REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2017-04683

BETWEEN

LENNOX PETROLEUM SERVICES LIMITED

Applicant

And

ARTEMIS ENERGY LIMITED

First Respondent

NICHOLAS ROGER MIKE

Second Respondent

ABIGAIL DE SOUZA

Third Respondent

CANDICE CALLENDER

Fourth Respondent

SIEUNARINE RAMBHAJAN

Fifth Respondent

Before the Honourable Mme. Justice Jacqueline Wilson

Appearances:

Mr. Riaz Seecharan instructed by Thomas B. Cunningham and Company for the Applicant

Mr. Neal Bisnath instructed by Ms. Lydia Mendonca for the Defendants

DECISION

The Application

1. This is the Applicant's application made pursuant to Part 26.7 of the Civil Proceedings Rules 1998 (the CPR) for an order that:

   i. The Applicant be granted relief from sanctions for failing to file and serve its Claim Form and Statement of Case (the Claim) on or before 19 January 2018 pursuant to the order of the Honourable Mr. Justice Ramcharan dated 29 December 2017; and

   ii. The Applicant be granted an extension of time to file and serve the Claim.

2. The application arises out of a search order, otherwise known as an Anton Piller order, that was granted ex parte on the application of the Applicant filed on 29 December 2017.

3. The ex parte application was brought in circumstances where it was alleged that the second, third, fourth and fifth Respondents, who were former employees of the Applicant, had all resigned to take up employment with the first Respondent, whose business was in direct competition with the Applicant. The Respondents are alleged to have used and exploited the Applicant's proprietary information, thereby acting against the Applicant's best interests and for their own personal gain. The Applicant asserts that a strong prima facie case exists against the Respondent for the tort of conspiracy and for breach of the common law duties of good faith and fidelity including breach of confidence, breach of copyright and passing off.[1]"

4. The search order granted by the court on 29 December 2017 was in detailed terms, covering some 28 paragraphs and 5 Schedules. The order was executed on the First Respondent (the Respondent) on 4 January 2018.[2] Among other things, the order required the Respondent to permit the Applicant's Attorneys, a Supervising Attorney and others to enter the Respondent's premises and vehicles under its control in order to

[1] See paragraph 45 of affidavit
[2] Paragraph 4 of the affidavit of Janelle St. George-Ahee sworn on 22 January 2018

search for, inspect, photograph or photocopy and deliver specified documents and articles to the Applicant's Attorneys.[3]

5. For the purposes of this application, the material part of the order is as follows:

> "The Applicant shall file and serve its Claim Form and Statement of Case within the period of 14 days after the search order is executed in default of which the claim is dismissed and this order discharged."[4]

6. The questions that arise for determination are:

1) Whether the deadline for filing the Claim Form and Statement of Case expired on 18 or 19 January 2018; and

2) Whether the Applicant is entitled to relief from sanctions for its failure to comply with the order.

Deadline for Filing Claim

7. Part 2.8 of the CPR sets out the procedures for the computation of time for doing an act required by the Rules, a practice direction or order of the court.[5] All periods of time expressed as a number of days are to be computed as clear days.[6] "Clear days" means that in computing the number of days, the day on which the period begins and ends are not included.[7] Where the period for doing an act is 5 days or less and includes a Saturday, Sunday or any other day on which the court office is closed, that day does not count.[8] When the period for doing an act ends on a day on which the court is closed, the act may be done before 4 p.m. the next day on which the court is open.[9]

[3] See paragraph 7 of the order
[4] Ibid., at paragraph 4
[5] CPR Part 2.8(1)
[6] CPR Part 2.8(2)
[7] CPR Part 2.8(3)
[8] CPR Part 2.8(4)
[9] CPR Part 2.8(5) and (6)

8. The question that arises is whether the day on which the 14-day period for filing and serving the claim ended should be included or excluded from the computation of the deadline for the said filing and service.

9. In this regard the search order was specific in its terms. The claim was to be filed and served "within" 14 days of execution of the order. This had the result of bringing the computation of time outside the wording of the "clear days" principle which would otherwise require the exclusion of the last day on which the period ended. As the wording of the order required the inclusion of the last day on which the 14-day period ended, the deadline for filing and service must be construed as expiring on 18 January 2018, and not on 19 January 2018, as contended by the Applicant.

Whether the Applicant is Entitled to Relief from Sanctions

10. It is not in dispute that an order for an interim remedy, including a search order, may be made before the filing of a claim.[10] Such orders may be granted only if the matter is urgent or it is otherwise necessary to do so in the interests of justice.[11] Where the court grants an interim remedy before a claim has been commenced, it must require an undertaking by the applicant to issue a claim.[12]

11. The undertakings given by the Applicant are set out in Schedule C of the search order. They include an undertaking that "(the) Applicant will issue a Claim Form and Statement of Case within the period of 14 days after the search order is executed in default of which the claim is dismissed and this order discharged."[13]

12. Accordingly, the requirement to file and serve the claim within 14 days of execution of the search order was the subject of both the order and an undertaking by the Applicant. Having regard to the terms of the order and undertaking, upon the event of default, or

[10] CPR Part 17.2(1)
[11] CPR Part 17.2(2)
[12] CPR 17.2(3)
[13] Schedule C, paragraph 2

the failure to file and serve the claim, taking place on 18 January 2018, the search order would have been discharged.

