REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 79 of 2011
CV No 2010-05237

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPELLANT/DEFENDANT

AND

MIGUEL REGIS

CLAIMANT/RESPONDENT

PANEL: I. ARCHIE, C.J.
P. JAMADAR, J.A.
G. SMITH, J.A.

APPEARANCES:
Ms. C. Nixon for the Appellant.
Mr. G. Ramdeen for the Respondent.

DATE OF DELIVERY: 13th June, 2011.

JUDGMENT

Introduction

1. This appeal arises out of a failed application by the Appellant for relief from sanctions (pursuant to Part 26.7, CPR, 1998) as a result of the failure to file its defence within the time limited for so doing.[1]

2. 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.

3. This rule has been the subject of interpretation and application by the Court of Appeal in a cluster of consistent written and unanimous decisions comprising different panels in the period May 2009 to March 2010.[2] It has been applied to both express and implied sanctions as

[1] See Part 10.3(3), CPR, 1998 with respect to the time limited for filing a defence.

[2] See **Trincan Oil Limited v Chris Martin** Civ. App. No. 65 of 2009 (Kangaloo, J.A., Weekes, J.A. and Jamadar, J.A., delivered on the 12th May, 2009); **Trincan Oil Limited v Keith Schnake** Civ. App. No. 91 of 2009

explained and justified in those decisions. In addition, almost weekly since these decisions have been handed down, appeals pursuant to Part 26.7 have come regularly before the Court of Appeal and the approach of the court has been to consistently apply its interpretation of Part 26.7 across the board.

4. There have been some hard cases, some unfortunate ones and some borderline ones, but by and large the majority have been demonstrative of the kind of "endemic *laissez-faire*"[3] approach to civil litigation that brought the CPR, 1998 into being in the first place and has been the earnest object of reform by the Rules Committee and the courts. A written judgment is being given in this appeal because there seems to still be some misunderstandings and misgivings with respect to the approach of the Court of Appeal to Part 26.7 applications.

Facts

5. The relevant facts of this case are quite simple. The claim form and the statement of case were filed and served on the 21st December 2010. The claim was for damages for malicious prosecution.[4] It included a claim for damages for assault and battery that allegedly occurred on the 26th May, 2004.[5] Copies of the Information, the relevant Magistrate's Case Book Extract and the pre-action protocol letter dated 8th December, 2010 were attached (pursuant to Part 8.6, CPR, 1998). There has been no complaint about the regularity of these proceedings or service. An appearance was entered on the 13th January, 2011.[6] In these circumstances it was agreed by the parties that the Appellant's defence was due on the 2nd February, 2011 (42 days after the date of service).

(Kangaloo, J.A. Jamadar, J.A. and Bereaux, J.A., delivered on the 3rd February, 2010); **The Attorney General of Trinidad and Tobago v Universal Projects Limited** Civ. App. No. 104 of 2009 (Archie, C.J., Kangaloo, J.A. and Jamadar, J.A., delivered on the 26th February, 2010); and **Andrew Khanhai v Prisoner Officer Darryl Cyrus and The Attorney General of Trinidad and Tobago** Civ. App. No. 158 of 2009 (Kangaloo, J.A., Jamadar, J.A. and Yorke – Soo Hon, J.A., delivered on the 9th March, 2010).

[3] See **Bernard v Seebalack** [2010] UKPC 15, at paragraph 31 (per Sir John Dyson SCJ).

[4] Arising out of a criminal charge that was allegedly heard and dismissed on the 15th October, 2010.

[5] The date the charge was also allegedly laid.

[6] In which it is accepted that the claim form and the statement of case were received on the 21st December, 2010.

6. No defence was filed within the said 42 day period and no request for an extension of time for so doing was made either to the Respondent[7] or the court[8] within that period. Those failures resulted in the imposition of an implied sanction (pursuant to Parts 10.2 and 26.6, CPR, 1998) against the Appellant, namely that it would be unable to file a defence (and so defend the claim) and the claimant would be entitled to enter judgment unless relief from that sanction was obtained and permission granted to extend the time for filing a defence.

