

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 91 of 2009

IN THE MATTER OF TRINCAN OIL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CHAPTER 88:01

BETWEEN

TRINCAN OIL LIMITED

APPELLANT

AND

KEITH SCHNAKE

RESPONDENT

PANEL: W. KANGALOO, J. A.

P. JAMADAR, J.A.

N. BERAUX, J.A.

APPEARANCES:

Mr. A. Sinanan S.C. for the Appellant.

Mr. N. Bisnath for the Respondent.

DATE OF DELIVERY: 3rd 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 by this court.

W. N. Kangaloo
Justice of Appeal

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

N. Beraux
Justice of Appeal

JUDGMENT

Delivered by P. Jamadar, J. A.

INTRODUCTION

1. This is an application to the full court of Court of Appeal to vary or discharge an order of a single judge of the court¹ (Yorke-Soo Hon, J.A.) made on the 9th April, 2009.
2. On the 30th July, 2009 Gobin J. delivered a judgment in favour of the Respondent in an oppression action brought by him against the Appellant. In that judgment Gobin J. made several declarations confirming the oppressive conduct and action of the Appellant against the Respondent and his interests, including those as a director and shareholder in the Appellant. As a consequence of these declarations several orders were also made, including orders that the Appellant pay the Respondent compensation with interest. That compensation was ordered to be the value of the Respondent's shareholding, which compensation was to be paid within ninety days of a valuation which was also ordered to be done.

¹ See Part 64.18 (2), CPR, 1998.

3. The order for the valuation was as follows:

The value of the claimant's shareholding to be determined by an independent valuation to be conducted by a suitably qualified expert to be agreed by the parties on or before August 21st 2008 and in default of agreement between the parties by a valuer nominated within twenty-one (21) days thereafter solely by the claimant.

4. On the 21st August, 2008 the Appellant filed an appeal against the judgment of Gobin J. limited to only one aspect of it, being the order for the valuation stated above. The challenge to the order was specifically to the default power given to the Respondent, that is, in default of an agreement as to a suitably qualified expert the Respondent could unilaterally nominate a valuer to determine the value of the Respondent's shareholding. What was sought on appeal was a variation of this aspect of the order to provide for a court appointed valuer in the event that there was no agreement.

5. However, on the 3rd October, 2008 the Appellant filed an application seeking to substantially amend the Notice of Appeal filed on the 21st August, 2008, effectively seeking permission to challenge the entirety of the judgment of Gobin J.

6. Permission of the court was sought because pursuant to Part 64.5 (b), CPR, 1998 an appeal must be filed within 42 days of the date when the judgment was delivered or the orders made. That time expired on the 10th September, 2008. What was presented as an amendment to an existing appeal was in reality the introduction of completely new areas of appeal to previously unchallenged aspects of the judge's judgment and orders.²

7. The Appellant's application of the 3rd October, 2008 sought an extension of time for the amendment of the notice of appeal. On the question of delay, the application on its face stated four things: (i) any delay was not intentional, (ii) there was an explanation for any delay, (iii) any delay "**was not due to any failure on the part of the Appellant but rather was due to certain failures on the part of the Appellant's attorneys at**

² See Part 64.4 (7), which permits amendments to the grounds of appeal only.

law”, and (iv) any delay would not affect any date of hearing for the appeal.³ This application was filed 23 days outside of the time within which any appeal against the judgment and orders of Gobin J. was required to have been filed.

8. On the 28th January, 2009 the Appellant filed a further application, this time for relief from sanctions pursuant to Part 26.7, CPR, 1998, arising out of “the failure of the Defendant/Appellant to appeal the entire decision of Gobin J. delivered on the 31st July, 2008 within the time prescribed by CPR 64.5 (b).”⁴

9. The justification for this second application was explained (in relation to the first application) as follows: “The said (first) Notice of Application, although referring to the matters specified in CPR 26.7, **omitted to expressly seek relief from the sanctions which arose from its failure to file its Notice of Appeal within the prescribed time**”.⁵

