REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-00741

BETWEEN

DEWANTIE MOHAMMED

MANZOOL MOHAMMED

Respondents/Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Applicant/Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances:

Mr Gerard Ramdeen and Mr Dayadai Harripaul for the Respondent/Claimant.

Ms Vanessa Gopaul, Mr Stefan Jaikaran and Ms Savitri Maharaj for the Applicant/Respondent.

REASONS FOR DECISION

1. In the claim filed on the 5th March, 2018 the respondents/claimants allege breach of contract against the applicant/defendant. They alleged that there exist a contract for the sale of sugar to Caroni (1975) Limited. The claimants claim:
    a. damages in the sum of One Hundred and Twelve Thousand, Four Hundred and Forty-Eight Dollars and Eighty-Six Cents ($112,448.86);

b. further and/or alternatively damages for breach of contract and/or monies due and owing to the claimants by virtue of a Compensation Package dated the 8th April, 2015;
c. interest;
d. such further orders and/or other reliefs as the Court may deem just; and
e. costs.

2. The issue raised was whether the court should grant the applicant's/defendant's application for an extension of time to file a defence.

3. The Attorney General was sued by virtue of the State Liability and Proceedings Act Chapter 8:02. The claim form and statement of case were served on the defendant on the 5th of March, 2018. The applicant/defendant entered an appearance on the 4th April, 2018. Dyadai Harripaul gave notice of his appointment as Attorney at Law for the applicant/defendant on the 23rd May, 2018.

4. By affidavit filed on the 29th of May, 2018 Savitri Maharaj deposed that the applicant/defendant received the consent from the respondent's/claimant's attorney for an extension of time. By consent of the respondents/claimants, the defendant agreed to extend the time for the filing of their defence until the 29th May, 2018. However, no defence was filed on the 29th May, 2018.

5. By notice of application filed on the 29th May, 2018, the applicant/defendant sought an extension of time to file the defence to the 31st July, 2018. The application was supported by an affidavit of Savitri Maharaj. The grounds for the application were outlined in paragraph five (5) of the affidavit. The deponent said that the applicant's/defendant's instructing attorney "has been liaising with Counsel and, taking the necessary steps to obtain instructions for the preparation of the defence…This process is taking longer than expected having regard to the fact that there are various persons/departments from whom/which instructions are to be obtained and the age of some of the allegations. The Defendant's Attorneys expect

that they will receive full instructions herein and should be in a position to file and serve the defence by 31st July 2018".

6. The application was granted in terms of the draft order on the 11th June, 2018.

7. On the 3rd of August, 2018 the applicant/defendant filed a notice of application. The application was supported by an affidavit of Savitri Maharaj sworn to on the 3rd August, 2018. The deponent averred that "since the service of the Claim Form and Statement of Case, the Defendant's instructing Attorney-at-Law has been liaising with Counsel and taking the necessary steps to obtain instructions for the preparation of the Defence herein."

8. The deponent further averred that "The Defendant's attorneys have recently obtained instructions from the Ministry of Planning and Sustainable Development. However, the Defendant's Counsel has requested clarification of certain instructions which needs to be obtained before the Defence herein can be prepared in accordance with Part 10 of the CPR. The Defendant's instructing Attorney is in the process of obtaining the said instructions and expects same and to be in a position to file and serve the Defence by 12 September, 2018". The applicant/defendant therefore, based on what was averred, requested an extension of time to 12 September, 2018 to file and serve its defence.

9. The court refused the application, without the need to have a hearing. In deciding the application the court considered the history of the claim, the application and the evidence in support thereof and the law. In particular the court considered the Privy Council decision in **The Attorney General v Keron Matthews [2011] UKPC 38 (at para 14)**:

> *"...a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises. If, as in the present case, judgment has not been entered when the defendant applies out of time for an*

extension of time, there is no question of any sanction having yet been imposed on him."