7. On the 3rd February, 2010 the Appellant, first by telephone request to the Respondent sought an extension of time (which was refused)[9] and then by formal application to the court sought relief from sanctions and an extension of time to file it's defence. The application was supported by an affidavit filed on the said 3rd February, 2011, and additionally by a supplemental affidavit filed on the 15th April, 2011. The application was opposed by the Respondent. On the 18th April, 2011 Kokaram J. dismissed the Appellant's application after hearing argument. The Appellant duly appealed, by way of procedural appeal filed on the 27th April, 2011.

8. The Appellant, pursuant to Part 26.7, CPR, 1998, had to satisfy the court, supported by evidence (rule 26.7 (2)), that the requirements of the rule were met. However, this appeal involves an appeal against the trial judge's decision in the exercise of his discretion to dismiss the Appellant's Part 26.7 application.

Disposition

9. In our opinion it has not been demonstrated that the judge was plainly wrong in the exercise of his discretion. The appeal is therefore dismissed and the Appellant is to pay the Respondent's costs assessed at two-thirds of the costs to be awarded by the trial judge on the application.[10]

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7 Pursuant to rule 10.3 (6).
8 Pursuant to rule 10.3 (5).
9 As he was constrained to do, the time for filing having passed and permission of the court having become necessary. Compare Part 27.9
10 See Part 67.14, CPR, 1998 and paragraph 12 of the judgment of Kokaram J.

Review of a Trial Judge's Discretion

10. Where there is an appeal against the exercise of a trial judge's discretion the Court of Appeal will not interfere with the decision of the trial judge unless it is shown to be plainly wrong.[11] As Lord Templeton has explained:

> "when a judge alive to the possible consequences, decides that a particular course should be followed in the conduct of the trial in the interest of justice, his decisions should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong."[12]

11. The law as to the reversal by a Court of Appeal in Trinidad and Tobago of an order made by a trial judge in the exercise of his discretion is well-established. The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated, for example, that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion.

12. In this case the trial judge properly considered the relevant law and legal principles and in a reasoned judgment carefully applied all of the relevant facts to these principles before exercising his discretion. Though this court may have exercised the same discretion in a different way, that in and of itself is not a basis for interfering with the judge's decision. The judge must be shown to be plainly wrong.

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[11] See Nelson J.A. in **Fishermen and Friends of the Sea v EMA** Civ. App. No. 106 of 2002; Jamadar, J.A. in **The National Lotteries Control Board v Michael Deosaran** Civ. App. No. 132 of 2007; and Kangaloo, J.A. in **Abzal Mohammed v Police Service Commission** Civ. App. No. 53 of 2009.

[12] **Ashmore v Corporation of Lloyd's** HL [1992] 1 WLR 446 @ 451F. See also, Sir Vincent Floissac in **Dufour v Helenairs Corporation Ltd**. (1996) 52 WIR 188.

Part 26.7 (1) Promptitude

13. The application was made one day after the time limited for filing the defence had expired and immediately after the telephone request to the Respondent for an extension was refused. The application was therefore prompt. No fault can be found with the trial judge in this regard. It is to be noted that the issue of promptitude is fact driven and contextual, to be determined in the circumstances of each case. It is therefore within the ambit of judicial discretion.

Part 26.7 (3) (a) Intentionality

14. Clearly it was the intention of the Appellant to defend this claim as stated in the appearance and to obtain instructions from the relevant police officers in order to do so. The inability to file the defence on time was because of a combination of reasons which do not undermine this intention. Again, no fault can be found with the trial judge in this regard. This issue is also fact driven and depends on the circumstances of each case, and so also is within the ambit of judicial discretion.

Part 26.7 (3) (c) General Complainace

15. No real issue was raised in this regard, except with respect to the Appellant's failure to respond to the pre-action protocol letter. The rules require compliance with the pre-action protocols by all parties[13]. In particular, in a case such as this, the Appellant was required to acknowledge the Claimant's letter in writing within 7 days of receiving it.[14] This was not done. However, what is required is general compliance, not absolute compliance. The consequence of the Appellant's failure to acknowledge the Respondent's pre-action letter was that the Respondent was entitled to file his claim at any time after the 7 days had elapsed. In this case the Appellant having been served with a claim form and statement of case, duly entered its appearance and promptly filed this application. We are satisfied therefore that there was general compliance. As with promptitude and intentionality, so also is general compliance fact driven and dependent on the circumstances of each case, and is also within the ambit of judicial discretion.