10. This application of the 28th January, 2009 sought to specifically address the requirements of Part 26.7, CPR, 1998,⁶ by stating that the failure to comply with Part 64.5 (b), CPR, 1998: (i) was not intentional⁷ and (ii) was not due to any fault of the Appellant “but rather was due to certain failures on the part of its Attorneys-at-Law”⁸ and further (iii) there is an explanation for the failure⁹, and that (iv) the Appellant “has generally complied with all other relevant rules, practice directions, orders and directions”¹⁰, (v) the interests of justice will not be adversely affected if relief is granted¹¹, (vi) the failure can be remedied within a reasonable time¹², (vii) the hearing of the appeal will not be affected.¹³

³ Notice of Application filed on the 3rd October, 2008, at page 3.

⁴ Notice of Application filed on the 28th January, 2009, at page 2.

⁵ Notice of Application filed on the 28th January, 2009, at page 2.

⁶ Notice of Application filed on the 28th January, 2009, at page 3.

⁷ See Part 26.7 (3) (a).

⁸ See Part 26.7 (4) (b).

⁹ See Part 26.7 (3) (b),

¹⁰ See Part 26.7 (3) (c).

¹¹ See Part 26.7 (4) (a).

¹² See Part 26.7 (4) (c).

¹³ See Part 26.7 (4) (d).

ANALYSIS

11. Justice of Appeal Yorke-Soo Hon dismissed both of these applications in a 29 page judgment in which she identified three issues, as follows:

1. Whether the Court of Appeal has jurisdiction to amend a notice of appeal.
2. Whether the two applications filed by the appellant, namely the application to amend the notice of appeal and the application for relief from sanctions, should be heard together.
3. If the Court of Appeal has jurisdiction and the applications may be heard together what must the Court take into account?

12. There is no challenge to the judge's opinion on the first and second issues, that the court had jurisdiction to amend a notice of appeal and that both applications should be heard together (as they were). On the second issue the judge concluded that: "both applications ought to be heard together and **the Court treats them as one application though filed at different times**".¹⁴

Extension Of Time/Relief From Sanctions

13. Having identified the issues, Justice of Appeal Yorke – Soo Hon then went on to pose and answer the following questions: (i) Should the Court extend time and grant relief from sanctions? and (ii) What are the considerations?¹⁵ The judge then proceeded first to accept the approach of the English Court of Appeal in **Sayers v Clark Walker**,¹⁶ that the same "check list" prescribed for a relief from sanctions application should also be used for an extension of time application, and concluded that the same approach should be applied here in Trinidad and Tobago. The consequence was that the requirements of Part 26.7, CPR, 1998 would have to be satisfied on an application for an extension of time.¹⁷

¹⁴ At page 11 of the judgment, emphasis added.

¹⁵ At page 11 of the judgment.

¹⁶ [2002] 3 All E.R. 490, per Brooke L.J.

¹⁷ See pages 11 to 15 of the judgment.

14. This review has proceeded and been argued on the correctness of this approach by the judge. In my opinion the judge was right in applying the provisions of Part 26.7, CPR, 1998 in this case, but only because the time had already passed for the filing of an appeal against the judgment and orders of Gobin J. that had not been challenged in the original appeal.

15. In this case, because the time had already passed for appealing the unchallenged aspects of the judgment of Gobin J. and because this was due to the failure of the Appellant to comply with the provisions of the CPR, 1998 with respect to the time for appealing,¹⁸ the consequence of that failure and non-compliance was the imposition of an **implied sanction** – that no appeal on these unchallenged aspects of the judgment of Gobin, J. could be pursued. This in turn resulted in the situation that unless the Appellant applied for and obtained relief from this implied sanction these new challenges could not be pursued.¹⁹ The crucial factor in this case is that even though the sanction that triggered the operation of Parts 26.6 and 26.7, CPR, 1998 is not explicitly “imposed by the rules”,²⁰ it is necessarily implied because the consequence is the same as if it had been expressly ‘imposed’. That is to say, the same sanction is impliedly ‘imposed’.

