

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 104 of 2009

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPELLANT

AND

UNIVERSAL PROJECTS LIMITED

RESPONDENT

PANEL: I. ARCHIE, C.J.

W. KANGALOO, J.A.

P. JAMADAR, J.A.

APPEARANCES:

Mr. M. Daly S.C.; Mr. K. Garcia and Mrs. D. Jean-Baptiste-Samuel for the Appellant.

Mr. N. Bisnath and Mrs. L. Mendonca for the Respondent.

DATE OF DELIVERY: 26th February, 2010.

I have read the judgment of P. Jamadar, J.A. and I agree that the appeal be dismissed with costs to be assessed.

I. Archie
Chief Justice

I have also read the judgment of P. Jamadar, J.A. and I also agree that the appeal be dismissed with costs to be assessed.

W. N. Kangaloo
Justice of Appeal

JUDGMENT

INTRODUCTION

1. This appeal is against the order of Gobin J., made on the 22nd April, 2009, dismissing the Appellant's application filed on the 1st April, 2009 seeking, inter alia, to set aside a default judgment entered against the State on the 16th March, 2009.

2. The general circumstances leading up to the filing of this action are relevant to the outcome of this appeal. These were as follows:
 - (a) The claim arose out of alleged difficulties experienced by the Respondent in progressing a contract (made between the parties and dated 19th May, 2005 – the Contract) to do certain improvements to the Churchill Roosevelt Highway in Trinidad. The Respondent formed the view that it was entitled to both an extension of time to complete the works and to additional payments.
 - (b) The Contract was subject to the FIDIC Conditions, and on the 13th April, 2007 the Respondent made a claim under Sub-Clause 20.1 of the Conditions.
 - (c) On the 4th October, 2007 the Appellant purported to terminate the Contract, which termination was disputed by the Respondent.
 - (d) In June 2008 the Engineer (under the FIDIC Conditions) invited the parties to meetings to discuss the Respondent's claim.
 - (e) On the 22nd September, 2008 the Engineer submitted to the parties his Determination pursuant to Sub-Clause 3.5 of the FIDIC Conditions. By Payment Certificate dated the 6th October, 2008 the Engineer indicated the Appellant's liability to the Respondent under the contract in the sum of TT\$31,246,826.95.
 - (f) By letters of the 10th October, 2008 and the 30th October, 2008 the Respondent demanded payment of the said sum of TT\$31,246,826.95, the latter letter requesting that an indication of intent to pay be given by the 15th November, 2008. No responses were received by the Respondent to these letters.

- (g) On the 12th November, 2008 attorneys for the Respondent wrote to the Permanent Secretary of the Ministry of Works and Transport (and to the Minister of Works and Transport and also to the Attorney General) requesting payment of the stated sum, making reference to the unanswered letters of the 10th and 30th October, 2008, and demanding payment on or before the 10th December, 2008, failing which legal action was threatened. This letter expressly stated that it was “intended to satisfy the pre-action protocol requirement under the CPR”.¹ No response to this letter was received by the Respondent or its attorneys.
- (h) On the 16th December, 2008 the Respondent filed this action by way of Claim Form and Statement of Case under the CPR, 1998. That claim was for the sum of TT\$31,246,826.95 as money due pursuant to the Engineer’s Certificate dated the 6th October, 2008 and under the Contract, together with interest thereon at 12% per annum from the 6th October, 2008 until payment (particulars of which were set out).
- (i) Service of the Claim Form and Statement of Case was effected on the Appellant on the 16th December, 2008.² In fact, the documents were served on Ms. Karlene Seenath, an attorney attached to the office of the Solicitor General of Trinidad and Tobago.
- (j) The pre-action protocol letter was received by the Appellant and a file was opened in the Chief State Solicitor’s Department “immediately the letter was received”.³ That file was then assigned to an instructing attorney in the said department.
- (k) Subsequently, the instructing attorney for the Appellant made several calls to the Legal Department of the Ministry of Works and wrote two letters, dated the 20th November, 2008 and 25th November, 2008, requesting instructions in order to respond to the pre-action protocol letter. Instructions were eventually received from the Ministry of Works and Transport on the 8th December, 2008.⁴ This was two days before the deadline fixed in the pre-action protocol letter. These instructions were then forwarded by the instructing attorney to two advocate attorneys attached to the Solicitor General’s Department for their “settled response to the pre-action protocol letter”.⁵

¹ The Civil Proceeding Rules, 1998 (CPR, 1998).

² An affidavit of service was duly filed on the 16th January, 2009.

³ Paragraph 4, affidavit of the Appellant, filed 23rd March, 2009.

⁴ Paragraphs 4 and 5, affidavit of the Appellant, filed 23rd March, 2009.

⁵ Paragraph 6, affidavit of the Appellant, filed 23rd March, 2009.

3. What then transpired within the State's legal departments and among the Appellant's legal representatives was the first and beginning of a litany of defaults with respect to the requirements of the CPR, 1998, that eventually led to the default judgment and ultimately to this appeal.

THE LAW AND FACTS LEADING UP TO THE DEFAULT JUDGMENT

4. On the 15th November, 2005 the Practice Direction with respect to pre-action protocols was issued. Of general relevance to this action, it being a claim for a specified sum of money, are the provisions at Protocols 1.4, 2.1, 3.2 and 4.4 (which must be read subject to the provisions in Appendix A to the Practice Direction which deals with claims for a specified sum of money). Of particular relevance is Protocol 1.4 of Appendix A, which provides that in a claim for a specified sum of money: "The defendant should reply within 14 days of the date of receipt of the letter indicating whether he admits the claim ...". Further, Protocol 1.5 of Appendix A also provides that: "If the claim is not admitted the defendant should give detailed reasons why ...".

5. In this case the pre-action protocol letter was certainly received by the 14th November, 2008.⁶ However, up to the 8th December, 2008 no reply had been issued.

6. Among the objectives of the pre-action protocols is the aim "to support the efficient management of proceedings under the CPR ...".⁷ Consistent with this objective, "the court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 ...".⁸ Non-compliance with a pre-action protocol includes the failure of a defendant to "make a preliminary response to the letter of claim within the time fixed for that purpose ..." and "to make a full response within the time fixed for that purpose ...".⁹

7. In this case the Appellant did not give either a preliminary or full response to the pre-action protocol within the time limited for so doing or at all. Instead, the instructing attorney

⁶ Paragraph 4, affidavit of the Appellant, filed 23rd March, 2009.

⁷ Pre-action Protocol 1.4 (3).

⁸ Pre-action Protocol 2.1.

⁹ Pre-action Protocol 3.2 (a) and (b).

waited for some ten days after forwarding the documents to the State advocates for a “settled response” before following up with them.¹⁰ That implies that nothing was done by the State advocates until at least the 18th December, 2008, yet there is absolutely no explanation given as to why no response to the pre-action protocol letter was sent by instructing attorney – even if only a preliminary response acknowledging receipt of the pre-action protocol letter and requesting more time to reply and explaining why. Rather, the Appellant’s attorneys chose to disregard both the pre-action protocol letter and the requirements relating to it in the CPR, 1998 and to deal with this matter as they determined best. This conduct is therefore conduct that may be considered in dealing with an application for making an order under Part 26, CPR, 1998, and in particular Part 26.7 – Relief from Sanctions.

FILING OF THE ACTION

8. Not surprisingly, having heard nothing from the State or its attorneys, the Respondent filed this action on the 16th December, 2008. Service was effected on the 16th December, 2008 on an attorney at law attached to the office of the Solicitor General.¹¹ The Appellant’s explanation of what happened is somewhat at odds with that of the Respondent’s process server. In the affidavit of the instructing attorney,¹² she deposed that “when the action was served ... it was taken into custody by inexperienced legal staff ... who then proceeded to store the papers in a vacant office ...”. The truth as to on whom the papers were served is not of great moment, since there is no dispute that they were served on and received by a “legal staff” member of the department. What happened next was a complete calamity.

9. The instructing attorney explained that: “the papers were not discovered until some six weeks later, sometime around January 30, 2009”. In these circumstances the instructing attorney acknowledged: “By that time, the forty two days permitted under the CPR for the filing of the Defendant’s Defence had expired”. What is not explained, especially if all of this occurred, is what was done with respect to the pre-action protocol letter, the instructions received on it on the

¹⁰ Paragraph 7, affidavit of **the Appellant**, filed 23rd March, 2009.

¹¹ Paragraph 6, Exhibit LM 3, affidavit of Mrs. Lydia Mendonca, filed on 2nd April, 2009.

¹² Paragraph 12, filed on the 23rd March, 2009.

