THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01014

BETWEEN

PHOENICIAN IMPORTS

Applicant

AND

ARCELOR MITTAL POINT LISAS LIMITED

Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances:

Applicant/Claimants:	Mr. Farid Scoon.
	Mr. Kevaugh Mattis.
Defendant:	Ms. Radha Carrie Maharaj.
	Ms. Vanessa Gopaul.

Date of Delivery: 17th November, 2017.

DECISION ON THE APPLICATION FOR RELIEF FROM SANCTIONS

BACKGROUND

1. The Applicant/Claimant by Claim Form and Statement of Case commenced proceedings against the Defendant on the 27th March, 2015. The Applicant/Claimant claims damages for the Defendant's breach of a written contract in the sum of Nine Hundred and Seventy-Nine Thousand Five Hundred and Fifty-One Dollars and Fifty-Five Cents of the currency of the United State of America (USD 979,551.55), for the supply of goods. The parties entered the written contract on 26th March, 2013. The parties agreed that the Applicant/Claimant would sell and deliver ship scrap to the Defendant at the Defendant's port at Point Lisa Trinidad. The Applicant/Claimant claims that the Defendant breached the terms of the contract by failing to unload the ship within 48 hours, failing to make payments for the amount of scrap that was delivered as well as failing to make payment for berthing charges, demurrage and other charges.

2. The Defendant entered an appearance on the 20th April, 2015. The Defendant acknowledged part of the Applicant/Claimant's claim and on the 21st September, 2015 the court ordered, inter alia, that the Defendant pay the Applicant/Claimant the sum of One Hundred and Fifty-Four Thousand Two Hundred and Thirty-Five Dollars and Eighty-Two Cents of the currency of the United State of America (USD 154,235.82). The matter proceeded to determine whether the Defendant is liable for the additional damages claimed by the Applicant/Claimant.

3. On the 11th April, 2017 the court ordered, inter alia:

    1. *Time is extended for the filing and exchange of the Applicant/Claimant's witness statements to 4:00 pm on 31st*

May, 2017 in default of compliance with this order the Applicant/Claimant's claim shall stand dismissed.

2. *…*
3. *…*
4. *…*
5. *…*
6. *The Pre Trial Review is adjourned to the 13th June 2017 at 9:30 am in Courtroom POS03 at Hall of Justice, Knox Street, Port of Spain.*

4. The Defendant filed and served their Witness Statements on the 30st of November 2016. This was filed pursuant to a court order dated 3rd November, 2016.

5. The Applicant/Claimant's witness statements were filed between 3:50 pm and 4:40 pm on 31st May, 2017. The Applicant/Claimant did not however, as the Judge ordered on the 11th April 2017, serve the witness statements by 4 pm on the said 31st May, 2017.

THE APPLICATION

6. On the 1st June, 2017 the Applicant/Claimant made an application for relief from sanctions. The Applicant/Claimant applied for:

   i. *An order for relief from sanctions in respect of the court's order dated April 11, 2017;*
   ii. *An order pursuant to CPR Parts 11.11 (4) and CPR 26.1 (w) that the Claimant's claim be reinstated;*
   iii. *A consequential order that the parties are to exchange witness statements within seven (7) days from the date upon which the order is granted and;*
   iv. *That there be no order as to costs.*

7. The application was supported by affidavits filed on behalf of the Applicant/Claimant deposed to by Farid Scoon, advocate attorney for the Applicant/Claimant and Kevaughn Mattis, instructing attorney for the Applicant/Claimant.

The evidence in support of the Application

Affidavit of Farid Scoon

8. Mr. Scoon in his affidavit recited the various request from both parties for extensions of time for the filing of documents as scheduled by the court. Mr. Scoon deposed that two adjournments were occasioned by the death of his father in law and him having to attend to urgent matters arising out of the death. Mr. Scoon further deposed that the unless order of the court was not made because of the contumelious conduct on the part of the Applicant/Claimant. He deposed that based on his understanding the court made this order as the matter was ongoing for more than two years and all parties were of the view it was time for the matter to proceed past the pre-trial phase.