[13] See Practice Direction, Pre-Action Protocols, Clauses 2 and 3.
[14] See Practice Direction, Pre-Action Protocols, Clause 4 at 4.4.

Part 26.7 (3) (b) Good Explanation for the Breach

16. It is under this limb of the rule that the trial judge's decision has really been challenged, though the argument has also been framed as a general challenge to the judge's exercise of his discretion.[15]

17. The judge was required to consider whether the Appellant had shown, supported by evidence, that there was a good explanation for the breach, that is, for the failure to file its defence on time. The requirement is for a good explanation, not an infallible one. Whether such an explanation has been shown is a question of fact to be determined in all the circumstances of the case, and is therefore a matter of judicial discretion.

18. The grounds stated in support of the application gave as the explanation the following: "The Defendant has been unable to secure the necessary instructions of the Police Complainant as he was on sick leave in order to settle his defence".

19. The two affidavits filed in support of the application explained that:

i. the claim form and statement of case were served on the 21st December, 2010, but "due to some administrative difficulties, instructing attorney … received the filed documents on the 12th January, 2011";

ii. thereafter 'diligent efforts' were made to get the necessary instructions, but the police complainant in the dismissed criminal matter "was on sick leave and was confined to bed rest," and "he had proceeded on sick leave on around 12th January, 2011 and returned off sick leave on or about 28th January, 2011";

iii. the defence was due by the 2nd February, 2011, but "instructing (attorney) … had an urgent personal issue and was forced to take two days leave to attend to it";

[15] See the Grounds of Appeal.

iv. instructing attorney returned to work on the 3rd February, 2011 and requested an extension of time from the claimant's attorney which was refused; and

v. this application for relief from sanctions and an extension of time was made on the 3rd February, 2011, promptly, and "the failure to comply was not intentional and simply beyond the control of the Defendant".

20. In the supplemental affidavit filed on behalf of the Appellant,[16] it was explained further that:

vi. the pre-action protocol letter (dated the 8th December, 2010) was only received by instructing attorney on the 12th January, 2011 (with the case file);

vii. the information about the sick leave was contained in a letter dated 15th April, 2011 (which was exhibited); and

viii. the Appellant's defence had been drafted (the draft was annexed).

21. The trial judge in his judgment alluded to all of these factors, articulated correctly the legal principles that were apposite and applied them carefully and rationally to the relevant facts. In particular, in his analysis of whether there was a good explanation for the failure to file a defence within time, the judge identified several gaps in the evidence in support of the application.

22. The trial judge's criticism of the lack of particularity of the explanations is consistent with observations that have been made in the Court of Appeal in matters such as these. For example, what exactly were the 'administrative difficulties' and the 'diligent efforts' alluded to? And, if instructing attorney took two days off and returned on the 3rd February, 2011, then he was out of office on the 1st and 2nd February, 2011. Why then did he not make the request for an extension of time on the 31st January, 2011 or instruct someone to do so on his behalf on or

[16] Filed on the 15th April, 2011.

before the 2nd February, 2011? And if he knew (and believed) that the police complainant would not be able to give instructions until after the 27th January, 2011 (which was a Thursday), thereby leaving only the period of 7 days from Friday 28th January to the following Wednesday 2nd February to get instructions and settle and file the defence, what was done up to the 31st January and/or why was nothing done before the 3rd February? In these circumstances, the judge concluded that: "This series of events suggest to me that both attorney and party was content to either leave the drafting of the defence for the last day of the deadline or allow the deadline to pass without any serious attempts to get instructions or to apply for an extension of time". This cannot be held to be plainly wrong.