16. It is in this context, of implied and expressed ‘imposed’ sanctions having the same consequence, that the requirements of certainty and consistency in the application of the rules of court and the overriding objective of the CPR, 1998 “to deal with cases justly”²¹ demand that the requirements of Part 26.7, CPR, 1998 are to be applied in a case such as this.

17. However, because of the significant differences in the relief from sanctions provisions in Trinidad and Tobago when compared to England and particularly the threshold requirements provided for at Part 26.7 (1) and (3),²² in my opinion it would not be appropriate to apply strictly the Part 26.7 requirements and approach to applications

¹⁸ See Part 64.5 (b) and Part 26.6 (2), CPR, 1998.

¹⁹ See Parts 26.6 (2) and 26.7, CPR, 1998.

²⁰ See Part 26.6 (2), CPR, 1998.

²¹ See Part 1.1 (1), CPR, 1998.

²² See **Trincan Oil Ltd. v Chris Martin**, Civ. App. No. 65 of 2009, paragraphs 13 – 18.

for an extension of time that are made **before** any sanctions are imposed – whether implied or expressed.

18. Thus, to the extent that the judge meant or could be interpreted as saying that in any application for an extension of time after an appeal has been filed, the requirements of Part 26.7 must be satisfied,²³ I am of the opinion that such an approach is too restrictive. In my opinion, in applications for an extension of time made before a sanction is imposed the strict requirements of Part 26.7 do not apply. In such a situation the court has to exercise its general discretion in determining whether or not to grant an extension of time. In such a case it may very well be that all of the factors stated in Part 26.7, CPR, 1998 will need to be considered and weighted (without any thresholds), including the merits of the appeal and questions of prejudice.²⁴ However, this question does not arise for determination in this case and I make no definitive suggestions as to what the proper approach should be.

Relief From Sanctions: Part 26.7, CPR, 1998

19. The judge in her analysis and application of Part 26.7 to the circumstances before her correctly identified the preliminary requirements of the rule as being those stated in Part 26.7 (1), (2) and (3).²⁵ The judge also correctly identified that these preliminary requirements²⁶ are ‘mandatory conditions imposed by the rule’,²⁷ and that “the appellant must satisfy (these) criteria”.²⁸ This approach accords with the opinion of the Full Court in **Trincan Oil Ltd v Martin**.²⁹

²³ At pages 14 and 15 of her judgment the judge states: “The Court is no longer empowered to use only its discretion to determine whether an application for extension of time should be granted. The considerations set out in the rules must be strictly followed The Rules therefore restrict the Court’s exercise of its discretion, the appellant must satisfy the criteria (referring to the Part 26.7, CPR, 1998 criteria)”.

²⁴ See for example the approach under the Rules of the Supreme Court, 1975, in **NLCB v Deosaran**, Civ. App. No. 182 of 2007 at para. 53.

²⁵ See pages 12 and 13 of the judgment.

²⁶ See Parts 26.7 (1), (2) and (3), CPR, 1998.

²⁷ At page 14 of the judgment, quoting with approval Barrow, J.A. in **Frampton v Pinnard**, Court of Appeal Dominica.

²⁸ At page 15 of the judgment.

²⁹ Civ. App. No. 65 of 2009, at paragraph 13.

20. Having done this the judge then proceeded to dispose of the applications on the bases that they were not made promptly³⁰ and that the failure to comply was intentional.³¹ In deciding that the failure to comply was intentional it would appear that the judge also concluded that there was no good explanation for the breach³² though there is no separate or independent analysis of whether or not there was any ‘good explanation’ as required by Part 26.7 (3) (b). I think it is fair to say, that the judge decided there was no good explanation because of her findings and conclusions on intentionality.

“One” Application/Promptitude

21. In my opinion the judge was right in concluding that the applications for relief from sanctions were not made promptly. I say applications, because the judge herself decided that “both applications ought to be heard together ... **as one application** though filed at different times”.³³ This approach was, in my opinion, the correct approach because in the Appellant’s first application the requirements of Part 26.7 were touched upon and in the second application this was acknowledged and it was made explicit that this was a formalization of an application for relief from sanctions.³⁴ In any event, Part 26.8, CPR, 1998 confers on the court a general power to rectify matters where there has been an error in procedure.³⁵

22. Part 26.7 (1) is mandatory. It requires that an application for relief from any sanction imposed must be made promptly. Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact. ‘Prompt’ must be considered in relation to the date when the sanction was imposed. In this case the sanction was imposed on the 10th September, 2008, 42 days after the judgment was delivered.