8th December, 2008 and the preparation of the State's reply to it, and the consideration of a defence during this period.¹³

10. Part 9 of the CPR, 1998 deals with the entry of an appearance and notice of intention to defend. By Part 9.3 (1) and (2), the general rule is that an appearance must be entered 8 days after service of the statement of case. However, by Part 9.3 (3) a defendant may enter an appearance at any time before a default judgment is entered.

11. Part 10 of the CPR, 1998 deals with the filing of a defence – which is mandatory where a defendant 'wishes to defend all or part of a claim',¹⁴ or wishes to admit liability but be heard on the issue of quantum.¹⁵ The general rule is that a defence must be filed within 28 days after service of a statement of case.¹⁶

12. However, in proceedings such as these - which are against the State, the period for filing a defence is within 42 days of the service of the statement of case.¹⁷ The State is therefore considered a special type of defendant and given significantly more time than other defendants within which to file its defence. Moreover, by Part 10.3 (6) and (7) parties may agree once to an extension of time for the filing of a defence up to a maximum period of three months from the service of the statement of case, and even then a defendant is still afforded an opportunity to make an application to the court for an order extending the time for the filing of a defence.

13. The CPR, 1998 therefore provides ample opportunities for the preparation and filing of a defence, for agreement between the parties for an extension for so doing and to apply to the court for an order to do so.

14. By the 30th January, 2009, when the proceedings were discovered by the Appellant's attorneys, the time for filing a defence to this action had already past. The instructing attorney

¹³ See Pre-action Protocols 4.4, 4.5, 4.6 and Appendix A, Protocols 1.4 and 1.5 – all of which require a defendant to give detailed reasons why a claim is not accepted and to disclose all documents on which reliance is placed.

¹⁴ Part 10.2 (1).

¹⁵ Part 10.2 (3).

¹⁶ Part 10.3 (1) and (2).

¹⁷ Part 10.3 (3).

explained that: “As soon as the papers were re-discovered ... action was taken promptly ...”¹⁸. This action was that on the 30th January, 2009 a file was opened, and on the 2nd February, 2009 that file was assigned to instructing attorney who briefed the same two State advocates who had been sent the pre-action protocol letters of the 12th November, 2008 for a “settled response”.¹⁹

15. Remarkably, knowing that the time for the filing of a defence had past, only an appearance was entered and filed on the 10th February, 2009 and no application was ever filed at that time for an extension of time for the filing of a defence, or any call made or letter written to attorneys for the Respondent seeking their agreement to such an extension. No explanation or no good explanation has really been given for any of these omissions.

16. The instructing attorney explained that she received a phone call from a Judicial Support Officer of a judge “sometime in the month of February, 2009” informing her that “the Universal Projects Limited matter was listed ... for hearing on March 11, 2009,” and that she “assumed” it was this matter and that what was listed was a case management conference.²⁰ All of her assumptions turned out to be erroneous. Again, quite remarkably, nothing was done to confirm exactly what was on before the court, and no attempt was made to get in touch with attorneys for the Respondent to confirm or clarify any of this.

17. In the interim the attorneys for the Respondent, having received no notice of any appearance being entered,²¹ proceeded on the 16th January, 2009 to make an application for permission to enter a default judgment against the State pursuant to Part 12.2 of the CPR, 1998. The date given for the hearing of this application was the 20th February, 2009 before Gobin J. This application was duly served on the 23rd January, 2009 on a law clerk at the office of the Solicitor General.

18. No default judgment having been taken up prior to the 10th February, 2009, the appearance entered by the Appellant on that date was acceptable pursuant to Part 9.3 (3), CPR,

¹⁸ Paragraph 13, affidavit of the Appellant, filed 23rd March, 2009.

¹⁹ It is to be noted that these State advocates had both the pre-action protocol letter and the instructions in response to it from the Ministry of Works since the 8th December, 2008.

²⁰ Paragraph 16, affidavit of the Appellant, filed 23rd March, 2009.

²¹ Part 9.4, CPR, 1998 requires that notification be given to the claimant.

1998. Notice of this was given to the Respondent's attorneys on the 11th February, 2009. However, what is again also quite remarkable is that the Appellant having been served on the 23rd January, 2009 with an application for a default judgment – which included as a ground the non-filing of a defence, did absolutely nothing about this application.

19. It is noteworthy, that though on the date that the application was filed to take up a default judgment the defence was not due, by the date scheduled for hearing it would have been overdue. It is also significant that in the explanations offered by the Appellant, there is a complete absence of any explanation as to what was done when this application was served/received or about it.

20. Surely this application should have prompted some urgent inquiry and response by the Appellant's attorneys. Instead, having 're-discovered' the claim form and statement of case on the 30th January, 2009, and knowing that by then the time for filing a defence had past, the Appellant's attorneys were quite content to simply make the most casual (and erroneous) assumptions about the matter based on a telephone call from the Court Office, intending to simply turn up on the 11th March, 2009 at an assumed case management conference and deal with it then.²²

21. This casual approach is further suggested by the fact that the same instructing attorney signed and entered two separate appearances, in two separate matters between these parties, and had them both filed on the same day – 10th February, 2009. Surely when this instructing attorney received the telephone call from the Court Office in that very month, she should have inquired as to which of the two matters the call was about and/or subsequently checked to verify which one it was.

THE ORDER OF THE 20TH FEBRUARY, 2009

22. As it turned out, the State's instructing attorney in this matter happened to be before Gobin J. on the 20th February, 2009 in a completely unrelated matter when it came to her attention that this matter was also before the judge on that day. It appears that her surprise

²² It would appear that the Respondent's application for judgment in default of appearance and/or defence was simply ignored or for some unexplained reason not considered by the State.

extended not only to the fact that the matter was scheduled on the 20th February, 2009 before Gobin J., but also to the fact that what was on was the application for default judgment filed on the 16th January, 2009.

23. The instructing attorney stated that she was “alarmed” and “taken completely by surprise”²³ on discovering that the matter was before Gobin J. and what was on for hearing. In her affidavit filed on the 23rd March, 2009 she deposed, at paragraph 19, as follows:

On the said date 20th February, 2009, the Honourable Madam Justice Gobin granted an extension of 21 days for filing of the defence, to March 13, 2009.

24. This statement may appear innocuous at first, but it is of some significance. This is because the order that the judge made on the 20th February, 2009, which was approved and stamped as such by the judge on the said date, stated inter alia,²⁴ that:

IT IS ORDERED that:

1. Time for filing Defence (sic) is extended to the 13th day of March, 2009, in default leave is granted to the Claimant to enter judgment against the defendant.

25. Indeed, in the affidavit of the instructing attorney for the Respondent, filed on the 2nd April, 2009, she stated²⁵:

I attended Court ... on the 20th February, 2009 on the hearing of the Application dated the 16th January, 2009. The matter was called and Mrs. Debora Jean-Baptiste-Samuel appeared for the Defendant. She informed the Court that she was not aware that the matter was on for hearing that morning and made an oral application for further time to file the Respondent’s Defence. The Honourable Judge granted an extension of time of 21 days to the 13th March 2009 for filing and service of the defence and further ordered that in default leave (permission) was granted to the Claimant to enter judgment in default of defence against the Defendant.

²³ Paragraphs 17 and 18, affidavit of the Appellant, filed 23rd March, 2009.

²⁴ Emphasis added.

²⁵ At paragraph 12.

26. How could this default provision in the judge's order have been omitted in paragraph 19 of the affidavit of instructing attorney? Why was it omitted? In a subsequent affidavit filed by the instructing attorney on the 1st April, 2009 in these proceedings, she stated:²⁶

I did not recall the Honourable judge having guarded the order for the delivery of the defence, or having imposed an unless order or having ordered that there be judgment for the Claimant in default of delivery of the defence by March 13, 2009.

27. In yet another affidavit filed by instructing attorney on the 7th May, 2009 in these proceedings, she deposed to:

The difficulties ... with becoming conversant with the developments in this matter, and the progress of the case, and in particular becoming aware that on February 20, 2009 the Honourable Judge had granted her Order for the delivery of the Defence with a default clause to take effect if the Appellant/Defendant did not deliver the Defence on March 13, 2009.²⁷

28. How could instructing attorney have had any difficulty "becoming conversant" with or "becoming aware" of the default clause to the order made by Gobin J. on the 20th February, 2009, when she was in court and was also the one who sought the order for an extension of time to file a defence? No doubt as instructing attorney she would have made a note of the judge's order, and surely the default provision would have struck her as particularly noteworthy. Yet there is quite simply no good explanation given for not knowing of the default order made on the 20th February, 2009. In her affidavit of the 1st April, 2009 instructing attorney stated that she "did not hear the Honourable Judge make a default order on February 20, 2009".²⁸ No explanation was given as to why this may have been so.

