REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV2018-04195

BETWEEN

COBHAM HELICOPTER SERVICES TRINIDAD LIMITED

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Appearances: Mr. Keshav Bahadursingh instructed by Mr. Bronock A. Reid for the Claimant

Mr. Duncan Byam, Ms. Karlene Seenath and Ms. Sasha Sukhram instructed by Mr. Sean Julien and Ms. Amrita Ramsook for the Defendant

Date: 8th July 2019

REASONS FOR THE ORAL DECISION DELIVERED ON THE 7TH MAY 2019

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1. By notice of application filed on the 18th April 2019, the claimant sought the court's leave pursuant to Part 12.2(2) of the Civil Proceedings Rules 1998 (as amended) to enter judgment against the defendant in default of defence in the sum of USD $10,638,497.82, costs in the amount of TT $1,930.00 and interest at the rate of 5% from the date of judgment to the date of payment. The application was supported by an affidavit

of Mark Edward James Thomas sworn on 12th April 2019 and filed on 18th April 2019.

2. This application followed the filing and serving of the claim on the 9th November 2018. The parties had agreed between themselves that the defendant be granted an extension of time to file their defence to the 8th February 2019. The respondent/defendant did not meet the deadline of the 8th February 2019. A notice of application was thereafter filed by the defendant on the 8th February 2019, in which the defendant requested further time to file and serve the defence to on or before the 8th April 2019. The application of the 8th February was supported by an affidavit of Amrita Ramsook Attorney at Law at the Chief Solicitor's Department. The court considered the application and the evidence in support thereof and without a hearing, determined the application by granting the time requested by the respondent/defendant to file the defence to on or before the 8th April 2019.

3. The defendant did not comply with the court's direction and the claimant's notice of application followed on the 18th April 2019. On the 3rd May 2019 the defendant filed a notice of application to further extend the time for the defendant to file a defence. The court fixed the notices of application filed on the 18th April 2019 by the claimant and the 3rd May 2019 by the defendant for hearing on the 7th May 2019.

4. At the hearing the court considered the notice of application filed by the defendant.

5. In arriving at a decision, the court had in mind *Roland James -v- The Attorney General of Trinidad and Tobago* Civil Appeal No. 44 of 2014 where the following was decided:

"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 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."
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> 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 opposite here."

6. In dealing with the case justly, the court considered that this was not the first application for an extension of time made by the defendant, it was the third application. The date of the application did not impact the court's decision either way. However, the evidence relied on by the defendant, is what impacted majorly, the court's decision.

7. The affidavit that supported that application was sworn by Amrita Ramsook, the same deponent whose evidence supported the defendant's application of the 8th February 2019. In the affidavit the deponent relied on the emergency and sudden relocation of the Attorney General's chambers from Cabildo Chambers to the International Waterfront Complex Tower C. The deponent averred that the move commenced on the 8th of April 2019 and was completed on the 26th April 2019. During the move, the deponent averred that they were not able to have access to the facilities and documents necessary to complete the defence. The deponent further stated that they were also not positioned to make an application for a further extension of time to file a defence until same was filed on the 3rd May 2019. The deponent reminded the court that the claim was for a substantial amount of money and that if judgment was entered against the respondent/defendant the monies would ultimately be paid by the taxpayers of Trinidad and Tobago. The deponent also relied on the fact

that little or no prejudice would befall the claimant as no trial date had as yet been fixed by the court.

8. The first and major issue the court encountered in assessing the explanation proffered by the defendant is the fact that the defence, according to the court's order of the 8th February 2019, was to be filed on the 8th April 2019. That day was the same day the deponent averred that the move from Cabildo Chambers commenced. By that time a defence, a reasonable person would expect, should have been completed and ready to file. If, as it turns out, that was not the case, then the application for an extension of time should provide the court with an explanation of the progress or reasons for the lack of progress. This is so especially as the application the court granted without a hearing was premised on certain evidence, including that the defendant was awaiting instructions from the Ministry of National Security with respect to the allegations made. Further the defendant averred that due to the value of the claim, there was need to assign additional counsel and they were awaiting the Attorney General's instructions on those matters. There was no explanation about the instructions they were awaiting or the selection and retaining of outside counsel and whether the outside counsel required time.

9. The court is certain that there are situations and circumstances where the timing of the move from Cabildo Chambers, without more, would provide a sufficient explanation and justification for an application for an extension of time to file a defence. The matrix here without more, was not one such circumstance. That is because as noted before, the defence should have been filed when the move commenced. Further, as already noted, this was not the first application for an extension of time to file a defence. At least the court should have been appraised of the progress as it related to the factors raised earlier. If those factors

were no longer relevant but other factors were, then the new factors should have be placed before the court for its consideration.