9. Mr. Scoon stated that following the court order on the 11 April, 2017 arrangements were made to settle the witness statements that were in draft form. Thereafter he travelled to United States on several occasions to meet with the Applicant/Claimant's representatives and to settle the witness statements. Particularly the witness statement of Azgar Said (the Director of the Applicant/Claimant Company). Mr. Scoon deposed that he travelled to Miami on three occasions subsequent to the court order on the 11th April, 2017. Specifically from 19th April, 2017- 24th April, 2017, 10th May 2017-16th May, 2017 and 26th May, 2017- 30th May, 2017.

10. On 31st May, 2017 at 3:00 pm the Witness Statements were taken to the Civil Registry by Mr. Pandohee an attorney-at-law from Mr. Scoon's firm to be filed. The attorney whilst at the registry having realised the time it would take to file the Witness Statements called the office and indicated that it was unlikely that the documents would be filed before 4pm. This was as a result of the number of persons waiting for documents to be filed, the attorney's position in the line and the number of documents that were to be filed.

11. Mr. Scoon deposed that one of the associates at his firm, Ms. Nazahah Khan contacted the Defendant's attorneys-at-law at or around 3:45 pm and spoke to Ms. Jewel Ann Troja via telephone and informed her that the Witness Statements in this matter were in the process of being filed. Ms. Troja was also informed that there was a likelihood that the witness statements would not be served prior to 4 pm. Mr. Scoon deposed that he was informed that Ms. Khan would enquire whether the chambers would accept service after 4:00 pm. Ms. Khan was advised by Ms. Troja that lead counsel for the Defendant in this matter was in a meeting at that time. Shortly thereafter, Ms. Troja called back to enquire about the likely time of service of the Witness Statements. Ms. Khan informed her of an approximated time of 4:30 pm and Ms. Troja advised that she would call back. Mr. Scoon deposed that he was informed that Ms. Khan did not receive any other calls from Ms. Troja.

12. Immediately after filing of the Witness Statements Mr. Pandohee and Steven Williams (a clerk from Mr. Scoon firm) proceeded to the offices of the Defendant. At or around 5 pm Mr. Pandohee and Mr. Williams arrived at the Defendants office and attempted to serve the Witness Statements, Witness Summary and Hearsay documents on the Defendant. The Defendant's attorneys-at-law did not accept service.

Affidavit of Kevaughn Mattis

13. Mr. Mattis deposed that he was informed by Mr. Scoon that witness statements were signed in the United States on the 30th May, 2017 and Mr. Scoon returned to Trinidad on 10 pm on that said date.

14. On 31st May, 2017 it was discovered that Mr. Scoon had inadvertently left his suit case containing exhibits required for the witness statement in Miami. Mr. Mattis deposed that he was informed by Mr. Scoon that the Director of the Applicant/Claimant Company located Mr. Scoon's suitcase at the hotel room and scanned and emailed the relevant documents to the Applicant/Claimant's counsel. Mr. Mattis deposed that he was also informed by Mr. Scoon that the Director of the Applicant/Claimant Company informed Mr. Scoon that the scanning and emailing process would take an unusually long period as the documents became unhinged from the binder and required sorting prior to the documents being scanned and sent to the counsel for the Applicant/Claimant.

15. On this same date a clerk along with Mr. Mattis went to file the Witness Statements and Hearsay Notices. He deposed that as a result of the number of persons ahead in the line by the time the office clerk was attended it was 4:00 pm and it was too late to effect service by sealed envelope. Therefore, it was impossible to serve the Witness Statements by 4:00 pm.

16. The clerk attempted to serve the Defendant at 5:00 pm. Mr. Mattis deposed that he did not enter the office of the Defendant, he waited outside. Mr. Mattis was informed by the clerk that upon arriving at the office of the Defendant at around 5:00 pm the clerk was informed that the Defendant would not accept service as the court order required service by 4:00 pm.

17. The court has taken notice of the fact that in his affidavit Mr. Mattis has deposed to circumstances surrounding the suitcase. This information was not included in the affidavit of Mr. Scoon although it was within his personal knowledge.