Part 26.7 Criticism and Response

23. Not all judges appear to give full support to the approach taken by the Rule and the Court of Appeal in relation to Part 26.7. For example, recently Gobin J.[17] stated in relation to Part 26.7:

> "But I find that when the enforcement of a procedural rule produces a result so disproportionate to the offence as to effectively prevent a judge from doing substantive justice for an insufficient reason, then the rule goes too far. It introduces an element of what can only be called arbitrariness which has no place in any judicial process."[18]

24. In her opinion:

> "… certain rules including the ones relevant here (Part 26.7) are systematically preventing me as a judge from doing substantive justice. The removal of a judicial discretion in procedural matters has been forcing judges to mechanistically apply rules to shut litigants out, even while we are conscious that our inability to do otherwise results in injustice. An argument that we are depriving litigants of the right to a hearing on substantive issues and possibly depriving litigants of a

[17] In **Roger Alexander v Alicia's House Ltd** CV 2010-03761.
[18] Ibid paragraph 10.

fundamental right to access to the court and to justice in circumstances where such a drastic consequence is unjustifiable by any standard, can no longer be ignored."[19]

25. Further:

"Inflexible rules of court both in the text and the interpretation cannot readily oust the jurisdiction of the court to replace it with justice by default. Such rules would be ultra vires."[20]

26. Her suggestion and recommendation to the Rules Committee is to adopt the English approach as stated by Lord Bingham L.J. in **Costellow v Somerset CC**.[21]

27. These arguments and pleas are not new. They were advanced by many in the legal profession when the Rules were first proposed in 1998. Indeed, these objections and others led to a deferral of the implementation of the rules and the creation of an Advisory Committee to the Rules Committee made up of judges, lawyers and members of the public, which was mandated to review and report on the appropriateness of the CPR, 1998. By 2005 that committee had reported generally in favour of the Rules and the Law Association and other stakeholders had agreed that the CPR, 1998 in its present form should be introduced. That was after almost six years of intense debate, dialogue and reconsideration. Though the original commencement date was to have been the 1st January, 1999, it was not until 16th September, 2005 that these rules were implemented.

28. It is in this context and with an agreed and accepted understanding of the intention and purpose of the CPR, 1998, that the law under Part 26.7, CPR, 1998 and how it is to be interpreted and applied was settled in several decisions of the Court of Appeal of Trinidad and Tobago.[22]

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[19] Ibid paragraph 3.

[20] Ibid paragraph 12.

[21] [1993] 1 WLR 256 at 263-264. For a different view see the Postscript of Kokaram J in **Miguel Regis v Attorney General of Trinidad and Tobago** CV 2010-05237; and see the opinion of the Court of Appeal in **The National Lotteries Control Board v Michael Deosaran** Civ. App. No. 132 of 2007, and its critique of **Cosstellow**.

[22] See **Andrew Khanhai v Prisoner Officer Darryl Cyrus and The Attorney General of Trinidad and Tobago** Civ. App. No. 158 of 2009; **Trincan Oil Limited v Chris Martin** Civ. App. No. 65 of 2009; and **The Attorney**

29. The consequences of these decisions and the approach mandated by the Court of Appeal has resulted in an observable shift away from a cancerous *laissez-faire* approach to civil litigation to a more responsible and diligent one. However, the discipline that is now demanded has also resulted in some disquiet among some members of the legal profession and even among a few judges. Despite this, certainly among the vast majority of the judges at first instance[23] and in the Court of Appeal, the clear view is that this approach articulated by the Court of Appeal is having a positive enabling effect on the efficient, effective and just disposition of civil litigation. Indeed, the Rules Committee[24] as recently as the 25th May, 2011, after due and lengthy deliberation, agreed to retain the existing Part 26.7 of the CPR, 1998 and not to remove the threshold requirements or make any changes to alter the effects of the interpretation to the rule given by the aforesaid decisions. It was however agreed to further review the rule after one year.