³⁰ See pages 15 to 19 of the judgment.

³¹ See pages 19 to 29 of the judgment.

³² See page 29 of the judgment: “It is my judgment that the non-compliance by attorneys for the appellant was clearly intentional, without good explanation and therefore fatal”.

³³ Emphasis added.

³⁴ See Ground (a), page 2, of the Notice of Application filed on the 28th January, 2009.

³⁵ In this regard the distinction between making an application which contains an error and erroneously not making an application at all must be borne in mind – see UK Civil Procedure, 2007, Vol. 1, para. 3.10.3 (page 119).

23. The first application to extend time, which is being treated as an application for relief from sanctions, was filed a little over 3 weeks outside of the time limited for filing an appeal – the time when the sanction took effect. The second application, which was the ‘formal’ application for relief from sanctions, was filed over 4½ months outside of the time limited for filing an appeal.

24. The context of these applications is that an appeal was filed in this matter well within the 42 day period limited for so doing³⁶ - some 20 days before the 10th September, 2008, and after 21 days had elapsed since the judgment. At that time the Appellant’s legal advisors were the same instructing attorneys and junior and senior counsel who led its defence at the trial. No doubt, and it must be presumed to be so, the Appellant and his legal advisors conferred, and agreed and decided (within the 21 day period) to only challenge a very limited aspect of Gobin J’s decision, which went only to the default aspect of the order for valuation.

25. The evidence shows that the Appellant had decided and instructed its attorneys “upon judgment being delivered on the 30th July, 2008”³⁷ to determine whether there were good grounds for an appeal and if so to prosecute it. Thus, from the 30th July, 2008 both the Appellant and its attorneys would have calculated and identified the deadline for filing an appeal – the 10th September, 2008.

26. Clearly, by the 21st August, 2008 an appeal was advised, agreed to and filed. This date of the 21st August, 2008 is significant, because it was the date on which the default provision in the order for valuation became operative. The evidence demonstrates that the Appellant and its attorneys were well aware of this and set themselves that date as the deadline for the filing of any appeal – and did so on the express advice of senior counsel.³⁸

³⁶ It was filed on the 21st August, 2008.

³⁷ See paragraph 4, affidavit of J. Harragin, filed on the 6th October, 2008.

³⁸ See paragraph 5, affidavit of J. Harragin, filed on the 6th October, 2008.

27. It would appear, as is normal and to be expected, that senior counsel requested that instructing attorneys do a ‘note’ on the law and a draft notice of appeal for his consideration. It would also appear that the instructing attorneys were unable to prepare a complete ‘note’ on the law before the 19th August, 2008, but did send to senior counsel a draft notice of appeal on that date. That notice of appeal was settled by senior counsel on the 21st August, 2008 and returned to instructing attorneys for filing, which was done that day.

28. However, on the 21st August, 2008 senior counsel also advised that he, having received no ‘note’ on the law, still required one to be completed as it may lead to the need to amend the notice of appeal to include further challenges to the judgment and orders of Gobin J.³⁹ Once again it is to be presumed that the deadline of the 10th September, 2008 must have been uppermost in everyone’s mind on the 21st August, 2008.

29. Unfortunately, as the 10th September, 2008 approached and despite senior counsel’s advice, neither instructing attorneys nor the two junior counsel were able to complete the ‘note’ on the law requested. Instead they focused their attention on preparing a draft amended notice of appeal based on the analysis of the law that they were able to carry out.⁴⁰ This draft amended notice of appeal was sent to senior counsel on the 9th September, 2008 who settled and returned it on the 10th September, 2008 with instructions to have it filed immediately (that is, on the 10th September, 2008).⁴¹

30. It is alleged “that due to a misunderstanding” between the two junior counsel representing the Appellant, and contrary to the specific instructions of senior counsel, it was thought that the instructions from senior counsel were “to defer filing of the amended Notice of Appeal to the following day”.⁴² As bizarre as this instruction must have seemed in the context of all that had transpired, there is no evidence that anyone sought to question or clarify a specific instruction to file an amended notice one day outside of the

³⁹ See paragraph 9, affidavit of J. Harragin, filed on the 6th October, 2008.