29. The judge at paragraphs 2, 3 and 4 of her Reasons set out in some detail what transpired on the 20th February, 2009. In these circumstances I am of the opinion, in the absence of any acceptable explanation, that it cannot be that instructing attorney was not aware on the 20th

²⁶ At paragraph 4.

²⁷ Paragraph 7, affidavit of the Appellant, filed 7th May, 2009. Emphasis added.

²⁸ At paragraph 8.

February, 2009 of the order that the judge had made and in particular of the default clause attached to the extension of time granted for the filing of a defence. To accept such a suggestion flies in the face of the facts and the record in this matter, and would be to accept the unacceptable. Certainly there has been no good or acceptable explanation given for this assertion. Surely instructing attorneys, especially in circumstances such as these, have a responsibility to at least pay attention when a judge is making an order, and I would suggest further, to check that order after delivery and to obtain an office copy of it at the earliest opportunity.

THE FAILURE TO FILE A DEFENCE BY THE 13TH MARCH, 2009

30. The Appellant did not file its defence by the 13th March, 2009. The reason advanced for this arose out of a suggestion by one of the two State advocates who had been involved in the matter that ‘outside counsel’ might need to be retained. This suggestion, it seems, was made on the 20th February, 2009 when instructing attorney returned from court.

31. There is in the affidavit of instructing attorney, filed on the 23rd March, 2009,²⁹ another suggestion that : “Owing to the absence of a substantive Solicitor General, this (the retaining of outside counsel) did not prove easy and further delay was occasioned in making arrangements to retain outside counsel.” This being the case, it appears that outside counsel (Senior and Junior) were only retained on the 10th March, 2009 – three days before the defence was due. What is not stated is precisely how and why in this particular case the absence of a substantive Solicitor General caused ‘further delay’ in retaining outside counsel; or indeed what caused any initial delay in so doing.

32. Instructing attorney, recognizing that a defence was not going to be ready for filing by the 13th March, 2009, wrote on the 13th March, 2009 to the Judicial Support Officer (JSO) assigned to Gobin J. In that letter she stated the State’s inability to file a defence by the 13th and requested that the JSO “notify the Honourable Judge that it is our intention to file the necessary applications early next week”. It was never disclosed in that letter what “the necessary

²⁹ Paragraph 20.

applications” were, but the 13th of March was a Friday and the next court week began on Monday the 16th March, 2009.

33. What in fact followed from the Appellant was an application filed on March 23rd for the following relief:

- a. A stay of the proceedings pending arbitration.
- b. An extension of time for the making of the application.
- c. Alternatively, a further extension of time for the filing of a defence to 21 days from the making of an order.
- d. Further alternatively that “summary judgment be entered for the Defendant on the whole of the Claimant’s claim”.

34. The grounds advanced³⁰ were:

- a. The Defendant had a realistic prospect of successfully defending the claim.
- b. The Claimant has no realistic prospect of success on its claim.
- c. The Defendant acted as soon as reasonably practicable when it found out that an application for default judgement had been made against it.
- d. The Claimant and the Defendant are parties to an agreement which provides for a dispute resolution process which has not been engaged and which the Defendant wishes to engage.

35. Clearly the Appellant did not intend, either on the 13th March, 2009 or on the 23rd March, 2009, to expressly seek any relief from the sanction of the default clause imposed by the judge, and intended primarily to obtain a stay of the proceedings in order to have the parties go to arbitration and only alternatively to defend this action.³¹

³⁰ It is apparent from these grounds that the Appellant had in mind Part 13.3, CPR, 1998, which contains the requirements for setting aside a default judgment ‘regularly’ entered.

³¹ Significantly there is no explicit claim for the striking out of the claim as an abuse of process (see paragraphs 72 et seq of this judgment).

36. In support of the Appellant's contention that it had a realistic prospect of successfully defending the case and that the Respondent had little prospect of successfully proving its claim, the affidavit of instructing attorney, filed on the 23rd March, 2009, alleged that³²:

- (a) The Engineer's determination was invalid because it involved an assessment of damages.
- (b) The Engineer had no power to issue interim certificates.
- (c) The Payment Certificate sued upon was invalid as not having properly been made in accordance with the contract and was outside of the Engineer's powers under the contract.
- (d) In any event, the Payment Certificate sued upon was based on findings of fact that could not have reasonably been arrived at.

37. Instructing attorney then asserted at paragraphs 30 and 31³³:

30. By reason of the matters deposed to ... I therefore verily believe that the Engineer's determination of the Claimant's Clause 20.1 claim was fundamentally flawed, was not a fair determination and was invalid null and void ... and/or was based on factually incorrect matters ...”.

31. In the premises, I therefore verily believe that the Defendant has a good defence to the claim herein on the merits, and has a realistic prospect of success in the claim. I also verily believe that the Claimant has no realistic prospect of success on its claim, or any part thereof.

38. It is abundantly clear that what the Appellant was asserting was a good defence on the merits, a part of which was based on the assertion that the Respondent's case “was fundamentally flawed” and “was invalid null and void”. Thus, if the stay was not granted what the Appellant wanted was an extension of time to file its defence. This was the formal application before Gobin J. on the 1st April, 2009.

³² Paragraphs 27 – 31.

³³ Affidavit filed 23rd, March, 2009. Emphasis added.

39. It is noteworthy that no explanation was given as to why any of these reliefs were not sought before the 13th March, 2009 – not that it would have made a difference, as in light of the judge’s default order of the 20th February, 2009 the first application that was required was one pursuant to Part 26.7, CPR, 1998 for relief from sanctions.

RELIEF FROM SANCTIONS

40. Part 26.6, CPR, 1998 states:

- (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 28.8 shall not apply.

41. Part 26.7, CPR, 1998 states:

- (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.

42. Following the default order of Gobin J. on the 20th February, 2009, and consequent upon the Appellant's failure to file its defence by the 13th March, 2009, the Respondent sought to have a judgment entered on its claim. This request was made on the 16th March, 2009, and on that day judgment in default was entered against the Appellant in the sum claimed with interest as sought.³⁴

43. Attorneys for the Respondent only received a copy of the letter from the Appellant's attorneys sent to the J.S.O. attached to Gobin J. on the 16th March, 2009, after they had already applied for permission to enter judgment against the Appellant pursuant to the default order of Gobin J.

44. Thus, in light of the default order of Gobin J., the provisions of Part 26.6, CPR, 1998 and the fact that on the 16th March, 2009 a default judgment had been entered against the Appellant, the Appellant was required to seek relief from the sanction imposed by Gobin J. – the default order, and to do so pursuant to Part 26.7, CPR, 1998.³⁵

45. It is agreed that before Gobin J., on the 1st April, 2009, the substantive issue of the Appellant's entitlement to relief from sanctions was aired. In fact, before the judge formal leave was sought and granted to include further relief seeking the setting aside of the default judgment,³⁶ but no formal leave was sought to include relief from sanctions. However, the judge, in her words, "sought to find in the misconceived application grounds that could properly have supported an application for relief from sanction".³⁷

46. The judge, in her analysis, found that none of the requirements of Part 26.7 (1) or (3) had been satisfied, and concluded on this issue that "there having been no proper application for

³⁴ This default judgment was subsequently corrected on the 31st March, 2009 by the Registrar, acting pursuant to Part 43.10 of the CPR, 1998, to reflect what may be best described as correct matters of form.

³⁵ It would appear that it was only on the 25th March, 2009, that the Appellant's attorneys received a copy of the default judgment under cover of a letter dated 20th March, 2009 from the Respondent's attorneys. See paragraph 3, affidavit of the Appellant, filed 1st April, 2009.

³⁶ See paragraph 7, page 4, of the Judge's Reasons. There is no suggestion that any formal application was made for the striking out of the claim as an abuse of the process.

³⁷ See paragraphs 9 (e), page 6, of the Judge's Reasons.

relief from sanctions and the material before me, in any case, falling short of what was required to grant relief, I dismissed the application.”³⁸

THE APPEAL

47. The Appellant contended that Gobin J. had erred because:

- (a) The State had satisfied the requirements of Part 26.7, CPR, 1998, and was entitled to relief from the sanction imposed on the 20th February, 2009.
- (b) In any event, in this matter, Gobin J. was not limited to considering only the matters listed in Part 26.7 (3) (a) to (c), CPR, 1998, but should also have considered “the fact that the Respondent/Claimant’s action was an abuse of process in that it was and is misconceived and was not and is not maintainable”,³⁹ which she did not do.
- (c) In failing to consider the matters at (b) above, Gobin J. had thereby failed to exercise the court’s inherent powers to protect the integrity of its own process, which it should have done in this case by granting relief from the sanction imposed.