30. In fact, on the said 25th May, 2011 the Rules Committee, after entertaining submissions from the Monitoring Committee of the Rules Committee, the Judges of the Supreme Court,[25] the Law Association of Trinidad and Tobago and State Attorneys agreed to amend several of the Rules. It was the considered view of the Rules Committee, taking into account all of the suggestions made, that at this time, given the beneficial consequences of the aforesaid application and interpretation of Part 26.7, to interfere with the rule would be counter-productive and undermine the gains made to date in fulfilling one of the intentions of the introduction of the CPR in the first place - which was to redress a crippled civil litigation system which was plagued by inefficiency, ineffectiveness and delay, caused in no small measure by the lack of discipline and responsibility in the system (including the so-called *laissez-faire* approach to civil litigation by a significant proportion of the profession).

General of Trinidad and Tobago v Universal Projects Limited Civ. App. No. 104 of 2009, and **Trincan Oil Limited v Keith Schnake** Civ. App. No. 91 of 2009.

[23] Indeed, the trial judge in this matter expressed support for this new approach in the postscript to his judgment.

[24] The Rules Committee is appointed pursuant to section 77 of the Supreme Court of Judicature Act, Ch. 4.01 and comprises the following members: The Chief Justice; A Judge of the Court of Appeal; A Judge of the High Court; The Attorney General or any legal officer referred to in Part I, II or III of the First Schedule to the Judicial and Legal Service Act; A Master of the High Court; The Registrar of the Supreme Court; and two practitioner members of the Law Association. Both I. Archie, C.J. and Jamadar, J.A. are members of the Rules Committee.

[25] Arising out of a critical collaborative analysis of the CPR, 1998 facilitated by the Trinidad and Tobago Judicial Education Institute and held on the 14th February, 2011, entitled "Working Session for CPR Judges and the Judges of the Court of Appeal".

31. Chief Justice Sharma noted in the foreword to the CPR 1998 the following:

> "The CPR introduced a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system. This new procedural code is a radical departure from what obtains under the 1975 rules."
>
> "It marks an important milestone in the development of our jurisprudential history. It seeks to instill discipline and promote responsible behavior on the part of all participants in the litigation process. Discipline in any system is the hallmark of efficiency and productivity."

32. The aforesaid decisions of the Court of Appeal on Part 26.7 reflect the exercise of the indigenous court's interpretative function as it develops a local jurisprudence relevant to existing needs and circumstances. While it is acknowledged that other jurisdictions and other cultures may adopt different approaches to similar problems, it is hoped that regard will be paid to the experiences and insights of local judges to know what best suits the needs of local society as they seek, in the exercise of their independent sovereignty and constitutional mandate, to interpret and apply the laws of Trinidad and Tobago in ways that are purposeful for their people.

33. In the foreword to the CPR 1998 Chief Justice Sharma also commented that:

> "The CPR brings with them a new litigation culture – a paradigm shift in the administration of civil justice."

34. This "new litigation culture" will not be created without a certain measure of resistance and denial. Clearly no system is perfect. However, it is for the Rules Committee of Trinidad and Tobago, the Judges of the Supreme Court of Trinidad and Tobago and for the Parliament of the Republic of Trinidad and Tobago, acting in consultation with the Law Association of Trinidad and Tobago and all other stakeholders to determine what is best for Trinidad and Tobago. Effecting sustainable change in culture is notoriously challenging. First the need to effect the relevant change must be identified and accepted. The will to do so must follow. Then the implementation of that change must be pursued and sustained for long enough for it to

become 'embedded'. And this must all be undertaken in a spirit of collaborative openness and receptivity with a willingness to review, reconsider and change when that is necessary. This has been the approach taken in relation to the CPR, 1998.

35. In fact, the workings of the CPR, 1998 have been under constant scrutiny and the subject of the specific mandate of the CPR, 1998 Monitoring Committee, which includes judges, lawyers and administrators. Furthermore, arising out of recommendations from the Monitoring Committee and other groups and paying heed to judicial decisions, the Rules Committee and the Chief Justice have been actively considering the effects of the CPR, 1998 and what changes need to be made to them in order to achieve equality, proportionality, fairness, efficiency, effectiveness, and expedition and in a way that both deals with matters justly, even as it effects the changes that are necessary to sustain a viable civil justice system that will promote public trust and confidence.