⁴⁰ See paragraph 12, affidavit of J. Harragin, filed on the 6th October, 2008.

⁴¹ See paragraph 13, affidavit of J. Harragin, filed on the 6th October, 2008.

⁴² See paragraph 17, affidavit of J. Harragin, filed on the 6th October, 2008.

time limited for so doing. Why if the settled amended notice of appeal was in hand on the 10th would senior counsel advise to file it on the 11th – after the time limited for so doing? Yet this is what is alleged was believed to have transpired. As a consequence of this the settled amended notice of appeal was not filed on the 10th September, 2008.

31. To complicate matters, one of the junior counsel allegedly involved in the ‘misunderstanding’, by letter dated 17th October, 2008, categorically denied that there was any ‘misunderstanding’, and suggested that any such suggestions were “materially untrue statements”. In fact this attorney filed an affidavit in these proceedings, pursuant to the order of Weekes J.A.,⁴³ and indicated his willingness to attend court ‘if required ... to answer each and every inaccurate allegation of fact that has been made’.⁴⁴

32. What allegedly transpired next is most astounding. Clearly there was leading up to the 10th September, 2008, the recognition by all concerned for the Appellant that the deadline for the filing of an appeal against the decision of Gobin J was the 10th September, 2008. Indeed, the necessity to meet that deadline was treated as critical and urgent by senior counsel, who though he only received the draft amended notice of appeal on the 9th September, 2008 settled and returned it on the 10th September, 2008 with instructions to have it filed forthwith.

33. However, having missed the deadline of the 10th September, 2008 the alleged approach taken was explained as follows:⁴⁵

On or around the 11th September, 2008 my firm informed senior counsel that the amended Notice of Appeal had not been filed on the 10th September, 2008. I am advised by Mr. Stephen Singh and verily believe that my firm accepted senior counsel’s advice to brief outside junior Counsel urgently, and that in view of the fact that the deadline for the filing of the amended Notice of Appeal had been missed, instructions on

⁴³ Order dated the 10th November, 2008.

⁴⁴ See paragraph 9, affidavit of Brandon Primus, filed on the 20th November, 2008. Justice of Appeal Yorke-Soo Hon never requested the attendance of this Junior Counsel.

⁴⁵ See paragraph 18, affidavit of J. Harrigin, filed on the 6th October, 2008.

the brief to junior counsel must include instructions to carry out an urgent analysis of the judgment, to research the relevant law, and to meet to confer with senior counsel on same. My firm recommended this advice to the Appellant who accepted same.

34. What is remarkable is that no consideration whatsoever is disclosed as having been given to the fact that the deadline for the filing of an appeal had passed and as to what should be done about it. Instead, a third ‘new’ junior counsel is recommended to be briefed to do exactly what was required since the 30th July, 2008, and this in the face of an already settled amended notice of appeal!

35. It would appear that as a consequence of this new advice from senior counsel given on the 11th September, 2008, a third junior counsel was retained and the fruit of his research and consultations with senior counsel was the filing of the first application on the 3rd October, 2008. Significantly, though that application purported to be one for an extension of time for the filing of an amended notice of appeal, there is no explanation in it as to why such an application was not made earlier.

36. In fact, after the filing of this first application on the 3rd October, 2008 “the relationship between the then Senior and Junior Counsel and the Defendant/Appellant deteriorated and ... in the beginning of January, 2009 ... both ... were asked to return their respective briefs”.⁴⁶ By the middle of January, 2009 new Senior Counsel was briefed, and it would appear that it was on his advise that the second ‘formal’ application for relief from sanctions was filed on the 28th January, 2009. The explanation given for this was simply that none of the Appellant’s prior legal advisors was aware that an application for relief from sanctions was required.⁴⁷

37. In my opinion, in the circumstances of this case as outlined above and in light of the clear and known deadline for the filing of a notice of appeal (10th September, 2008)

⁴⁶ See paragraph 5, affidavit of J. Harragin, filed on the 28th January, 2009.