Objection to the Application

18. The Defendant filed submissions on the 15th of August 2017, in objection to the Applicant/Claimant's application for relief from sanctions. The basis of the objection was that the Applicant/Claimant had not satisfied the threshold requirement of "good explanation" under the **CPR, Part 26.7**.

THE LAW AND ANALYSIS

19. The consequences for a party's failure to comply with an order or direction of the court where a party fails to comply with such order or direction are plainly laid out in the **CPR, Rule 26.6**

> *(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.*
>
> *(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.*

20. The order made pursuant to **CPR, Rule 26.6 (1)** is an unless order. An unless is order described as

> *A peremptory order directing a party to litigation to do a specific act, within a specific time, which, if not done, is visited by sanctions prescribed by the order. It is a fundamental principle that a litigant who fails to comply with such an order should suffer the penalty*

prescribed by the order unless he can show good reason why the stated consequences should not follow[1].

21. The court, prior to making the unless order would have carefully considered all the circumstances of this case, (specifically, the numerous occasions where counsel on both sides asked for extensions of time to file witness statements) and the appropriateness of the consequences (which in this case is dismissal of the Applicant/Claimant's claim). That court formed the view that an unless order was necessary in the circumstances.

22. The consequences of an unless order would take effect automatically unless the defaulting party applies for and obtains relief from the sanction by virtue of **CPR, Rule 26.6**. In determining whether to grant relief from the sanction the court has considered what is required by virtue of the **CPR, Rule 26.7**. This rule provides as follows:

> *(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 satisfied 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 interests of the administration of justice;*
> *b) Whether the failure to comply was due to due to the party or his attorney;*
> *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.*

[1] Forrester v Holiday Inn (Jamaica) (2005) Supreme Court, Jamaica, no CL 1997/ F-138 (unreported), Sykes J

(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.

23. The effect of the **CPR, Rule 26.7** was considered in **Trincan Oil Limited v Chris Martin**[2]. At paragraph 13 Jamadar JA stated:

> *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 26.7 (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 three 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.*

Part 26.7 (1) Promptitude and Supported by Evidence

24. The Rule requires firstly that an application must be made promptly. In **Trincan Oil Limited and Keith Schanke**[3] Jamadar JA stated:

> *Part 26.7 (1) is mandatory. It requires that an application for relief from any sanction imposed must be made promptly. Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact. 'Prompt' must be considered in relation to the date when the sanction was imposed*[4].

25. In this case the application for relief from sanctions was made the day after the Applicant/Claimant failed to serve the Witness Statements by the prescribed time. The Defendant's submission is not based on non-compliance with this rule,

[2] Civil Appeal No.65 of 2009
[3] Civil Appeal No. 91 of 2009
[4] Paragraph 22

suggesting that promptitude was satisfied. The court agrees that this application was made as promptly as it could have been made.

26. The second requirement outlined in **CPR, Rule 26.7 (2)** is that the application should be supported by evidence. In this case the application was supported by affidavit evidence deposed by lead and instructing Counsel for the Applicant/Claimant. This second requirement is also satisfied.

Condition Precedents

27. Next there are three condition precedents that must be satisfied before the court can consider if this is an appropriate case to grant relief from sanctions. The three condition precedents are intentionality, a good explanation for the breach and general compliance with all other relevance rules, practice directions, orders and directions.

(a) Intentionality Part 26.7 (3) (a)

28. The Applicant/Claimant submitted that there is no ground to sustain the finding that the Applicant/Claimant's breach of the order was intentional.