36. For example, pursuant to Part 4 (1) and 4 (2) of the CPR, 1998, the Chief Justice on the 26th May, 2010 issued a Practice Direction on the late filing of documents.[26] This Practice Direction sets out the practice and procedure to be followed in respect of documents to be filed after the date prescribed by any rule, practice direction, court order or directions. Clause 1 in effect incorporates and applies the aforesaid Court of Appeal decisions in relation to Part 26.7 applications.

37. Further, at the Rules Committee meeting of the 25th May, 2011 several amendments were made to the existing rules, including amendments to Part 18.5 and Part 20.1 to include, consistent with the approach taken in Part 26.7, threshold requirements in relation to counterclaims and changes to a statement of case. These changes in fact ameliorate some of the strictness of the relevant original rules. Notably however, the use of threshold requirements has been incorporated and has been considered appropriate at this time. Indeed, the amendments to

[26] These provisions took effect from the 14th June, 2010. See Appendix 1 for the text of the Practice Direction.

Part 20.1 took into consideration the observations of the Privy Council in **Charmaine Bernard v Ramesh Seebalack**.[27]

Proportionality and Judicial Discretion

38. It is important to state that the view held, that Part 26.7 and the interpretation given to it by the Court of Appeal in some way removes judicial discretion and allows for no flexibility and which in turn somehow impermissibly undermines proportionality and access to justice,[28] needs to be exposed as erroneous and unfortunate.

39. It also needs to be said that the Court of Appeal and the Rules Committee appreciates the respect and deference paid by the Privy Council to the local courts' approach, as articulated by Sir John Dyson SCJ in **Charmaine Bernard v Ramesh Seebalack**.[29] Though it is clear that the English approach is different and the priorities that are valued are also weighted differently at this time, it is noteworthy that the Rules Committee has heeded the advice of the Privy Council to revisit Rule 20.1 and that it has amended the relevant rule (though not as may have been suggested or even expected by the Board).[30]

Proportionality

40. Those who argue that proportionality demands that the approach of the Court of Appeal be rejected because it impacts negatively on the judicial value of access to justice and an entitlement to so called 'substantive justice', have failed to appreciate that the very notions of both proportionality and access to justice are contextual. Thus, the existing contexts of both the current civil litigation culture and the individual circumstances of any single case impact on what is considered to be proportionate and whether there has been some constitutionally offensive denial of access to justice.

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[27] [2010] UKPC 15, at paragraph 33 (of the opinion of Sir John Dyson SCJ).

[28] For example, by Gobin J. in **Roger Alexander v Alicia's House Ltd**., and Mr. Rishi Dass in 'The Quest for Proportionality under the CPR,1998'. But compare the approach of Gobin J. in **Maharaj v The Arima Race Club**, CV 2006 – 0421 and her statements in that case on access to justice and judicial discretion in the context of Part 26.7 (at paragraphs 17 and 18).

[29] [2010] UKPC 15, at paragraphs 28 and 31.

[30] [2010] UKPC 15, at paragraph 33.

41. Access to justice is not an absolute judicial value, in the sense that if it does not lead to 'substantive justice' on the merits it is somehow lacking. Indeed, how it manifests varies from legal culture to legal culture, and over time in any single legal culture. For example, a limitation period where access to justice is denied *ab initio*, irrespective of merits, is an acceptable part of all civilized legal cultures. In Trinidad and Tobago we have had many limitation periods, varying from periods of 1 year (as in the former state liabilities limitation statutes), 2 years (as in the former limitation periods for contracts), and 4 years (as in the case of torts). At present the approach is governed by the Limitation of Certain Actions Act, No. 36 of 1997.

42. Procedurally, the position is no different. For example under the RSC, 1975, Order 3 was amended in 1993 to introduce an Order 3 Rule 6, which provided for the automatic dismissal of claims before trial where there was inactivity and delay that was considered inordinate in Trinidad and Tobago. In fact, most if not all procedural schemes provide for the possibility of claims and counterclaims being struck out for procedural non-compliance before any substantive hearing on the merits.[31] Clearly there never has been in Trinidad and Tobago an absolute entitlement to substantive justice on the merits.