⁴⁷ See paragraph 4, affidavit of J. Harragin, filed on the 28th January, 2009.

and in the absence of any explanation as to why an application could not have been filed before the 3rd October, 2008, it cannot be said that either the first or the second application was made promptly.

38. In the circumstances of this case, this application (whether framed as an application for an extension of time or for relief from sanctions) ought to have been filed within days of the 10th September, 2008 and this could easily have been done. The Appellant and its advisors had in hand on the 10th September, 2008 a settled amended notice of appeal. On the 11th September, 2008 senior counsel was briefed about the default in non-filing on the 10th September, 2008. Any ‘misunderstanding’ that may have occurred on the 10th September, 2008 was therefore irrelevant by the 11th September, 2008 when the default was known and apparent. Yet nothing was done immediately to seek either an extension of time or relief from sanctions. The timelines in the CPR, 1998 are fair and are to be strictly complied with. The failure to do so without good reason and/or to act promptly to remedy any default can have serious consequences, especially at this time in Trinidad and Tobago when the civil litigation system is suffering the consequences of a *laissez-faire* approach to the conduct of civil litigation which is undermining public trust and confidence in the administration of justice.⁴⁸

39. Furthermore, when it comes to applications to appeal out of time there are certain general and fundamental principles which must always be borne in mind: (i) the outcome of litigation should be final, (ii) parties are entitled to the fruits of their judgment, and (iii) therefore generally appeals out of time are to be treated as an exception and usually only permitted for good and compelling reasons. All of these considerations impact on an assessment of the criteria in Part 26.7 when what is ultimately being sought is an extension of time within which to file an appeal. In my opinion Yorke-Soo Hon J.A. was correct in holding that the requirements of Part 26.7 (1) had not been satisfied.

⁴⁸See **Trincan Oli Ltd. v Chris Martin**, Civ. App. No. 65 of 2009, paragraph 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”.

Intentionality

40. Justice of Appeal Yorke-Soo Hon also held that the failure of the Appellant to comply with the rule for the filing of an appeal⁴⁹ within 42 days of the date of judgment was intentional. I disagree. Part 26.7 (3) (a), CPR, 1998 states that a Court may only grant relief from sanctions if it is satisfied that the failure to comply with a rule “was not intentional”. If an intention not to comply with a rule is demonstrated then relief from sanctions will not be granted as this threshold requirement of Part 26.7 would not have been satisfied.

41. In my opinion, to establish intentionality for the purpose of Part 26.7 (3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the non-compliance. However, where as in this case there is an explanation given for the failure to comply with a rule which, though it may not be a ‘good explanation’, if it is nevertheless one that is consistent with an intention to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied.

42. In this case the circumstances outlined above demonstrate that at all times up to the 10th September, 2008 the Appellant and its attorneys intended to file an amended appeal. There is no dispute that there was an intention to appeal a part of the judgment. Further, an amended notice of appeal was settled by senior counsel on the 10th September, 2008 with instructions to have it filed forthwith. What had preceded this were several attempts in vain by senior counsel to get a proper note on the law. In my opinion, in these circumstances it cannot be said that the failure to file the amended notice of appeal on the 10th September, 2008 was a deliberate positive intention not to file the notice of appeal by that date.

43. In addition, the only possible evidence in this case that could have led to a reasonable conclusion that the non-compliance was intentional, would have had to come from a resolution of the ‘misunderstanding’ issue between the two junior counsel for the

⁴⁹See Part 64.5 (b), CPR, 1998.

Appellant that allegedly occurred on the 10th September, 2009. However, no request was made for Mr. Primus to attend and explain his contention that there was no misunderstanding, though he had offered to do so.⁵⁰ That issue not having been resolved, it is my opinion that the judge was wrong to conclude that the non-filing of the amended notice of appeal on the 10th September, 2008 was deliberate and intentional.