10. What was averred by the defendant carried little or no weight in advancing the defendant's application. Apart from the timeline of the move, which the court has already addressed, the size of the claim was a matter already known to the defendant. That the citizens would ultimately bear the burden of a judgment against the defendant is no different in any matter where judgment is entered against the Attorney General for a liquidated sum. Rather those two factors, the size of the claim and the burden on the citizens, are factors that the defendant should have considered in the alacrity in preparing and filing a defence; and for that matter, in making applications for extensions of time and the evidence in support of such applications.

11. The court did not agree with the submission that the claimant would not be adversely affected if the application was granted. The claimant is not on equal footing with the defendant since the latter has the full weight of the state, its agencies and resources to rely on. The claimant is not so positioned.

12. Consequently, the application for an extension of time for the defendant to file a defence was refused.

13. Regarding the claimant's application for the court's leave to enter judgment in default of defence pursuant to Parts 12.2(2), requires a claimant to seek and obtain permission from the court in order to obtain default judgment on a claim against a State. The court also considered Part 12.4 which states:

> "12.4 At the request of the claimant the court office must enter judgment for failure to defend if—
> (a) the court office is satisfied that the claim form and statement of case have been served; or
> (b) an appearance has been entered; and

(c) the period for filing a defence has expired;

(d) the defendant—

(i) has not served a defence to the claim or any part of it;

(ii) where the only claim is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) has not satisfied the claim on which the claimant seeks judgment; and

(e) (where necessary) the claimant has the permission of the court to enter judgment."

14. The court, considering the overriding objective, considered the defendant's submissions in objection to and opposed to the claimant's application.

15. The claim was premised on the fact that the Minister of National Security issued an invitation to Tender for the supply of maintenance and support services for four (4) AW139 twin-turbine helicopters for a period of two years. The claimant made a proposal in response to the invitation to tender. The Ministry subsequently, but before an award on the tender was made, invited the claimant to provide interim maintenance for the aircraft. The Minister of National Security confirmed the interim engagement by letter dated 22nd March 2017. The services were provided and the claimant was paid for the services.

16. By letter dated 28th March 2017 the Minister of National Security informed the claimant that they were the successful tenderer and that the proposal made by them was accepted. The proposal was for the supply of services for two years. Following the receipt of the letter by the claimant, the Minster sought to reopen negotiations to change the length of period of engagement from two years to one year. The Minster's effort at renegotiations is documented in a letter dated the 9th June 2017 from the Minister to the claimant.

17. Meanwhile pursuant to the acceptance of the defendant's proposals, the claimant provided services to the Ministry of National Security according to the proposal during the period 1st April 2017 to the 30th November 2017.

18. By letter dated the 9th June 2017, the Minister acknowledged the contract and the indebtedness to the claimant up to the date for the months of April and May and requested documentation in order for the payments to be made. The applicant/claimant and Minister of National Security went back and forth for months about the contract re-negotiation amongst other thing. However, the Minister of National Security never disputed the fact that the claimant was providing services or that they were indebted for the services provided, until finally the applicant/claimant was forced to terminate the contract since they had not been paid for months for services rendered.

19. The defendant's objections to the application for judgment were premised on among other things, that the Tenders Board is the body with the sole and exclusive authority to accept offers for the provisions of the articles and services that are the subject of them. The claimant's claim relates to the tender but it does not depend on the tender. The claimant's claim is that while that process was engaged on an interim engagement, they were asked to provide services which they provided. After they were informed that they were the successful tenderer and before the contract was negotiated they were effectively asked to provide services which they did. The claimant was paid for some of the services provided and not paid for other services provided.

20. It would be wrong, in the court's view that the claimant not be entitled to judgment being entered on their behalf when their claim is supportive of their entitlement to restitution. The Ministry of National Security was enriched when they received and accepted the services, which by any measure were critical services. It cannot be argued that

the claimant provided those services at their own expense. Additionally, it would be wrong that the claimant not be entitled to judgment for payment of services they provided that they were requested to provide. The claimant did what was required of them. They responded to a tender, made a proposal and were asked to provide a critical and important service. They provided the service on terms agreed upon and accepted by the Minister of National Security. The provision of the services and the debt owed were admitted. Here too the claimant did what was proper. They submitted all that was required to support the services provided to justify the payments due. Further after they were informed that their proposal was accepted, they entered re-negotiations for a different and shorter period than that which they tendered and no doubt planned for.

21. The court was satisfied, at least on the basis of restitution and quantum merit, that the defendant had no defence.

22. In any event, the court was satisfied that the requirements of Parts 12.2 and 12.4 were met. The court was mindful that the defendant's submission in objection to the claimant's application for permission to enter judgement was more appropriate for an application to set aside a court's judgment made in default of defence.

23. In all the circumstances, it therefore would have been unfair, unreasonable and unjust not to give permission for judgment to be entered in default of defence and to order that such judgment be entered.

Justice Avason Quinlan-Williams

JRC: Romela Ramberran