1. The matter commenced by the filing of the claim form and statement of case on the 13th of February 2015. The appearances of the 1st and 2nd defendants were entered on the 14th of May, 2015 and the 12th of March, 2015 respectively.

2. Thereafter, the case was managed with a number of case management hearings.

3. On the 24th of October, 2016, a pre-trial review was held before the docketed Judge, des Vignes J (as he then was). The trial was fixed for three days: the 26th, 27th and 28th of September, 2017 at 9:00am in POS 16. It was also ordered that the parties would make oral submissions at the end of the trial. At the pre-trial review,

Mr. Seelochan appeared for the claimant and Ms. Mark appeared for the 1st and 2nd defendants.

4. Thereafter, on the 20th of April 2017, the file was reassigned to this court.

5. On the 1st of June, 2017, a status hearing was held before this court. At this status hearing, Mr. Seelochan appeared for the claimant and Ms. Bello appeared for the 1st and 2nd defendants. The trial dates were confirmed for the 26th and 27th of September, 2017. The last day of the previously fixed trial dates, the 28th of September, 2017 was vacated. The attorneys agreed that the trial could be completed in two (2) days. Following the status hearing, the order was sent out by the Assistant Registrar to both attorneys.

6. The order recited the following:
    I. Trial dates are confirmed as the 27th and 28th days of September, 2017 to commence at 9:00am on both days in Courtroom POS 04.
    II. There shall be no oral addresses at the end of the Trial. All addresses shall be in writing and to be filed and served on or before the 16th day of October, 2017.
    III. Any reply to the written addresses shall be filed and served on or before the 30th of October 2017.
    IV. Witness Statements as filed shall stand as Evidence in Chief. Cross Examination only at the Trial.
    V. Cross-Examination of Witnesses limited to one (1) hour for each witness.
    VI. The trial bundle, tabbed and paginated is to be filed and served by the claimant at least ten (10) days before dates fixed for Trial.

7. There was therefore a discrepancy between the order made in court, in the presence of the attorneys and the perfected order dispatched from the court office to the attorneys.

8. On the 26th of September, 2017, 9:00am at POS 03, the matter was called at 9:03am. The claimant and his attorney were present. There was no appearance of neither the 1st Defendant, the attorney representing the 1st and 2nd defendant nor any witnesses for the defendants. The matter was stood down and efforts were made to contact the state attorney. No contact was made. At 9:17am the matter was recalled. The claimant and his attorney, as before, were present. Also as before there was no appearance of the 1st defendant, the attorney for the 1st and 2nd defendants nor any witnesses for the defendants. Upon the matter being recalled, the appearances remained as mentioned before.

9. The trial commenced. The claimant took the oath and identified his witness statement and verified the contents of same. The case for the claimant was closed and the matter was adjourned to follow the orders made at the status hearing on the 1st of June 2017. The court reserved it decision for the 13th of December 2017, 9:30am in courtroom POS 16.

NOTICE OF APPLICATION FILED ON 28th of SEPTEMBER 2017

10. On the 28th of September 2017, the defendants filed a notice of application, pursuant to the Civil Proceedings Rules (CPR) Rule 11.17. The notice of application sought the setting aside of the court's order made on the 26th of September, 2017 to be filed for the trial to proceed (with the filing) of written closing submission. The notice of application was supported by an affidavit sworn to by Kendra Mark, the instructing attorney for the defendants.

11. The deponent averred, among other things, that the notice informing of the status hearing was received after the 1st of June 2017. That the advocate attorney happened to be in the Hall of Justice for an unrelated matter when she became aware of this matter. She also aversed that when she attended court she did so without the papers for this matter.

12. The deponent further averred the advocate attorney was present on the 1st June, 2017 when the trial dates were confirmed. Thereafter perfected order was received by the Chief State Solicitor's Department on the 30th of June 2017. The deponent averred that the "Counsels for the defendant formed the belief that the terms of the Order were correctly stated and full reliance was placed on same. Further in preparation for the trial, Counsel, Ms. Bello, for the Defendants telephoned the Court's Information Desk and confirmed that the trial was still set for the 27th and 28th of September, 2017." The deponent aversed that the defendants and their Attorneys at Law and all their witnesses attended Court for the Trial of the matter. On the 27th September, 2017, on this date they were informed that the matter was heard on the 26th of September 2017.

13. The claimant resisted the application filed by the defendants and filed an affidavit in opposition thereto. The claimant averred an email was sent to the claimant and defendant by "one Mr. Vickram Ramjattan on the 24th of May, 2017 informing that the matter was listed for hearing on the 1st day of June, 2017 before the Honourable Madam Justice Avason Quinlan-Williams at 9:00am in Courtroom POS 18"[1].