10. When therefore the applicant/defendant applies for an extension of time to file a defence, as was done here, the application is correctly made, if made under rule 10.3(5)[1] and not under Rule 26.7[2] which deals with applications for relief from sanction. In this case, the application made was for relief of sanctions pursuant to Rule 26.7. Rule 10.3(5) makes no distinction between applications for an extension of time made before or after the period for filing a defence (see **The Attorney General v Keron Matthews Supra**). The decision, **The Attorney General v Keron Matthews Supra**, went on to say

20. Unlike rule 26.7, rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises, how the Court's discretion is to be exercised. I think because no criteria is mentioned in rule 10.3(5) it was intended that the Court should exercise its discretion having regard to the overriding objective (see Robert v Momentum Services Ltd. [2003] EWCA Civ. 299).

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

[1] **10.3**(5) A defendant may apply for an order extending the time for filing a defence.

[2] **26.7** (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 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.
(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.

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.

27. Firstly, it must be borne in mind that the Court on the hearing of the application for an extension of time is not engaged in a rubber stamping exercise. It must not be taken for granted that such an application, as opposed to an application for relief from sanction, is one that the Court must or would ordinarily grant. Secondly, as has been said before, it was the casual or laissez faire approach to litigation that mandated the repeal of the Rules of the Supreme Court, 1975 and brought the CPR into existence (see Civil Appeal 79 of 2011 and The Attorney General of Trinidad and Tobago v Miguel Regis). The old lax culture is not to be tolerated and while that does not mean zero tolerance the intention of the CPR is to create a culture of compliance. There is therefore a need for compliance with the rules and this applies as much to rules where a sanction is imposed as to other rules where there is none. Thirdly, by identifying the factors that should be considered in the exercise of the Court's discretion, it is the expectation that decisions would be less subjective and be more predictable. Fourthly, I do not see that the approach should cause any increase in opposed applications. First of all it is not new. This has been the approach of the Court of Appeal for some time (see Civil Appeal 83 of 2010 Lincoln Richardson v Elgeen Roberts-Mitchell). Secondly the law is not concerned with trivial or insignificant things. Where therefore the delay is trivial or insignificant I do not expect that such applications would usually be opposed or if it is that it should generally detain the Court for any length of time. Thirdly it is the duty of the parties and their representative to help the Court to further the overriding objective. This is clearly spelt out at rule 1.3 which provides:

"The parties are required to help the court to further the overriding objective."

Parties should therefore work together to ensure that applications for extensions of time are avoided. In relation to that obligation the Court of Appeal of England and Wales in Denton v T.H. White Ltd. and anor. ; Decadent Vapours Ltd. v Bevan and others; Utilise T.D.S. Ltd. v Davies and others [2014] EWCA Civ. 906 (at para 43) made the following comments and observations in

the context of an application for relief from sanction which I think are apposite here:

11. In dealing with the case justly, the court considered the fact that the applicant/defendant had previously been granted extensions of time to file a defence. In those circumstance the court found that an application for a further extension should be supported by evidence sufficiently detailed to allow the court to make an informed decision. The court considered the evidence and concluded that the deponent did not provide sufficient information in the affidavit to allow the court to make a considered decision. Therefore to grant the application would not have resulted in the parties being of equal footing. The applicant/defendant has the advantage of the resources of the state, the respondents/claimants are not equally resourced. The vagaries provided in the affidavit were striking. A simple detail such as the dates certain things were done may have assisted the court in its deliberations on the application.

12. While the application was promptly made, there wasn't sufficient evidence to find that the failure to comply was not intentional. Further as noted, there was insufficient evidence to find a good enough explanation for the breach. Additionally, the application for an extension was not the first.

13. The court also considered Rule 11.13 (d), and determined that the application should be dealt with, without a hearing as the court did not find it appropriate. The notice of application was supported by the evidence the applicant relied on.

Dated this 3rd day of October, 2018

Justice Avason Quinlan-Williams

JRC: Romela Ramberran