29. The case of **The Attorney General of Trinidad and Tobago v Universal Projects Limited**[5] submitted by the Applicant/Claimant is instructive. In this case Justice Jamadar JA discussed **Rule 26.7 (3) (a)** and stated:

> *In my opinion, to satisfy intentionality in Part 26.7 (3) (a) a more positive intention not to comply is required. That is to say,*

[5] Civ App No. 104 of 2009, paragraph 70

> *what must be shown is that the motive for the failure to comply was a deliberate intent not to comply. It is accepted that this positive intention can be inferred from circumstances, but in this case it is difficult, given the history of the matter, to characterize the motive for non-compliance as intentional. In circumstances such as these, it is I think important to distinguish between intentionality and responsibility. It is simply not true that the consequences of every action or omission taken or choice made are intended. However, because the consequences of actions or omissions or choices are not intended, does not Page 24 of 40 necessarily exempt one from taking responsibility for them.*

30. In this application the court has found no evidence that the failure of the Applicant/Claimant was intentional. The filing of the Witness Statements in compliance with the court's order is evidence proof positive that the Applicant/Claimant had no 'positive intention' not to comply with the court's order. The Defendant has not asked to be heard on this issue, the court agrees the Applicant/Claimant may have made efforts to comply with the order and that the failure to comply with part of the order may not have been intentional or contumelious.

(b) Good Explanation for the Breach Part 26.7 (3) (b)

31. The second condition precedent requirement requires the court to be satisfied that there is a good explanation for the breach. The Defendant's submission is that the Applicant/Claimant cannot satisfy this condition precedent. Both parties made submissions on this condition. The Applicant/Claimant submitted that in this case there was substantial compliance with the unless order. This is so as the Applicant/Claimant was only unable to serve the Witness Statements within the

stipulated time frame. Accordingly, the Applicant/Claimant is in a different category from a party who has to provide a good explanation for complete non-compliance. The Applicant/Claimant contended that the reason for the breach is a good explanation and is not one that runs afoul of the law.

32. The Defendant submitted that the evidence provided by the Applicant/Claimant is bereft of the requisite particulars and or fail to satisfy the court that there is a good explanation for the failure of the Applicant/Claimant to file the Witness Statements within the seven week extended period ordered by the court.

33. The Defendant contended that the mere fact that a witness is abroad, does not constitute a good reason without more for the breach of an order. This is so as advancements in technology enables Witness Statements to be completed remotely (it was the eight). The Defendant submitted that the current extension of time was the ninth extension. Given this fact the Applicant/Claimant should have made necessary alternative arrangements to ensure that it met the deadline for filing and service of the witness statements. In this regard the Defendant relied on **John Bruce Milne v Trinidad Dock and Fishing Services Limited**[6].

34. The Defendant further submitted that the evidence surrounding the suitcase that remained in the hotel room in Miami is not credible. The Defendant contended that Mr. Scoon who inadvertently left the suitcase behind did not depose to the circumstances surrounding same. Further no explanation was given as to why the witness statements that were engrossed and executed were not together with the exhibits at the time of execution. It is also not credible that the Applicant/Claimant's attorneys-at-law would only have one copy of the exhibits to be attached to the Witness Statements. Further for the Applicant/Claimant's

[6] CV 2007-03438

attorney-at-law to wait until the day of filing to finalise the witness statements for filing is unacceptable in the circumstances of the case.

35. The Defendant submitted that the Applicant/Claimant's attorney-at-law being aware of the length of their Witness Statements and the number of exhibits attached, were under an obligation to ensure that they attended at the registry in sufficient time to enable filing before 4 pm.

36. The Defendant submitted the following cases. In the case of **Attorney General v Universal Projects Limited**[7] Lord Dyson states at paragraphs 22 and 23

> *Applying the test, Mr Knox submits that the State did have a good explanation for its failure to serve a defence by 13 March, it needed to instruct outside counsel (given the size of the claim), but this took some time with the result that they were not instructed until 10th March because the matter had to be passed to the Attorney General*
>
> *The Board cannot accept these submissions. Firstly, if the explanation for the breach i.e. the failure to serve a defence by 13th March connotes real or substantial fault on the part of the defendant, than it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explain how the breach came 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.*

37. In the case of **Attorney General of Trinidad and Miguel Regis**[8] the Court of Appeal at paragraph 17 stated that the requirement for **CPR, Rule 26.7 (b)** to be

[7] [2011] UKPC 37
[8] Civ App No 79 of 2001

fulfilled, is that the explanation must be a good one and not infallible. This is a question of fact to be determined in all the circumstances of the case.