14. The claimant also averred that on the 1st of June 2017, when the trial dates were confirmed as the 26th and 27th of September 2017, advocate attorney Ms. Bello was in attendance. Further the perfected order contained a typographical error. He also averred that it was not proper for the defendants to rely on the court administration staff to provide accurate information when they were present in court when the order was made.

THE ISSUES

15. The issues for the court to determine are whether:

    I. the applicants/defendants have provided good reasons for the court to vary the order to proceed to the filing of written closing submissions; and

[1] Affidavit of Kern Cooke, paragraph 4.

II. had the applicants/defendants attended court on the 26th of September 2017, the court would have allowed the claimant to be cross-examined, and allowed the defendants to present their cases.

THE LAW

16. The notice of application was made by the defendants pursuant to the CPR Rule 11.17, Application to set aside order made in the absence of a party. Rule 11.17 states as follows:

> *(1) The application must be made within 7 days after the date on which the order was served on the applicant.*
> *(2) A party who was not present when an order was made may apply to set aside that order.*
> *(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.*

17. However the claimant submits that the appropriate rule for such an application is the CPR Part 40.3, Application to set aside judgment given in party's absence:

> *(1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.*
> *(2) The application must be made within 7 days after the date on which the judgment or order was served on the applicant.*
> *(3)The application to set aside the judgment or 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 judgment or order might have been given or made.*

18. The court considered the submission made by the claimant, that the defendants application made pursuant to the CPR Rule 11.17 is brought under the wrong rule and therefore must fail. The court notes that the scope of Part 11 states that it deals with applications for court orders made "before, during or after the course of proceedings"[2]. Certainty, this Part is wide enough to allow the application to

[2] CPR Rule 11.1

be made thereunder. The CPR Part 40.3 is a restrictive rule that limits applications during the trial. The application could also have been brought under this part, as it was made during a trial. The court's opinion, that this application could properly have been brought under either rule, is fortified as the substance of both rules are almost identical. Rule 11.7 deals with orders, while Rule 40.3 sets out the orders and judgment. Rule 11.7 is not limited to any particular stage while 40.3 (speaks) specifics about the trial stage. However, what is required by way of form and evidence in both parts, is identical.

19. Under both Rules 11.17 and 40.3, the applicant would be required to prove three things: firstly, absence at the relevant time. Secondly, the time within which the application is made. Thirdly, evidence which shows a good reason for failing to attend and that it is likely had the applicant attended some other judgment or order might have been given or made. The third factor requires evidence of two separate matters that must be proven conjunctively.

20. There is no dispute that the first two factors are satisfied; absence and an application within seven 7 days after the judgment or order was served.

21. With respect to the first part of the third factor; a good reason for failing to attend, the applicant depends on the court order issued out of the court office as the good reason for the failure to attend. What constitutes a good reason was considered in **Brazil v Brazil**[3] where Mummery LJ discussed was capable of being "a good reason" (and said):

> *There has been some debate before us, as there was before the judge, about what is or is not capable of being a "good reason." In my opinion the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact,*

[3] COURT OF APPEAL (CIVIL DIVISION) [2002] EWCA Civ 1135, (Transcript: Smith Bernal)

was the true "reason" for non attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance. (paragraph 12)

ANALYSIS AND DISCUSSION

22. The respondent, in resisting the application has relied on two cases. Harricharan and Campbell namely, and Rolinston and George Rompery In **Harricharan and Campbell**[4], the explanation proffered was that the matter had not been listed on the list posted at the information booth nor on the door of the courtroom. Rampersad J said in his judgment that "it would have to be the court's recording, notebook and the court's file which guides and verifies notes in relation to the proceedings…the list at the information booth at the front is merely a guide and it would be folly in the circumstances which prevailed on the date". The circumstances included that the parties were aware of the date of hearing, all parties had representatives before the court, that the defendant's representative in court indicated that the defendant's attorney was on his way.

23. The Respondent also referred to **Rolingston and George Pompey**[5] where the application to set aside the order was made pursuant to both Rules 11.7 and 40.3. It appears that the order was made at the trial in the absence of the attorney and the party. In giving his decision Kokaram J referred to the case of **Hackney London Borough Council v Briscoll**[6] where it was held that a distinction was to be made between a case in which a party had no knowledge of the proceedings at all and a case in which he had no knowledge of the date fixed for a hearing.

[4] CV 2008-02024
[5] CV 2013-03696
[6] [2003] EWCA Civ 1037

Kokaram J[7] noted that once a party knew about the proceedings and participated in them the court had the necessary jurisdiction to make an order affecting him. [The judge noted that the applicant had not complied with the requirement of Rule 40.3 (3).]

24. The court considered the case of **Cox and ors and Primus[8],** where the parties failed to attend court and did not pay attention to the written order of the court which was served on the parties. Delzin J as he then was decided that the written order of the court must be relied on.