13. The Applicant contended that the requirements of CPR Part 26.7 for the grant of relief from sanction were satisfied whereas the Respondents asserted that they were not.

14. Part 26.6 of the CPR sets out the court's powers in cases of failure to comply with rules, orders or directions. It provides that:

> (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.

15. Rule 26.7 lists the criteria for the exercise of the Court's discretion to grant relief from sanction as follows:

> **"Relief from sanctions"**
>
> 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.

16. An application for relief from a sanction would fail unless the three conditions specified in rule 26.7(3) are satisfied. That is, it must be demonstrated that (i) the failure to comply was not intentional; (ii) there is a good explanation for the breach and (iii) the party in default has generally complied with all other relevant rules, practice directions, orders and directions: *Attorney General v Keron Matthews [2011 UKPC 38, para. 17; Attorney General v Universal Projects Limited [2011] UKPC 37, para. 23; Roland James v the Attorney General of Trinidad and Tobago (Civ App No. 44 of 2014); Attorney General of Trinidad and Tobago v Regis (Civ App No 79 of 2011).*

17. In so far as the requirement for a good explanation is concerned, the authorities suggest that a good explanation does not mean the complete absence of fault. What is required is a good explanation not an infallible one: *Rawti Roopnarine and another v Harripersad Kissoo and others Civil Appeal No. 52 of 2012, paragraph 33*.

18. Where an explanation for the breach connotes real or substantial fault on the party in default, it is not a good explanation. Although oversight may be excusable in certain circumstances, inexcusable oversight can never amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency: *Attorney General v Universal Projects Limited.*

19. The Applicant's evidence is that it understood the deadline for the filing the Claim to expire on Friday 19 January 2018. On that date, the Applicant's Senior Advocate Attorney was very ill and unable to attend work. At around 2.30 pm on the said 19 January 2018, the Senior Attorney sought to obtain the Respondent's consent for an extension of time to 22 January 2018 to file the Claim and when the consent was not forthcoming, he gave instructions to his Legal Assistant to arrange for the filing of a draft claim form and statement of claim that were stored on his computer. The Office Assistant who was given responsibility for filing the documents arrived at the court registry at approximately 4.00 pm and was unable to file the documents as the registry was then closed. The Applicant filed an application for relief from sanctions on 22 January 2018, to which the draft claim form and statement of case were attached.

20. The Respondents opposed the application for relief from sanctions, contending that the application was not brought promptly and that no good explanation was provided for the breach. The Respondents argued that, having regard to the draconian and oppressive nature of an Anton Piller order and the fact that the ex parte application was brought on an urgent basis, the threshold requirements for the grant of relief were significant.

21. The Respondents argued that a good explanation was not been provided by the Applicant, as the explanation related solely to the illness of Senior Attorney on 19 January without reference to the Junior Counsel who also involved in the matter and with no account being given of what transpired in the period subsequent to the execution of the search order on 4 January 2018. The Respondents argued that the promptitude of the application must be established in its proper context and that without an explanation covering the full period from 4 to 19 January the question of promptitude had not been addressed.

Decision and Reasons

22. An examination of the Applicant's evidence demonstrates that it falls far short of the threshold requirements for the grant of relief. The very detailed terms of the order required the Applicant to put appropriate safeguards in place to ensure that the requirements of the order and undertakings were scrupulously followed.

23. Deriving its name from the 1976 English Court of Appeal decision, *Anton Piller KG v. Manufacturing Process Ltd.*, Anton Piller orders have been described as a powerful pretrial mechanism, obtained on an *ex parte* basis, that allows one party to search for and preserve evidence, that is likely to be destroyed or concealed prior to its discovery, on the premises of another party.[14]

24. There are stringent requirements to obtain an Anton Piller order. A plaintiff must demonstrate a strong *prima facie* case; the damage to the plaintiff by the defendant's alleged misconduct, potential or actual, must be very serious; there must be convincing evidence that the defendant has in its possession incriminating documents or things; and it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process. As with any application for an interlocutory injunction, an applicant must provide an undertaking in damages.

25. The potentially intrusive nature of an Anton Piller order suggests that an act of misunderstanding or oversight which may not be a barrier to relief from sanction in other cases would not be similarly construed where orders of this nature are concerned.

26. In all the circumstances, the Applicant has not, on the evidence, provided a "good explanation" within the meaning of Part 26.7(3)(b) of the CPR for the failure to file and serve a Claim Form and Statement of Case by 18 January 2018. This omission is fatal to the Applicant's application.

[14] [1976] Ch. 55

27. The Applicant's application is therefore dismissed.

28. The Applicant is to pay the Respondent's costs of the application to be taxed by the Registrar in default of agreement. Pursuant to the undertaking given by the Applicant in paragraph (1) of Schedule C to the order of 29 December 2017, the loss and damage sustained by the First Respondent as a result of the order or carrying out the order are to be assessed by a Master in Chambers.

Dated this 9th day of May 2018

Jacqueline Wilson
Judge