THE ISSUES ON APPEAL

48. Two issues are therefore to be determined in this appeal. First, whether the Appellant has satisfied the strict requirements of Part 26.7, CPR, 1998, and is entitled to relief from the sanction imposed on the 20th February, 2009. Second, whether in any event because of the alleged abuse of process the Appellant is entitled to relief from the said sanction and to have the default judgment entered set aside (and one would assume to have the claim struck out).

PART 26.7, CPR, 1998

49. There is no avoidance of the fact that this appeal has proceeded on the basis that relief from the sanction imposed by the judge was required in this case. That is to say, the Appellant has proceeded on the basis that the first relief that the Appellant must secure before the other aspects of its application of the 1st April, 2009 could be considered was relief from the sanction imposed on the 20th February, 2009.

³⁸ See paragraph 10, page 10, of the Judge’s Reasons.

³⁹ Ground 3 (i) Amended Grounds of Appeal, filed on the 28th May, 2009.

50. Part 26.7 was considered by the Full Court of the Court of Appeal in **Trincan Oil and Ors. V Chris Martin**,⁴⁰ in which it was stated at paragraphs 13, 18, 19 and 20:

13. 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.

18. The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and will adapt their behaviour accordingly, thus effecting the desired change in culture.

19. Simply put, in the context of compliance with rules, orders and directions, the *'laissez-faire'* approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated.

20. Finally, reliance on the overriding objective⁴¹ as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and

⁴⁰ Civ. App. No. 65 of 2009, Kangaloo, J.A., Weekes, J.A., Jamadar, J.A. Paragraphs 14 to 17 of the Judgment of the Court explain in greater detail the philosophy underlying the structure and intent of Part 26.7 and its differences from the corresponding English rule.

⁴¹ CPR, 1998, Rule 1.2.

application of the rules, but it is not intended to override the plain meaning of specific provisions.⁴²

51. Counsel for the Appellant accepted these statements as a correct and an apt approach to Part 26.7, which this Court also reconfirms. The judge in her analysis of Part 26.7 (1) and (3) correctly interpreted these provisions, and unless it can be shown that she was plainly wrong in applying them to the facts before her, her decision ought not to be interfered with.⁴³ In my opinion the judge was also correct in the application of her analysis with respect to Part 26.7 (1) and 3 (b) and (c): promptitude, good explanation and general compliance. In each of these the judge found that the Appellant had not discharged the onus on the State, conclusions that I agree with.

PROMPTITUDE

52. By the order of the 20th February, 2009, a defence was to have been filed by the 13th March, 2009. In default the Respondent was granted permission to take up judgment against the Appellant. As I have already explained the Appellant was aware of the time within which the defence was to have been filed and must be assumed to also have been aware of the consequences of a failure to do so. This application could have been made shortly after the 13th March, because prior to the 13th March it was clear that a defence would not have been ready on or before that date. Indeed, on the 13th March the Appellant's attorneys wrote a letter to the J.S.O. attached to Gobin J. indicating this to be the case. An application under Part 26.7 could just as well have been filed at that time.

53. Instead nothing was done until the 23rd March, 2009, which in my opinion, in the circumstances of this case, could not be described as being prompt.⁴⁴ What compounds the matter is that neither on the 23rd March, 2009 nor on the 1st April, 2009 was any formal

⁴² See **Vinos v Marks and Spencer Plc** [2001] 3 All E.R. 784, per May L.J. (at para. 20) and Peter Gibson L.J. (at paras. 26 – 27); and **Ramesh Seebalack v Charmaine Bernard** Civ. App. No. 261 of 2008, per Kangaloo J.A. (at para. 6) and Warner J.A. (at paras. 19 and 20).

⁴³ See **Fishermen and Friends of the Sea v The Environmental Authority and Ors.** Civ App.No. 106 of 2002, per Nelson J.A. at paras. 38 – 39 and **Trincan Oil & Ors. v Chris Martin** at paragraphs 21 and 22.

⁴⁴ It is noteworthy that where a judgement is entered against a party at a trial in his absence, an application to set aside that judgment “must be made **within 7 days** after ... the judgment ... was served”. See, Part 40.3, CPR, 1998.

application made for relief from sanctions and indeed it was only raised orally at the hearing of the application on the 1st April, 2009!

GOOD EXPLANATION

54. The explanations offered by the Appellant for the breach – the failure to file a defence by the 13th March, 2009 (compounded by the default order of the 20th February, 2009), arose in the context of a suggestion from one of the two State advocates assigned to the case to retain outside counsel. It appears that to retain outside counsel required some input from the Solicitor General. However, there was no substantive office holder at the time, and in these circumstances it was alleged that: “Owing to the absence of a substantive Solicitor General, this did not prove easy and further delay was occasioned in making arrangements to retain outside counsel ...”.⁴⁵ I have already discussed this explanation earlier in this judgment. In addition to what I have already said there is no suggestion that there were no other officers in the department who could discharge the duties of the Solicitor General or even that there was not someone acting in that post, and it was not contended that without a substantive office holder outside counsel could not be retained. Thus, apart from this vague suggestion, no evidence was given as to why specifically the absence of a substantive Solicitor General caused a delay in retaining outside counsel in this case.

55. In my opinion a bald allegation of the absence of a substantive Solicitor General without more cannot be a good explanation for any delay in retaining outside counsel and consequently for the breach of the court’s order in this case.

56. On the very day that the default order was made the suggestion was also made to retain outside counsel. If it was known that such a decision was likely to take undue time, which it seems was known, then that occurrence could not have been unexpected and should have been considered in any decision to be made by the Appellant with respect to retaining outside counsel. This especially in light of the order to have a defence prepared and filed by the 13th March, 2009. A party cannot in the face of a court order pursue a course that it knows or reasonably anticipates will lead it afoul of that order and then pray in aid of relief from the sanctions of the order the

⁴⁵ Paragraph 20, affidavit of the Appellant, filed 23rd March. 2008.

circumstances that it was aware could lead to default. In such circumstances a party must act promptly to either comply with the court order or to secure further directions so as to avoid default. Thus the explanation given for failing to file a defence by the 13th March, 2009 is not, in my opinion, a good explanation for the breach.

GENERAL COMPLIANCE

57. The history of this matter as outlined above and as detailed by the judge in her Reasons, demonstrates that from the very inception, starting with the pre-action protocol letter, there have been several instances of non-compliance with the rules, practice directions and orders in this matter. For example, there was no response to the pre-action protocol letter, there was no appearance entered or defence filed within the times strictly limited for so doing, there was no defence filed within the time ordered by the court and there was no formal application made for relief from sanctions as required by Part 26.6, CPR, 1998.

58. Whereas the judge seemed to have excluded the State attorneys from responsibility for these omissions and placed the blame on a “failure of systems”,⁴⁶ I think otherwise. At every step along the way in this matter State attorneys were involved as described above. They must take some responsibility for the colossal disaster that has been chronicled in this matter. Moreover, the Appellant and the Ministry of Works must also take some responsibility.

59. From the very beginning both the Appellant and the Ministry of Works had been informed of these proceedings, beginning with the pre-action protocol letter that was copied to them. The Ministry of Works for unexplained reasons dragged its feet in responding to requests by instructing attorney for instructions to reply to the pre-action protocol letter. Indeed, letters requesting information were sent on the 20th November, 2008 and the 25th November, 2008, and these were sent because telephone calls from as early as the 17th and 18th November, 2008 to the Ministry of Works were not responded to. Those instructions were only given on the 8th December, 2008: “After several telephone calls and reminders”.⁴⁷

⁴⁶ Paragraph 9 (m), page 10, of the Judge’s Reasons.

⁴⁷ Paragraph 5, affidavit of the Appellant, filed 23rd March, 2009.

60. When it came to retaining outside counsel, it was explained that this decision could only be taken “after discussion with the Attorney General”.⁴⁸ Why was that decision only made three days before the 13th March, 2009? When did the Attorney General give an opinion or approval? When was the request made for the Attorney General’s opinion or approval? All of these questions remain unanswered. However, the fact remains that the Attorney General apparently had a significant role to play and presumably would have been informed and seized of the history of default in this matter and the urgency of meeting the 13th March, 2009 deadline to file a defence (especially in light of the default order of the 20th February, 2009).

61. What of the role of outside counsel in relation to the default? Presumably they were briefed, at a minimum, about the urgency with respect to the filing of a defence before the 13th March, 2009. It is only reasonable to assume that their advice must have been sought before instructing attorney wrote to the judge’s J.S.O. on the 13th March, 2009. In this regard the observation of the judge in her Reasons⁴⁹ is apposite.

On March 17th 2009 a letter dated March 13th 2009 (that was the last day for the filing on (sic) the defence) reached my desk. I advised my JSO that the order that I had made on February 20th 2009 would have already taken effect and in the absence of a proper application or notice the matter was out of my hands.