38. The court also considered the text **Zuckerman on Civil Procedure Principles of Practice**[9] where the author stated:

> *If the unless order has been made after careful consideration of what should follow from a default, an application for relief must be approached on the basis that unless something has happened subsequent to the order, which might render the consequences unfair, the stipulated consequences should be allowed to stand…*
>
> *But if the default has been significant and there is no reasonable excuse, consequences that were considered fair and proportionate when the order was made must continue to be regarded as fair and proportionate after the default. If the court were required to refrain from exacting the consequences of non-compliance with the unless order whenever the consequences for the defaulting party were serious, unless orders would lose much of their binding force and the court would lose much of its management authority.*

39. The affidavit evidence filed by the attorneys-at-law for the Applicant/Claimant gave the following explanations:

    i. On the 31st May, 2017 it was discovered that Mr. Scoon had inadvertently left a suitcase containing the bulk of documents needed for the Witness Statement in Miami. The suitcase had to be located in the hotel and documents had to be located and scanned

[9] 3rd edition, page 598, 599

and emailed. This took a long period of time as the documents became unhinged from their binder and required sorting through to be scanned and emailed.

ii. The length of time it took at the court registry to file the documents. (A representative and an attorney from the firm on the 31st May, 2017 went to the registry around 3:00 pm on the 31st May, 2017. This process was completed at about 4:40 pm and around 5 pm the Claimant attempted service on the Defendant, however, service was refused).

40. In analysing this evidence the court has to consider the context within which the unless order was made. Firstly what were the circumstance which led the court to make the order. The court considered the history of the matter and in particular the history around the filing and exchanging of Witness Statements. The issue of the filing and exchanging of Witness Statements was dealt with by the court as follows:

a. On the 24th of February 2016, the Court ordered the parties to file and exchange witness statements on or before the 30th of June 2016. It was also ordered that no witness on whose behalf a Witness Statement has not been filed shall be permitted to give evidence at the trial.

b. On the 29th of June 2016, the Court extended the time the filing and exchanging of Witness Statements to the 23rd of September 2016. This order was made by consent of the parties. The pre-trial review carded for the 4th of October was vacated and rescheduled.

c. On the 30th of September 2016, the Court further extended the time for the filing and exchanging the Witness Statements to the 30th of October 2016. As a consequence the pre-trial review carded for the 4th of October was vacated and rescheduled.
d. On the 3rd on November 2016, the Court further extended the time for the filing and exchanging of Witness Statements to the 30th of November 2016. The pre-trial review carded for the 8th of November 2016 was vacated and rescheduled.

e. On the 30th of November 2016, the Defendant filed and served their Witness Statements.

f. On the 5th of December 2016, the Court further extended the time for the filing and exchanging of Witness Statements to the 31st of December 2016. The pre-trial review carded for the 15th of December was vacated and rescheduled.

g. On the 9th of January 2017, the Court further extended the time for the filing and exchanging of Witness Statements to the 16th of January 2017.

h. On the 24th of January 2017, the Court further extended the time for the filing and exchanging of Witness Statements to the 17th of February 2017. The pre-trial review carded for the 13th of February 2017 was vacated and rescheduled.
i. On the 1st of March 2017, the Court further extended the time for the filing and exchanging of Witness Statements to the 31st of March 2017. The pre-trial review carded for the 11th of April 2017 was vacated and rescheduled.

j. Finally, on the 11th of April 2017, the court further extended the time for the filing and exchanging of the Claimant's Witness Statements to 4:00pm on the 31st of May 2017, with the unless order that in default of compliance with this order (of the 11th of April 2017) that there be a sanction of the Claimant's Claim standing dismissed.

41. In total there were eight extensions for the filing and exchanging of Witness Statements. The first extension was ordered on the 29th of June 2016 and the last on the 11th of April 2017. Any deliberation on the issue whether there is a good explanation for the breach, must be considered in light of the peculiar contextual and historical reality of the numerous extensions for the filing and exchanging of Witness Statements. There was obvious need to make all efforts to file and exchange Witness Statements in this case, and the court expected that the Applicant/Claimant's attorneys to have treated the issues necessary to comply with the court's order with a suitable amount of alacrity to meet the deadline imposed by the court's order. In these circumstances, the court is of the view that the imposition of the unless order and its consequences were not unfair to the Applicant/Claimant.