43. In none of the above instances is there any denial of access to justice. There is however regulation that is perfectly constitutional and proportionate in the context of Trinidad and Tobago. In all of these examples, the people of Trinidad and Tobago through their Parliament in the case of statutes of limitation and the Rules Committee in the case of procedural rules (subject to negative resolution by Parliament), determined and decided what is appropriate for Trinidad and Tobago. It is therefore vitally important for the local courts to robustly dialogue about, develop and pay due regard to their local jurisprudence in the context of procedural law.

44 In our opinion the aims of the CPR, 1998 are legitimate, as are those articulated by the Court of Appeal in relation to Part 26.7. And, the means employed to achieve these aims are proportionate (given the appropriateness of the relevant criteria) in the context of both aims and existing culture. There is no arbitrariness. However we assess it, questions about the assignment

[31] See for example, Part 26.2, CPR, 1998.

of weight to competing values and of their balance in the context of any legislative or procedural scheme, are necessarily driven by local needs and circumstances. Indeed, in Part 26.7 these considerations are intentional, rational and have been introduced and interpreted in this way for good reason in Trinidad and Tobago.

45. We wish to highlight that the CPR, 1998 is designed to promote a culture of compliance, and that the non-compliant ought not to govern the conduct and pace of litigation. In any event the non-compliant are provided for. They have several bites at the cherry. They have generous time limits provided by the Rules. In certain circumstances the parties can agree to vary timelines.[32] They can apply for an extension before the expiration of the relevant time limits (in which event the strictures of Part 26.7 do not apply). Finally, they can even apply after the time limits have passed. However, the bar is raised after each bite at the cherry. The system is progressive and proportionate. This system honours the conscientious, while accommodating the non-compliant within guided parameters. This approach promotes a culture of compliance, while at the same time eroding the vicious cycle of *laissez-faire*.

Judicial Discretion

46. Nothing is further from the truth than to assert that Part 26.7 somehow removes judicial discretion. Such a suggestion is rather disingenuous. In fact, as has been indicated above, at every level of consideration in Part 26.7 there is the necessity for the exercise of judicial evaluation, analysis and discretion. The fact of a threshold does not remove judicial discretion or force judges to 'mechanistically apply rules to shut litigants out'. All that a threshold does is to structure the weighing and balancing of values and consequently the exercise of judicial discretion. This structuring (weighing and balancing) of values is a normative act designed to assign to values their appropriate place at this time in the scheme of Part 26.7. It is purposeful. It does not negate the exercise of judicial discretion, though it does regulate it.

47. What is prompt, whether there is intentionality or good explanation or general compliance, all involve the engagement of the judge in the judicial process of sifting, weighing

[32] See for example, Part 10.3(6) and Part 27.9(4), CPR, 1998.

and evaluating fact and circumstance before arriving at a decision. These judicial functions all constitute the exercise of judicial discretion.

48. Judicial discretion implies a power to choose, decide and determine according to one's own judgment. It is a power to be exercised, not arbitrarily or according to the subjective whims of a judicial officer, but, in accordance with the will of the law. From this general proposition it follows that there are many aspects of judicial discretion.[33] However, what is common to all is choice.

49. In the context of Part 26.7 there is clearly the exercise of an evaluative discretion (often referred to as 'concealed' discretion by academics), which is created by the use of relatively imprecise and general standards contained in Part 26.7 (1) and (3), evidenced by the use of words such as 'promptly', 'non intentional', 'good explanation' and 'generally complied'. This language indicates that a weighing and balancing exercise must occur at the end of a preliminary fact-finding process. This requires a personal assessment by the judge of circumstances as they relate to particular value–qualified precepts. It involves therefore the exercise of judicial discretion.

50. Further, even in the fact-finding process inherent in Part 26.7 (1) and (3), judicial discretion is involved (referred to as 'fact' discretion by academics). There is always an element of choice and judgment involved when ascertaining facts. Indeed, in the fact-finding process there is a generous margin of appreciation for legitimate differences of opinion as to what facts have been established by the evidence. This process involves a range of decisional choices and therefore the exercise of judicial discretion – the inherent discretion in finding the facts to which the rule is to be applied.