62. That is to say, there was no point in writing to the Judge on the 13th March, 2009! Even if one could somehow accept that the State was actually or reasonably unaware of the default provision in the order of the 20th February, what was required was still not a letter, but an application seeking, at minimum, an extension of time for the filing of a defence. No explanation is given as to why this was not done or could not have been done by the 13th March, 2009.

63. For myself, I would say that in this case not only was there general non-compliance as contemplated by Part 26.7 (3) (c), but there was also a general mismanagement of this action by all concerned on behalf of the Appellant. Senior Counsel for the Appellant’s suggestion that in

⁴⁸ Paragraph 20, affidavit of the Appellant, filed 23rd March, 2009,

⁴⁹ At paragraph 5, page 3, of the Judge’s Reasons.

this case there was “one drop of the ball”, which he submitted “arose out of a management problem and a leadership problem”⁵⁰ – caused by the absence of a substantive Solicitor General, simply does not accord with the facts and history of this matter.

INTENTIONALITY

64. The judge found that the Appellant’s failure to comply with the order of the 20th February, 2009 was intentional. I disagree.

65. The judge came to this conclusion on two bases, which she stated as follows:

- (i) “Where the date fixed for compliance is looming large and a party chooses to move at a pace which makes it impossible to comply, then it seems to me that that party can only intend the consequences of its inaction or its laxity”.⁵¹
- (ii) “Since the absence of a substantive Solicitor General has been raised by the defendant, I believe I am entitled to comment on this attempt as an excuse. There is no explanation for the absence of a substantive Solicitor General, but if this impacts on the ability of the defendant (as it obviously does from the evidence here) then so long as this absence continues, it seems to me that the State must intend the consequences of all delays, failure to make administrative decisions, and all consequences that flow from this unsatisfactory state of affairs”.⁵²

66. In my opinion, both of these matters – the choice by the Appellant to move at a pace which made it impossible to comply with the court order and the absence of a substantive Solicitor General - if this impacted on the ability of the Appellant to file its defence on time, go to whether or not there is a good explanation for the breach in this case⁵³ and not to intentionality.

⁵⁰ Oral submissions made on the 15th June, 2009.

⁵¹ Paragraph 9(i), page 7, of the Judge’s Reasons.

⁵² Paragraph 9 (j), page 7, of the Judge’s Reasons. And see also paragraph 9 (j), page 8 of the judge’s Reasons: “The absence of a substantive Solicitor General ... so long as the State continues to operate without this functionary then it can only intend the consequences that flow from a void that is bound to affect the planning, organising and directing of the work of the department. Emphasis added

⁵³ Part 26.7 (3) (b).

67. In my opinion, it is fair to say that the Appellant may have intended to defend this action. However, it is one thing to say that the Appellant in pursuance of that intent delayed, defaulted and ultimately run fatally afoul of the CPR, 1998, but it is quite another to say that the Appellant intended the consequences of its inaction and laxity and that the State intended the consequences caused in this case by the non-appointment of a substantive Solicitor General.

68. Dealing with the second proposition first. In this case there is no evidence as to why a substantive Solicitor General has not been appointed. There may be a good reason or there may be no good reason for this non-appointment. For the purposes of Part 26.7 (3) (a) however, in the absence of any evidence as to why no substantive Solicitor General has been appointed it is plainly wrong and irrational to assume that the failure to appoint a substantive Solicitor General could deem any delays in the preparation or conduct of litigation caused by it to be intentional.

69. With respect to the first proposition, that a party is deemed to intend the consequences of its inaction or its laxity, this proposition is also inapt for the purposes of Part 26.7 (3) (a) of the CPR, 1998. Inaction or laxity in relation to compliance with a court order can be caused by many things, including carelessness, ignorance of the rules, bad legal advice, negligence or even poor judgment (choice). None of these necessarily means that a party intends not to comply with the order. All of these reasons may be assessed as not providing any good explanation for the breach of the order, but it is, in my opinion, inconsistent with Part 26.7 to ascribe such a meaning and intent to Part 26.7 (3) (a) in the context in which it appears, linked as it is to the two other criteria in Part 26.7 (3) and wedded to all of the requirements of Part 26.7.

70. 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, 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

necessarily exempt one from taking responsibility for them. In this case the Appellant must accept full responsibility for the consequences of its actions, omissions and choices.

71. In all of these circumstances I am therefore satisfied that the judge was right in her assessment with respect to Part 26.7 (1) and (3) (b) and (c), and that the Appellant has therefore not satisfied the threshold requirements of Part 26.7, CPR, 1998 to justify any exercise of a discretion to grant relief from the sanction imposed on the 20th February, 2009.⁵⁴

ABUSE AND INTEGRITY OF THE COURT'S PROCESS

72. In essence the Appellant's submissions on this issue are that (i) it is an abuse of process to permit the Respondent to take up judgment in an action that is misconceived and fundamentally flawed and therefore invalid, null and void, and (ii) in such circumstances the court has a duty and the power to protect the integrity of its own process to ensure that such an action does not succeed.

73. In his oral submissions Senior Counsel for the Appellant, in a discussion with Kangaloo, J.A., explained that the abuse of process was not just because the Respondent's claim is 'unsustainable' but that: "It is more fundamental than that ... this claim has no foundation, the cause of action was wrong and was mischaracterized (and) is capable of being struck out".

74. The evidential basis for this submission of the Appellant appeared formally for the first time in an affidavit of instructing attorney filed on the 7th May, 2009, after the appeal was filed. At paragraph 9 of that affidavit instructing attorney stated:

The Appellant/Defendant also contends that CPR Part 26.7 ought not to be applied in a manner which results in a claimant having judgment on a claim which is not maintainable and which ought to be struck out as opposed to a claim in response to which the Appellant/Defendant has a good arguable Defence. In this case the Appellant/Defendant contends that the Claimant's claim is not maintainable and ought to be struck out because the claim is based on a clause in

⁵⁴ It should be noted that even though a default judgment had been entered in this case, and ordinarily an application under Part 13.3, CPR, 1998 would have to be made to set it aside, because the sanction imposed was for permission to take up a default judgment, relief from this sanction was the first hurdle that had to be crossed.

a contract that is not applicable at all, the contract having, as admitted by the Respondent/Claimant, been terminated. The Appellant/Defendant also says that the critical and admitted fact of the termination of the contract was not disclosed to the Court until after Judgment was obtained. In those circumstances the Appellant/Defendant respectfully submits that the State ought not to be saddled with a judgment for the sum of \$32, 811,582.31 or any sum at all on the basis of a claim that has absolutely no foundation.

75. It is in this context that the Appellant contends, that even if the strict requirements of Part 26.7 are not satisfied “the court must intervene for the benefit of protecting the Court’s process”. What the Appellant is appealing to here is the inherent jurisdiction of the court to prevent an abuse of its process, which the Appellant contends has occurred in this case.

76. To appreciate this submission it is helpful to distinguish between what may be described as ‘substantive’ and ‘pure procedural’ abuse of process. The Appellant contends, that even if the Respondent has properly done everything that is required of it procedurally, ‘substantively’ the Respondent’s claim is an abuse of process because it is without any foundation, hopeless and bound to fail, and should be struck out.

77. It is clear that a court has, as part of its inherent jurisdiction, the power by summary process to strike out an action that is an abuse of process.⁵⁵ This power to protect the court’s process from abuse was recognised by Baron Alderson as long ago as 1840 in Cocker v Tempest⁵⁶ where he stated as follows:

The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion.

⁵⁵ See for a general review of this power (i) ‘The Inherent Jurisdiction of the Court’ by Master I. H. Jacob, in Current Legal Problems, Vol. 23, 1970, pages 23 et seq; and (ii) the more recent judgment of Lord Justice Brooke, M.R., in Bhamjee v Forsdick (No. 2) [2003] EWCA Civ. 1113.

⁵⁶ [1840 – 41] 7 M&W 501.

78. One well accepted circumstance which is considered an abuse of process is when proceedings that are frivolous and vexatious are filed. Vexatious proceedings have from the earliest times included those that are without any foundation or that cannot possibly succeed; so called ‘hopeless actions’.

79. In **Bhamjee v Forsdick (No. 2)**⁵⁷ Lord Justice Brooke, M.R. explained what is considered hopeless litigation and why such litigation is an abuse of process, as follows:

7. The courts have traditionally described the bringing of hopeless actions and applications as “vexatious”, although this adjective no longer appears in the Civil Procedure Rules (compare RSC O 18 R 19 (1) (b) with CPR 3.4 (2)). In **Attorney General v Barker** [2000] 1 FLR 759 Lord Bingham CJ, with whom Klevan J agreed, said (at paragraph 19) that “vexatious” was a familiar term in legal parlance. He added:

“The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.”