42. Secondly, the court considered the evidence in support of the Applicant/Claimant's application, in the appropriate context. The deponent Attorney at Law for the Applicant/Claimant, Mr Scoon, deposed that it was necessary to travel to the United States of America on a number of occasions to settle the Witness Statements. Further, he deposed at paragraph 31 "this task was accomplished successfully and I returned to Trinidad on 30th May 2017 to finalize the Witness Statements for filing". The Attorney left himself no breathing room for any expected or unexpected event that could have impacted their ability to file and exchange Witness Statements in circumstances where there had been eight

extensions to complete this event. There is nothing in the context and the resultant consequences that would render the consequences of unless order unfair.

43. Thirdly, the court considered what is said to have occurred that caused delay and the result of not having had the time to serve the statements by 4:00 pm. The events that unfolded in the United States of America resulting in the documents being left behind, at its worst can be attributed to negligence on the part of the attorney. Negligence because the attorney travelled for a specific purpose and one would have expected the attorney to be conscious of the location of the documents at every moment from when he left the hotel all the way to Trinidad and Tobago. At its best, it can be attributed to carelessness on behalf of the attorney. In either case it is the fault of the attorney. This does not provide a good explanation simply because it is the attorney's fault. The court considered, that in the circumstances outlined by Mr Scoon, the fault is such that it cannot render the consequences of the unless order unfair to the Applicant/Claimant.

44. Fourthly, the court considered what is alleged to have occurred at the registry office. The Deponent averred that he arrived at the Registry at approximately 3:00 pm. Based on the state of the queue, the deponent filed his first document at 3:40 pm and completed the filing process at 4:30 pm. Even if there was no one ahead of the deponent and he was attended to immediately upon his arrival at the counter, it would had taken approximately forty minutes to file the documents presented by the Applicant/Claimant. It is clear that even on the day of filing and with what had occurred, according to the Applicant/Claimant's attorney that they did not make reasonable efforts to ensure that the Witness Statements are filed and served before 4:00 pm on the 31st May 2017. It is not unfair therefore, for the consequences of the unless order to take its natural course.

45. Finally, the court considered what occurred when the attempt was made to serve the witness statements out of time. The deponent arrived at the Defendant's address for service after 4:00 pm. The court's order was for the filing and serving of the documents before 4:00 pm and therefore the Defendant's representative were entitled to refuse service of the Witness Statements, and it is not unfair that the Applicant/Claimants be subject to the consequences of the unless order.

46. The Applicant/Claimant submitted the authority of **Ronald Joseph v the Attorney General**[10] in this case the Claimant made an application for relief from sanctions and an extension of time to exchange witness statements and serve his list of documents. The Claimant filed the witness statements by the time specified by the court but served the documents one working day after this date. The reason given was heavy rains, flooding and lack of access on this date. The court in this case was satisfied this was a good explanation. The Court also considered the position taken at the court office by members of staff. It should be noted that this decision was overturned by a decision of the Court of Appeal, **The Attorney General of Trinidad and Tobago v Ronald Joseph**[11] delivered on 11th January, 2011. In this case Archie CJ[12] did not regard the explanation as to the failure to serve as being adequate, as the evidence was deficient.

47. It is accepted that the fault of the Attorney at Law does not necessarily amount to a good explanation for the failure to file and serve witness statements. In the case of **Rawti also called rawti Roopnarine and anr v Harripersad also called Harripersad Kissoon and ors**[13], while the Attorney waited until the last day to file

[10] CV 2008-04040
[11] CA No 249 of 2010
[12] Page 22
[13] Civil Appeal No: 52 of 2012, paragraphs 38 and 39

the witness statements, the clerk attended the registry at 9:30 am. This should have provided sufficient time for the court's order of filing and serving of the witness statements and for the managing of any expected and unexpected delay. However, the clerk could not locate the office of the Attorney to deliver the witness statements. The Attorney had changed his address and did not provide a forwarding location. This lack of co-operation, that occurred after the court's order, did provide a good explanation for the grant of the relief from sanctions. The court noted however:

> *As I mentioned, the Judge was also of the view that the fault also lay with the Attorney- at-law for leaving the filing of the statements until the last day. He was of the view that the attorney did not properly manage the ample time given to him for the filing and exchange of the witness statements, and accordingly failed to take account of exigencies such as those that occurred.*
>
> *I agree with the Judge that it is proper for an attorney-at-law to anticipate the usual problems that may be encountered. However what occurred on the October 31st when Mr. Fortune attempted to exchange the witness statements cannot be described as usual. It should be noted that this is not a case where the attorney-at-law waited until the court office was almost closed to attempt to file and exchange the witness statements. He appeared to have been early. Mr. Fortune attended the court office to file them around 9:30 a.m. That should have provided him with ample time to file and exchange the witness statements in the usual run of things. The Judge's criticism does not take account of the facts of this case. I do not think that the Attorney can be faulted for failure to anticipate the events that did occur.*

48. The Court of Appeal was not satisfied that what occurred in the **Rawti** case was planning inefficiency that amounted to fault on the part of the Claimant/Applicant. However, the Court of Appeal agreed that attorneys should

anticipate usual problems that would be encountered. Long lines at the registry is a contingency that attorney-at law should cater for. In view of the foregoing , the court of the view that what occurred in this case does not amount to a good explanation for not serving the witness statements in compliance with the court's order.

(c) General Compliance Part 26.7 (3) (c)

49. The Defendant has not contended that there was not general compliance with the general rules, practice directions orders and directions. This factor is fact driven and dependent on the circumstances of each case, and is also within the ambit of judicial discretion (see **Attorney General of Trinidad and Miguel Regis).** The court is not satisfied that there has not been general compliance with the court rules. The Applicant/Claimant could not satisfy this pre condition of the **CPR, Rule 27 (3)(c).**

Other Issues

50. There were other issues that the court considered. This included what effect non-compliance of the court's order had on the court's timetable. While a trial date had not yet been fixed, the court is of the view that this is as a result, partly or wholly, of having to vacate numerous pre-trial reviews. The non-compliance with the court's orders for the filing of Witness Statements must have therefore necessarily impacted the court's timetable for resolution of this case.

51. The court also considered that the unless order would have the ultimate devastating impact on the Applicant/Claimant. This is what is intended by sanctions and unless orders of the court. That fact alone cannot make the

consequences of the unless order unfair. There is nothing else in this case, which occurred after the making of the order, that would now make the consequences of the unless order unfair to the Applicant/Claimant. On the contrary the court considered that the Applicant/Claimant had possession of the Defendant's witness statements since November of 2016 when they were filed and served. The Defendant did not have the liberty of having an equal and fair opportunity to answer the case brought against them since the Claimant/Applicant's Witness Statements had not been served. If there was any prejudice, it is the Defendant who suffered significant prejudice.

52. In view of the foregoing, the Applicant/Claimant did not satisfy all the threshold requirement, and certainly not the requirement in CPR, Rule 27 (3) (b). Accordingly, as all three conditions having not been satisfied, consideration of CPR, Rule 26.7 (4) does not arise. The need to ensure that there is compliance with the court's orders, especially where they are 'unless orders' must be of vital importance. In the circumstances the court is constrained to dismiss the application. The consequences of the unless order remain.

53. On the issue of cost Mendonca J.A. stated[14]

> *With respect to costs, I think as a general rule on an application for relief from sanctions, the applicant should pay the respondent's costs even if successful on the application.*

[14]Harripersad Kissoon and ors Civil Appeal No: 52 of 2012, paragraph 50

54. Cost of this application to be paid by the Applicant/Claimant to the Defendant in the sum of Twenty Three Thousand Dollars ($23,000.00).

Avason Quinlan-Williams
Judge

(Leselli Simon-Dyette, Judicial Research Counsel)