Good Explanation

44. In my opinion none of the explanations offered, whether taken singly or together, amount to a **good explanation** for the failure to file an amended notice of appeal (or an appeal against the entire judgment of Gobin J) on or before the 10th September, 2008. What is required by the rule is not simply an explanation, but a **good explanation**.

45. The Court of Appeal has been consistent in stating that, except in exceptional circumstances, default by attorneys will not constitute a good explanation for non-compliance with the rules of court.⁵¹

46. In this case senior counsel for the Appellant has himself described what happened in this matter as: “The colossal mess perpetrated by attorneys”.⁵² Such an occurrence does not amount to exceptional circumstances. The reasons given for this ‘colossal mess’ began on the 30th July, 2008. Despite the attendance of instructing attorney and two junior counsel (one being a senior partner in the firm representing the Appellant) and senior counsel – all of whom were present at the trial and despite the repeated requests of senior counsel, it is alleged that a proper note on the law was not prepared before the 10th September, 2008. The reasons for this failure included busyness of the attorneys, short staff at the firm of instructing attorneys for the Appellant, instructing attorney being out of the office for 7 days (4th – 10th August, 2008), the resignation of one of the two junior

⁵⁰ See page 25 of the judgment.

⁵¹ See **The National Lotteries Control Board v Michael Deosaran**, Civ. App. No. 132 of 2007, paragraph 10, citing with approval the decision in **Deryck Mahabir v Courtney Phillips**, Civ. App. No. 30 of 2002.

⁵² In his oral submissions made on the 13th July, 2009. It is to be noted (as explained in the section below) that the Appellant itself was also responsible for what occurred.

counsel on the 12th September, 2008 (two days after the 10th September, 2009) and a heavy workload in the litigation department of the firm of instructing attorneys.

47. In my opinion, none of these reasons can amount to a good reason or explanation for the inability or failure to file the amended notice of appeal on the 10th September, 2009. In fact that notice was duly settled and returned by senior counsel on the 10th September, 2009 with instructions to have it filed that day. The reason (tenuous as it is) why it was not filed that day also does not qualify as a good explanation. Indeed, the bona fides of the explanation is questionable, given Mr. Primus' letter and affidavit filed in these proceedings categorically disputing the assertion that there was any 'misunderstanding' with respect to senior counsel's instructions to have the amended notice of appeal filed on the 10th September, 2008. What Mr. Primus necessarily implies is that he was instructed by the senior partner in the firm of instructing attorneys not to file the amended notice on the 10th September, 2008 and that is why it was not done.

48. In these circumstances I am of the opinion that the requirements of Part 26.7 (3) (b) have not been satisfied by the Appellant. To the extent that Yorke-Soo Hon J.A. was also of this view I am of the opinion that she was right.

Failure Of Party Or Of Attorney

49. Senior Counsel for the Appellant has accepted that to a large measure the responsibility for the errors and failures in this case lie with the Appellant's attorneys. However, he has contended that when there is no fault or culpability in a party then the fault or failure of its attorneys cannot be held against the party for the purposes of the criteria in Part 26.7, CPR, 1998. He cites Part 26.7 (4) (b) which states:

- (4) In considering whether to grant relief the court must have regard to –
 - (b) whether the failure to comply was due to the party or his attorney.

50. He also prayed in aid the Overriding Objective of the CPR, 1998 which is that the “objective of these rules is to enable the court to deal with cases justly”,⁵³ and argued that the consideration stated at Part 26.7 (4) (b) must be read into the Part 26.7 (3) criteria.

51. I disagree. In **Trincan Oil Ltd. v Martin**,⁵⁴ the Court of Appeal explained that: “Rules 26.7 (3) and (4) are distinct”. The requirements of Part 26.7 (3) must all be satisfied before the factors stated at Part 26.7 (4) can be considered and the exercise of any true discretion arises. To construe Part 26.7 as is contended would be to rewrite the rule and undermine the expressed statutory intent contained in it.⁵⁵ In any event, it is not correct that in this case the Appellant was without responsibility for what occurred. Both in September 2008 and in January 2009 decisions were made at critical times (in relation to these applications) to replace junior and senior counsel for the Appellant. The Appellant was involved in these decisions and must have given the necessary instructions knowing that one certain consequence would be further delay.