8. In recent years the courts have become more conscious of the extent to which vexatious litigation represents a drain on the resources of the court itself, which of necessity are not infinite. There is a trace of this in the judgment of Staughton LJ in **Attorney General v Jones** [1990] 1 WLR 859, 865C, when he explained why there must come a time when it is right for a court to exercise its power to make a civil proceedings order against a vexatious litigant. He said that there were at least two reasons:

⁵⁷ [2003] EWCA Civ. 1113, paragraphs 7, 8 and 9.

“First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances and should not be squandered on those who do not.”

9. In **Attorney General v Ebert** [2000] EWHC Admin 286 at [50] Laws LJ articulated this anxiety in the following terms:

“Mr. Ebert’s vexatious proceedings have ... been very damaging to the public interest; quite aside from the oppression they have inflicted on his adversaries. ... the real vice here, apart from the vexing of Mr. Ebert’s opponents, is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try.”

Silber J, concurring, referred (at para 61) to “a totally unjustified use of judicial time”.

80. What is important to note is that the test in England, for this category of vexatious litigation, is that the action must “have no merit at all”⁵⁸ and must be “totally devoid of merit”⁵⁹ and so deemed hopeless.

81. Master Jacob, in his article on the inherent jurisdiction⁶⁰ states that: “the very nature of the inherent jurisdiction of the court enables it to go behind the pleadings and to inquire summarily what are the true facts and circumstances of the case”. He cites the case of **Remington v Scoles**⁶¹ in which affidavit evidence was received by the court of appeal to show that a defence filed was vexatious (though unobjectionable on the face of it) and an abuse of the process of the court and it was accordingly struck out. I agree that the court has this jurisdiction.

⁵⁸ See **Bhamjee v Forsdick (No. 2)** [2003] EWCA Civ. 1113, paragraph 3.

⁵⁹ See **Bhamjee v Forsdick (No. 2)** [2003] EWCA Civ. 1113, paragraphs 38, 39 and 53.

⁶⁰ The inherent jurisdiction of the Court by I.H. Jacob, Current Legal Problems, Vol. 23, 1970, page 42

⁶¹ [1897] 2 Ch. 1.

It is open to a court and within its inherent power to inform itself to the appropriate degree, by the reception of evidence, in order to determine summarily whether or not an action is an abuse of process.

82. Thus, if it is alleged that proceedings are manifestly groundless or without any foundation a court can summarily inquire whether this is so, and if it is a court can determine that the proceedings are vexatious, an abuse of process and strike them out.⁶² This is what the Appellant is asking this court to do.

83. Can it be said at this stage of the proceedings, before a case management conference has been held and where no defence or witness statements have been filed and disclosure is not yet completed, that the Respondent's case is hopeless or bound to fail? In **Chatterton v Secretary of State for India In Council**⁶³ Lord Esher M.R. accepted that where "the action is one which cannot by any possibility be maintained" the court was entitled to strike out the proceedings. Lord Justice Smith explained the court's position in this way:

The Divisional Court affirmed the order dismissing this action on the ground that they saw clearly that the action could not by any possibility be maintained, and therefore, in the exercise of the inherent jurisdiction of the Court to prevent abuse of its process, they dismissed it as vexatious. It seems to me that their decision was quite right.

84. In **The Grand Hotel (SA) PTY Ltd v DAC & Others**,⁶⁴ a decision of the Supreme Court of South Australia, Bleby J. explained the approach of the Australian courts to this aspect of abuse of process. Having stated that "the Court has an inherent jurisdiction ... to dismiss proceedings which disclose no cause of action or which are frivolous, vexatious or an abuse of the process of the Court",⁶⁵ Bleby J. went on to state:

26. I respectfully agree with Olsson J in the **State Bank Case Ruling** (Unreported, 27 March 1997), Judgment No S6111, that without intending to be

⁶² The inherent jurisdiction of the Court by I.H. Jacob, Current Legal Problems 1970, Vol. 23, page 43.

⁶³ [1895] 2 Q.B. 189; and see also **Salaman v Secretary of State In Council of India** [1906] 1 K.B. 613.

⁶⁴ [2000] SASC 272 (14 August 2000).

⁶⁵ **The Grand Hotel (SA) PTY Ltd v DAC & Others**, [2000] SASC 272 (14 August 2000) paragraph 25.

exhaustive, the categories of proceedings which may be described as an abuse of process include any one or more of the following:

- (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
- (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
- (c) **proceedings which are manifestly groundless or without foundation or which serve no useful purpose;**
- (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

As Olsson J did in that case, I respectfully adopt what Cross J said of a similar power in New South Wales in **Brimson v Rocla Concrete Pipes Ltd** (1982) 2 NSWLR 937 at 944:

Where the court is asked to reject a plaintiff's case, either under its statutory rules or its inherent jurisdiction, the fundamental principle is that prima facie a plaintiff is entitled to have his case come to trial; and applications to deprive him of that right will succeed only in the clearest of cases. True, the court will not look merely at the suggested weakness of the plaintiff's case but – though to a less extent - at the suggested strength of the defendant's case; and, true, forensic argument and subsequent judicial reflection are not necessarily inconsistent with a firm conclusion that the cause of action should not be allowed to proceed. But fatal defects in the plaintiff's case must be very clear before the court will intervene in this fashion.

27. I refer also to what Dixon J said in **Dey v Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91:

The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims.

The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

85. In my opinion the above comments properly summarize the general task that the court is called upon to undertake and the factors to be balanced if it is going to consider striking out an action as an abuse of the court's process because it is groundless or without any foundation.

86. In Trinidad and Tobago a litigant is entitled to file any action that he considers appropriate. The rules of court provide an adequate process for an action to proceed to final determination, including opportunities to have it disposed of prior to trial. For example, if there is no jurisdiction to file an action, steps can be taken to have it stayed or dismissed;⁶⁶ and if there is jurisdiction to file an action but it discloses no reasonable cause of action or there is a good defence to the action, steps can also be taken to strike it out or defend it.⁶⁷ Under Part 26.2, CPR, 1998, a court may strike out a statement of case if it is an abuse of process or if it discloses no grounds for bringing a claim.⁶⁸

87. The rules of court provide a comprehensive and fair process for the conduct of civil litigation. By way of further example and as is relevant in this case, there are provisions in the CPR, 1998 for entering default judgments and for setting them aside or varying them.⁶⁹ And,

⁶⁶ See Parts 9.2 (b); 9.6 and 9.7, CPR, 1998.

⁶⁷ See generally Parts 9 and 10, and see also Parts 26.1, 26.2 and 26.3, CPR, 1998.

⁶⁸ Part 26.2 (b) and (c).

⁶⁹ Parts 12 and 13, CPR, 1998.

there are rules that deal with the court's power to make orders. When a court makes orders, the rules provide specifically that "the court must whenever practicable also specify the consequences of failure to comply".⁷⁰ Where sanctions are imposed the rules also provide specifically how relief from sanctions can be obtained.⁷¹

88. In this case the Respondent has done everything that was required of it procedurally and there is no assertion that it has abused the procedural law that governs the conduct of civil litigation. What is contended is rather a matter of merits which, however framed, amounts to claims that (i) the statement of case should be struck out because it is misconceived and/or fundamentally flawed,⁷² and (ii) the Appellant has a defence that has a realistic prospect of success.⁷³

89. In this context, where the Appellant has not availed itself of the provisions and procedures in the CPR, 1998, but is relying rather on the inherent jurisdiction of the court to have an action struck out as an abuse of process because it is hopeless, then in my opinion, it is only where the 'fatal defects' in the case are very clear and it cannot be said that there is a real issue to be determined, whether of fact or of law, that an action will be held to be groundless and an abuse of the court's process.

90. It is noteworthy that under the English Civil Proceedings Rules, Order 3.4 (2) (a), which is similar to the Trinidad and Tobago CPR, 1998, Part 26.2 (1) (c)⁷⁴, an action may be struck out if the statement of case raises "an unwinnable case on the merits" or a claim "which is misconceived or ... is bound to fail as a matter of law".⁷⁵

91. These rules and analogous provisions are in reality a 'codification' of the court's powers under its inherent jurisdiction to stay or dismiss actions that are an abuse of its process because they disclose no or no reasonable grounds or basis for bringing an action. The underlying policy

⁷⁰ Part 26.6 (1), CPR, 1998.

⁷¹ Part 26.7, CPR, 1998.

⁷² See Part 26.2, CPR, 1998.

⁷³ See Part 13.3, CPR, 1998.

⁷⁴ A court may strike out a statement of case if it appears that it "discloses no grounds" for bringing a claim.