51. However Part 26.7 is not limited only to the above. Once the threshold requirements are crossed, then the exercise of what is often referred to as 'overt' discretion arises. Not only must

[33] See for example the discussion in: Judicial Discretion, by A. Barak; Judicial Discretion and Criminal Litigation, by R. Pattenden; Exercising Discretion by L. Gelsthorpe and N. Padfield; Discretionary Justice, by L. Davis; N. Isaacs (The limits of Judicial Discretion); R..M. Dworkin (Is law a System of Rules); and D.J. Galligan (Discretionary Powers).

fact-finding and value–qualified discretions be exercised in relation to the Part 26.7 (4) criteria, but at the end of that process (which is not exclusive in relation to the factors that can be considered) and an overall weighing and balancing of all relevant considerations, the court must then exercise a further choice between alternative courses of action (to grant relief or not).

52. Part 26.7 is therefore full of opportunities for the exercise of judicial discretion. However this discretion is regulated by the structure of the rule in order to reduce subjectivity, prioritize values and to achieve a specific aim with reasonable predictability and equality.

53. In addition, as the Court of Appeal has been at pains to explain, context and circumstance are the primary factors in the analysis and evaluation of the Part 26.7 requirements. Thus, what may be considered a good explanation may vary not only in the evaluation under each limb in the circumstances of each case, but also with the stage of the proceedings; for example what may be a good explanation when the filing of an application occurs early in the process may not be so later on or after judgment and on an appeal. So also in relation to whether the application for relief is prompt or whether there is intentionality or general compliance. These are all matters for the discretion of the judge. It is therefore an unfortunate mistake to assume that a judge who is called to apply Part 26.7 is somehow reduced to a mere automaton.

54. As this case illustrates, the Court of Appeal will respect the exercise of judicial discretion, even when it may have exercised that discretion differently, once it cannot be shown to have been plainly wrong. The CPR, 1998 places unprecedented trust in the hands of judges. Part 26.7 is no exception. The approach of the Court of Appeal to the interpretation and application of Part 26.7 facilitates that trust. It is for the trial judges in the exercise of their judicial discretion to determine whether and when to grant relief from sanctions.

_____
I. Archie
Chief Justice

_____
P. Jamadar
Justice of Appeal

_____
G. Smith
Justice of Appeal

APPENDIX 1

REPUBLIC OF TRINIDAD AND TOBAGO
SUPREME COURT OF JUDICATURE
PRACTICE DIRECTION
LATE FILING OF DOCUMENT

IN ORDER to ensure uniformity of practice at all court offices of the Supreme Court of Judicature and in order to give effect to the proper administration of the Civil Proceedings Rules, 1998 (CPR) it has become necessary to give directions in respect of documents to be filed after the date prescribed by any rule, practice direction, court order or direction.

Accordingly, under provisions of the CPR Parts 4 rules 4.1 and 4.2 the Chief Justice directs that with effect from the 14th day of June, 2010 -

1. Subject to the provisions of the CPR Parts 9.3(3), 10.3(6) and 27.9(4), every document pertaining to any civil matter that is lodged at a court office after the date or period prescribed by any rule, practice direction, court order or direction shall be accompanied by –
   (a) an application for an extension of time;
   (b) where the particular rule, practice direction, court order or direction imposes an expressed or implied sanction for non-compliance, an application for relief from sanction (s);
   (c) evidence in support of the above application(s); and
   (d) a draft of the order sought.
   (Attention is drawn to CPR Part 26 rules 26.6 and 26.7).

2. For the avoidance of doubt both applications mentioned in 1(a) and (b) above may conveniently be made in one document in the prescribed form (Form 10).

3. The court office shall immediately refer any document(s) and application(s) filed under 1(a) - (d) above to the judge to whom the matter is assigned.

4. The defaulting party shall as soon as practicable serve copies of any such document(s) and application(s) filed on all other parties in the matter so that the application for an extension of time, and where appropriate, relief from sanction(s) can be dealt with at the next case management conference or so soon as the judge may direct.
   (Attention is drawn to CPR Part 11.10).

5. The judge may deal with the above application(s) without a hearing in accordance with any of the provisions of CPR Part 11.13.

Dated this 26th day of May, 2010.