General Non-Compliance With The Rules

52. Part 26.7 (3) (c) was neither explored before Yorke-Soo Hon J.A. nor dealt with in her judgment. Further, it was never formally raised in this appeal. There is therefore no necessity for me to consider this aspect of Part 26.7, since the failure to satisfy Part 26.7 (1) and/or any of the requirements of Part 26.7 (3) is sufficient to decline granting relief from sanctions, and I have concluded as much. However, for the sake of completeness in the application of Part 26.7 (3) to the circumstances of this case, I am of the opinion, having considered the record in this matter, that the Appellant may also not be able to satisfy the requirements of Part 26.7 (3) (c), CPR, 1998, particularly with respect to the requirements of Part 64.11, CPR, 1998. In this case the Appellant has not made the required application for directions under Part 64.11 (1), though the time for so doing is long past. This default by the Appellant is a relevant consideration under Part

⁵³ See Part 1.1 (1), CPR, 1998.

⁵⁴ Civ. App. No. 65 of 2009, paragraph 13.

⁵⁵ See **Trincan Oli Ltd. v Chris Martin**, Civ. App. No. 65 of 2009, paragraphs 15, 16, 17 and 18, for an explanation of the rationale for Part 26.7, CPR, 1998.

26. 7 (3) (c), which mandates the court to consider whether there has been general compliance with “all other relevant rules, practice directions, orders and directions”.

CONCLUSION

53. In the circumstances this appeal is dismissed. The Appellant is to pay the Respondent’s costs of this appeal. These costs will be assessed upon hearing counsel for both parties.

54. On the face of it this decision may appear somewhat harsh in its effect and based upon an overly strict interpretation and application of the CPR, 1998. It is therefore worth repeating, though it has been already stated by the Court of Appeal, that at this time in the evolution of the new CPR, 1998 in Trinidad and Tobago this approach is considered necessary if a meaningful shift is to occur in the way civil litigation is practised here.

55. The overriding objective may be thought of as describing the purpose and intention of the CPR, 1998 – which is to facilitate dealing with cases justly. However, this concept of dealing with cases justly, in a modern civil litigation system which involves a non-bifurcated docket system and an obligation on individual judicial officers to effectively manage over one thousand cases in a single docket and to deal with all cases effectively and efficiently, demands that generally one considers not simply individual cases but also the integrity and efficiency of the entire civil litigation system. In the court of appeal, though the circumstances are different, the integrity of the entire civil justice system remains an important consideration.

56. This case is, sadly, not an exceptional one, but is rather only too typical of what the culture of civil litigation in Trinidad and Tobago is and has been for far too long. It is hoped that with a sufficiently sustained insistence on ‘strict’ compliance with the rules for conducting litigation an overall change in the existing culture will be established. When this change is evident the Rules Committee may consider reviewing the strictures of Part 26.7 given the current approach, but until such time this is the manner in which Part 26.7,

CPR, 1998 will be applied. Though the core interpretation of the text, faithful to legislative intent, its language, structure and context is likely to remain unchanged, its application over time can change as circumstances change. The interpretation of the law is also historically and culturally contextual and as such is an unfolding process. In this way the law is responsive to changes in society.

57. In my opinion, and in the context of these observations, there is also at this time an urgent need for the legal profession to take full responsibility for its members. This responsibility must include doing all that is necessary on its part to help change the prevailing culture in which civil litigation is practised. This responsibility may include more continuing legal education training and greater efforts at monitoring standards in the profession, but should also embrace conscious programs of formation and mentoring for junior attorneys-at-law. Finally, it is my hope that in the near future the courts will not be called upon to make decisions such as this one, or at least that such decisions will truly be the exception.

P. Jamadar
Justice of Appeal