⁷⁵ **Wragg & Anor v Partco Group Ltd. UGC Ltd.** [2002] EWCA Civ 594, at paragraphs 45, 46 and 47.

of courts has always been to protect the integrity of its processes in appropriate cases by summarily disposing of actions that were obviously without any merit.

92 What seems clear is that whether this application was made pursuant to Part 26.2 (1) (c), CPR, 1998, or under the inherent jurisdiction of the court, the test to be applied is essentially the same. It is also noteworthy therefore, that in Trinidad and Tobago under the CPR, 1998 the basis for striking out an action is that the statement of case discloses ‘no grounds for bringing ... a claim’.⁷⁶ In my opinion, at the very least, for the Appellant to succeed on this submission in the circumstances of this case, it must be very clearly and unquestionably obvious that the Respondent’s action is utterly devoid of any merit and completely and manifestly hopeless. It must be plain and obvious that the Respondent’s action is certain to fail. If there is a chance that the Respondent’s action might succeed, then it is not an abuse of process in this sense.⁷⁷

93. However, in addition to having to satisfy this ‘merits test’, there is another hurdle that the Appellant must cross to succeed on this submission in this case.

94. In order to establish an abuse of process, I am of the view that the Appellant must also show that it has not itself been guilty of an abuse of the court’s process that would disentitle it from invoking the inherent jurisdiction of the court. In this regard the court is entitled to look at the conduct of the Appellant in relation to this claim, including relevant pre-action conduct. The new CPR, 1998 anticipates a consideration of pre-action conduct in relation to litigation, and doing so in this case is therefore not inconsistent with the current judicial approach to assessing the legitimacy of an application before the courts.

95. The unchallenged evidence of the managing director of the Respondent is as follows:⁷⁸

- (i) That “other than by the challenge raised in these proceedings the Defendant (Appellant) has not challenged the determination made by the Engineer or the

⁷⁶ In England the basis is: ‘no reasonable grounds for bringing ... the claim’.

⁷⁷ For a most helpful summary of the ‘codification’ of this principle in the rules of court in England and Canada, see **Hunt v Carey Canada Inc.** [1990] 2 S.C.R. 959.

⁷⁸ See affidavit of Louis John Williams, filed on the 16th April, 2009.

Payment Certificate issued by the Engineer ... or in any way initiated the Contract dispute resolution”.⁷⁹

- (ii) The Respondent’s claim under the contract for an extension of time and additional payment was first submitted on the 3rd April, 2007.⁸⁰
- (iii) On the 4th October, 2007 the Appellant issued a Notice of Termination of the Contract which the Respondent challenged. At that time the Engineer did not assess the value of the works and/or any other sums due to the Respondent for works done under the Contract.⁸¹
- (iv) In June 2008 the Engineer invited both the Appellant and Respondent to attend before him to consider the Respondent’s claims. The Respondent attended but the Appellant did not.⁸²
- (v) On the 15th August, 2008 the Respondent submitted to the Engineer particulars of his claim, “specifically including a claim for loss, expense and damages”.⁸³
- (vi) By letter of the 22nd September, 2008, in the absence of an agreement and after attempts at consultation with the parties, the Engineer submitted to both parties his determination. By Payment Certificate dated 6th October, 2008 the Engineer indicated the Appellant’s liability as stated.⁸⁴
- (vii) The Respondent then made several requests for payment to the Appellant including two written requests of the 10th and 30th October, 2009 and through its attorneys at law, by pre-action protocol demand of the 12th November, 2008. None of these was acknowledged or responded to.
- (viii) That by a specifically agreed term of the Conditions of Contract,⁸⁵ it was agreed that any dispute between the parties, whether before or after termination of the Contract, would first be referred to the Engineer. That upon such referral the Engineer would promptly give a decision in writing. That such a decision would

⁷⁹ See paragraph 6, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸⁰ See paragraph 8, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸¹ See paragraph 9, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸² See paragraph 10, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸³ See paragraph 11, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸⁴ See paragraph 11, affidavit of Louis John Williams, filed on the 16th April, 2009.

⁸⁵ An agreed amendment to clause 20.6 of the FIDIC General Conditions of Contract. See affidavit of Deborah Jean-Baptiste-Samuel, filed on the 23rd March, 2009 paragraph 24 and exhibit DJBS – 7, section 3B – Conditions of Particular Application, and paragraph 17, affidavit of Louis John Williams, filed on the 16th April, 2009.

be final and binding, save and except for a right to challenge the decision, which in the case of the Appellant (Employer) entitled it, within 28 days of receiving notice of the decision to take prescribed steps to have the matter referred for arbitration.

96. In relation to the Respondent's claims under the Contract, both before the Engineer and before the Court, it was only on the 23rd March, 2009 in the Appellant's application of that date that the Appellant indicated its intention to go to arbitration in order to challenge the validity of the Engineer's Certificate.⁸⁶

97. In my opinion, this conduct of the Appellant in relation to the Contract and the Respondent's claim is such that it is now disentitled from invoking the inherent jurisdiction of the court to allege that the Respondent has abused the court's process and made a flawed claim.

98. The Appellant had several opportunities to question or challenge the Engineer's Certificate but chose not to do so: before the Engineer himself, after the Payment Certificate was issued, and upon the demands made by the Respondent (written demands for payment were made on the 10th and 30th October, 2008). In this action the Appellant could also have raised the issue of an abuse of process directly and unequivocally at several stages: in answer to the pre-action protocol letter (written on the 12th November, 2008), on the 20th February, 2009 before Gobin J., in the letter written on the 13th March, 2009 to the JSO assigned to Gobin J., in the application filed on the 23rd March, 2009, on the 1st April, 2009 in the application to amend the application of the 23rd March, 2009, and before Gobin J. on that date. Yet this was not done on any of these occasions. It is noteworthy that the judgment of Gobin J. gives absolutely no indication that this argument was advanced before the court on the 1st April, 2009.

99. In my opinion, and in the context of the new CPR, 1998 regime, a contention that a 'substantive' abuse of the court's process has occurred because of the hopelessness of a claim

⁸⁶ See relief (a) sought in the Appellant's application of the 23rd March, 2009: for "a stay ... pending arbitration". And see, paragraph 34 of the affidavit of Deborah Jean-Baptiste-Samuel, filed on the 23rd March, 2009: "The Defendant wishes to follow the dispute resolution procedure (in the Contract) ... in order to challenge the validity of the Engineer's Certificate ...".

must be clearly raised at the earliest opportunity. The failure to do so can result in one of the very consequences that makes a hopeless case an abuse of process – the waste of scarce and valuable judicial resources. In my opinion, the delay by the Appellant in raising this alleged abuse clearly and unequivocally, coupled with the conduct of the Appellant in relation to this claim by the Respondent, is such as to disentitle the Appellant from being able to benefit from raising it in this way at this stage of the proceedings.

100. In any event, on the merits of the claim, that is, on the question whether or not the claim can be held to be certain to fail, I am of the opinion that this is a conclusion that the court cannot arrive at at this stage in these proceedings.

101. Under the new regime of the CPR, 1998 the concept of pleadings that existed under the old RSC, 1975 is no longer apt. A claimant is generally required to simply and clearly set out in a claim form and/or statement of case “a short statement of all the facts on which he relies”.⁸⁷ All documents considered necessary to his case must be either identified or annexed.⁸⁸ On the claim form a claimant must generally set out “a short description of the claim” and “specify any remedy” that he seeks.⁸⁹ As already stated, a court may strike out a claim if the statement of case “discloses no ground” for bringing it.⁹⁰ Noteworthy, is that this provision to strike out is found within the Case Management Powers of the Court – Part 26, CPR, 1998. It is in this general context that a claim usually comes before a court at a case management conference. At such a conference Part 25, CPR, 1998 sets out the court’s duties. It’s first duty is to promptly identify the issues,⁹¹ and then, having done so to decide “promptly which issues need full investigation and trial and accordingly disposing summarily of the others”.⁹²

⁸⁷ See Part 8.6 (1), CPR, 1998.

⁸⁸ See Part 8.6 (2), CPR, 1998.

⁸⁹ See Part 8.5 (1), CPR, 1998.

⁹⁰ See Part 26.2 (1) (c), CPR, 1998.

⁹¹ See Part 25.1 (a), CPR, 1998.

⁹² See Part 25.1 (b), CPR, 1998.

102. At a case management conference a court may also give permission to change a statement of case.⁹³

103. The overriding objective of the CPR, 1998 is to deal with cases justly, and any discretion to be exercised is to be done so as to further this objective.⁹⁴

104. Thus, the CPR, 1998 envisages that at the first case management conference a court will consider the short statement of facts and documents relied upon by the claimant (together with the facts relied on by the defendant⁹⁵) and determine what are the issues and how these are to be disposed of (whether by trial or summarily). Included in these powers of case management is the power and discretion to consider and grant amendments so as to ensure that all cases are dealt with justly.