25. The applicant relied on a submission filed on the 8th of February 2018 along with three authorities. In the three cases relied upon, the respective courts found the applicants/appellants provided good reasons for their absence from court, and so set aside the orders made. In **Gaydamak and another v UBS Bahamas Ltd and another[9]** no written notification of the date that the appeal would be heard was sent to the appellant. In **Grimshaw and Dunbar[10],** an employee of the court provided incorrect information to the applicant/appellant, that it was not necessary for him to attend court. In **Astley v AG and The Board of Management of the Thompson Town High School[11]** the application was for relief from sanctions. The Court of Appeal found the reason provided for the non-appearance of the party, the attorney erroneously telling the party that their attendance was not required, amounted to a good reason for his non-attendance. (The attorney had incorrectly told the party that they did not need to attend the pretrial conference).

26. In this instance, like in **Harricharan (Supra)**, the attorney was present when the court order was made. In my view, it is not reasonable therefore, for the applicant to seek confirmation of a trial date from persons at the information

[7] Page 3, paragraph 7
[8] H.C.3254/2008
[9] [2006] 1WLR 1097
[10] [1953] QBD 408
[11] [2012] JMCA Civ 64

desk when the court order was made in the presence of the parties. This court is able to distinguish this matter from the cases relied on by the applicant. Here, the evidence does not satisfy the court that the reason provided for the applicant and the witnesses being absent on the 26th of September 2017 is a good reason.

27. The court considered the CPR Part 43.2, Judgments and Orders which states:

> *A party is bound by the terms of the order or judgment whether or not the*
> *judgment or order is served where—*
> *(a) he is present whether in person or by attorney-at-law when the judgment given or order was made; or*
> *(b) he is notified of the terms of the judgment or order by facsimile transmission, or otherwise*

28. Accordingly, a party is bound by the terms of the order, whether or not a perfected order was later served. This is because the party was present when the order was given or made. Service of the order is not mandatory. This applicant therefore, is bound by the order made in court. If the applicant was not present, then the applicant would have been bound by the order served on them. Where, as here, the applicants was present and the order was served, what binds them is the order made in their presence. In these circumstances where, (as here) there is a discrepancy between the order made in court and the order served on the applicant, what must take precedence is the order made in the presence of the party.

29. Additionally the court considered the evidence provided. As noted in **Harricharan and Campbell (supra)** about the evidence that supported the application, hereto the court expected additional other evidence. There was no evidence from any of the witnesses who were supposed to have been present at court on the 27th of September 2017.

30. Therefore examining all the evidence relating to the applicant/defendants and their witnesses non-attendance the court notes:

    I. The deponent is the instructing attorney assigned to the matter;

II. Ms. Bello is the advocate attorney assigned to the matter;

III. Notice of the status hearing fixed for the 1st of June 2017 was emailed to the parties;

IV. Ms. Bello was present in court when the trial dates were confirmed to be the 26th and 27th September 2017– and the vacating of the 28th of September 2017;

V. The order was received on the 30th of June 2017 – well before the trial dates;

VI. Although the advocate attorney was present in court when the order was made that "counsels for the Defendant formed the belief that the terms of the Order were correctly stated and full reliance was placed on same." Clearly at this point counsel for the defendants chose to rely on the date in the order when it must have been obvious that there was a difference between the order made in court and the order received on the 30th of June 2017;

VII. Further "Ms. Bello, for the Defendants telephoned the Court's Information Desk and confirmed that the trial was set for the 27th and 28th of September, 2017". If the counsel for the defendants felt the need to confirm the trial dates – (even after choosing to rely on the date in the order), considering that the date in issue was the trial date, the appropriate communication to be held was with the judge's JSO and or assistant JSO;

VIII. That the order that is binding on a party when present is the order made in court; and

IX. there was no evidence from the second defendant nor any witnesses for the first and second defendant.

31. Considering all the circumstance, the court is not satisfied that the applicant has provided a good reason for the absence of the defendants and their attorneys on the 26th of September 2017. The court is also not satisfied that the overriding objective of the CPR should cause the court to set aside the order.

32. With respect to the issue of prejudice meted out to the parties, the court is satisfied that more prejudice would be caused to the respondent/claimant if the court were to set aside the order of the 26th of September 2017. The overriding objective which is to treat with cases justly, should mean that there should be trial certainty. To allow the applicants/defendants application would make a mockery of the case management process and be encouraging of laxness where the opposite is what is required.

ORDER

33. It is hereby ordered that the notice of application filed on the 28th of September 2017 be dismissed.

Dated this 8th day of February 2018

JUSTICE QUINLAN-WILLIAMS
JUDGE

(Leselli Simon-Dyette - Judicial Research Counsel)