105. In this case the Respondent in its short description of its claim on the claim form stated that it was claiming a liquidated sum of money which it said was due on the Engineer's Certificate. In the statement of case the statement of facts and documents relied on included the fact that the claim for money due on the Engineer's Certificate was pursuant to a contract in writing made between the parties with respect to improvement works on the Churchill Roosevelt Highway, whereby the Appellant agreed to pay to the Respondent "the amount certified as due" on the Engineer's Certificate.

106. On these facts it is possible to conclude that what the Respondent is really claiming is compensation due to it under the Contract, which it contends was assessed and certified by the Engineer's Certificate. However, because the Appellant never questioned or challenged the Engineer's Certificate at any stage before action, neither in response to the formal written demands by the Respondent (which both specifically referred to the Engineer's Certificate and demanded payment based on it), nor on the pre-action protocol

⁹³ See Part 20.1, CPR, 1998.

⁹⁴ See Parts 1.1 and 1.2, CPR, 1998

⁹⁵ See Part 10.5, CPR, 1998.

letter (which did the same), it is reasonable to assume that the Respondent only thought it necessary to state the facts and identify the documents on which it relied as it did.

107. In these circumstances, if the Respondent at the first case management conference, was confronted for the first time with a statement of facts in the defence that alleged that the Engineer's Certificate was null and void, and sought amendments to clarify its claim for damages arising out of the Contract and to explain its reliance on the Engineer's Certificate, it is possible that such amendments may have been considered and allowed in order to deal with this case justly. It is also possible that other directions may have been given to identify issues and determine how best to deal with them.

108. However, the Appellant has been content to sit quietly and to permit the Respondent to proceed on the assumption that the Engineer's Certificate was unchallenged. That it was an unchallenged assessment of what was due to the Respondent under the Contract. And to allow the Respondent to incur expense in pursuing its claim for this sum, only to be told after an action is filed and default judgment duly entered, that the Appellant is challenging the Engineer's Certificate. Such conduct by the Appellant flies in the face of the new regime of conducting civil litigation under the CPR, 1998. The CPR, 1998 specifically provides that where a specified sum of money is demanded, then on receipt of a pre-action protocol letter claiming that sum, a defendant **“should give detailed reasons why the claim is not admitted ...”**.⁹⁶ If not before, this was when the Appellant should have clearly and unequivocally stated that this claim was fundamentally flawed and why.

109. In light of the above, I am of the opinion that at this stage in these proceedings and in all of the circumstances, it is not possible to say that this action is hopeless or bound to fail. It is to be noted that this analysis does not attempt to specifically address the issue of whether or not the Engineer's Certificate is valid. The complexity of the arguments before this court, though not a bar to inquiring whether a case is hopeless, demonstrate the difficulties in resolving this issue at this stage. Chief among the difficulties, in my opinion, is whether the Appellant can at this late stage seek to challenge the Engineer's Certificate

⁹⁶ See Practice Direction on Pre-action Protocols, Appendix A, PAP 1.5.

at all, given the terms of the contract between the parties which indicate how such challenge is to be made. I say this particularly in light of all the opportunity previously afforded the Appellant to make such a challenge. A further difficulty is that there may be a need for further evidence as an aid to resolving the issues surrounding the Engineer's Certificate.

CONCLUSION

110. In fact, what has happened in this case has nothing to do with any abuse or misuse of the court's process by the Respondent. The State has found itself in this position because of a multitude of defaults, omissions and choices made on its behalf. In my opinion the inherent jurisdiction of the Court to protect its process from abuse and misuse simply does not arise in this case.⁹⁷

111. The Appellant must take full responsibility for the consequences of its actions, omissions and choices. Though I accept that the consequences were not intended, that does not absolve the State from full responsibility for what has happened. It never challenged or questioned the Engineer's Certificate before this action was commenced. It never raised clearly and unequivocally that the Respondent's case was an abuse of the court's process because it was utterly hopeless until the decision of Gobin J. went against it. It has done so clearly for the first time on appeal. In my opinion this is so because it recognised the difficulties it faced in satisfying the requirements of Part 26.7, CPR, 1998. This attempt by the State to invoke the court's inherent jurisdiction is therefore an attempt to get by collateral means what it could not achieve by direct means under the CPR, 1998. To permit such a circumvention of the requirements of Part 26.7 and of other provisions of the CPR, 1998 in a case such as this, would be to undermine a fundamental aspect of the underlying philosophy of the CPR, 1998 – responsibility.⁹⁸

⁹⁷ See the comprehensive discussion of the inherent jurisdiction of the court by Archie J. (as he was then) in **Chaitan and Peters v A.G.**, H.C.A. Nos. 3223 and 3224 of 2000

⁹⁸ In this regard it is noteworthy that a statement of case may be struck out if there is "a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings".⁹⁸ The CPR, 1998 is thus consistent when it deems general compliance a threshold requirement under Part 26.7 (3) (c).

112. What therefore appears from this analysis is that a fundamental principle underpinning the CPR, 1998 is that the rules of court are to be followed and court orders are to be complied with. When sanctions are imposed, that signals that non-compliance has serious consequences and there will be no relief unless the strictures of Part 26.7, CPR, 1998 are also complied with.⁹⁹ In Trinidad and Tobago, at this time, this approach to civil litigation is considered vital to the creation of an efficient and effective civil justice system. Until there is a real change in the culture in which civil litigation is conducted in Trinidad and Tobago it is unlikely that Part 26.7 will be applied differently. There will always be ‘hard cases’. Making exceptions in such cases often only creates ‘bad law’.

113. Knowing this, parties must act and make choices that are appropriate to securing relief from sanctions. Here the Appellant has failed dismally to do so. The consequence is that the State has deprived itself of the opportunity for setting aside the default judgment entered against it in this case. Though the sum payable in this case is a large one, that ought not to change the approach of the courts to matters such as this one, where consistently it has been held that the strict requirements of Part 26.7 must be satisfied if relief from sanctions imposed by any rule, court order or direction is to be granted.

114. Underlying Senior Counsel for the Appellant’s submission has been a subtle invitation to the court to treat with the State differently because of its ‘special circumstances’. In this regard it is worth noting that the CPR, 1998 does exactly that by providing, for example, (i) exclusive permission to the State to continue proceedings against it in Port of Spain even if commenced in San Fernando;¹⁰⁰ (ii) a more generous time within which the State must file a defence;¹⁰¹ (iii) that permission of the court is required before a default judgment can be entered against the State;¹⁰² and (iv) generally for proceedings against the State by a specific Part in the CPR, 1998 – Part 58.

115. Significantly, under Part 58.4, when the State is the defendant to a claim, the time for entering an appearance (and consequently the time for filing a defence) may be extended upon a

⁹⁹ See the Court of Appeal Judgment in **Trincan Oil Ltd. & Ors. v Chris Martin**, at paragraphs 11 – 20 for a detailed explanation of the rationale for and purpose of Part 26.7, CPR, 1998.

¹⁰⁰ See Part 9.2 (6).

¹⁰¹ See Part 10.3 (3).

¹⁰² See Part 12.2 (2) (c).

request for information by the State pursuant to Part 35.1, to four days after the defendant (State) gives notice in writing to the claimant that it is satisfied with the information supplied or four days after the court on the application of the claimant decides that no further information is reasonably required.¹⁰³ Thus, in this case for example, if the Appellant, upon being served with the claim form and statement of case, had simply requested information about the several bases upon which it is contending that the claim is fundamentally flawed, as it was entitled to do, it would have had more time to fully consider and prepare its defence.

116. It is therefore difficult to see any justification as to why the court should intervene and supplement the CPR, 1998 to accommodate the State because of its special circumstances in a case such as this. The CPR, 1998 has taken the special needs of the State into consideration and has provided for them. However, the State, like any other party to civil litigation, must face the rigours of Part 26.7, CPR, 1998 whenever sanctions have been imposed by a court order.

117. The circumstances of this case illustrate exactly the kind of *'laissez-faire'* approach to civil litigation that undermines the good administration of justice and that can no longer be accepted. The overriding objective of the CPR, 1998 to deal with cases justly, must also mean to deal with them justly in accordance with the rules of court. In this case there is no justification for invoking the inherent jurisdiction of the court in order to either protect the integrity of the court or to do justice between the parties.

118. In these circumstances this appeal is dismissed. The Appellant will pay the Respondent's costs of the appeal. These costs now have to be assessed and counsel will be heard on this matter.

Peter Jamadar
Justice of Appeal

¹⁰³ Part 58.4 (2) and (3).