REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 52 of 2012

BETWEEN

IN THE MATTER OF THE PARTITION ORDINANCE CHAPTER 27 NO. 14

AND

In The matter of All and Singular that certain piece or parcel of land situate at Longdenville, in the Ward of Chaguanas, in the Island of Trinidad comprising Two Lots more or less and bounded on the North by lands of Manoo Maraj on the South by Amaroosingh Street on the East by lands of Manoo Maraj and on the West by a road reserved together with the buildings thereon and the appurtenances thereto belonging.

AND

RAWTI also called RAWTI ROOPNARINE

KUMAR ROOPNARINE

Appellants

AND

HARRIPERSAD also HARRIPERSAD KISSOO

1st Respondent

RAKHUNANAN also HARRY BOODOO

2nd Respondent

BHAGMATI also BHAGMATIAH also BHAGMATTIE BOODOOSINGH

3RD Respondent

CHANDERWALI also CHANADAYE also CHANADAYE ROOPSINGH

4th Respondent

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
R. Narine, J.A.

APPEARANCES: **Mr. K. Sagar appeared on behalf of the Appellant**
Ms. S. Persaud appeared on behalf of the first to third Respondents and
Mr. Ramdeen appeared on behalf of the fourth Respondent

DATE DELIVERED: June 22nd, 2012

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree and have nothing to add.

R. Narine,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the Judge's refusal to grant relief from sanction arising out of the Appellants' failure to exchange their witness statements within the time prescribed by the Judge's order.

2. The facts and circumstances giving rise to this appeal are not in dispute. They are essentially contained in affidavits of Ms. Chunilal and Mr. Fortune which were filed in support of the application for relief from sanction. Ms. Chunilal is an attorney-at-law in the employ of Mr. Gerard Raphael and had conduct of the matter on behalf of the Appellants at the time of the making of the application for relief from sanction. Mr. Raphael had conduct of the matter prior to that. Mr. Fortune is a "free-lance clerk" who was employed by Mr. Raphael to file and exchange the witness statements. No affidavits were filed by the Respondents in opposition to the Appellants' affidavits.

3. The parties to these proceedings are all related. The first Appellant and the Respondents are siblings. The second Appellant is the son of the first Appellant. The Respondents seek an order of partition of certain lands at Longdenville, Chaguanas or alternatively an order for the sale of the said lands. They also claim certain orders and directions consequent upon an order of sale or partition.

4. The Respondents claim that the lands are owned jointly by them and the Appellants and from time to time they all have lived in the house on the lands. The Appellants, on the other hand, deny that the Respondents have any right or interest in the lands. They contend in their defence that the legal interest in the lands was vested in the Respondents and themselves but they have been in continuous and undisturbed possession of the lands for upwards of sixteen (16) years and accordingly the Respondents' title to the lands has been extinguished by virtue of the provisions of the **Real Property Limitation Act**. The Appellants also allege that they have spent substantial sums in additions, improvements and repairs to the house on the lands.

5. On October 19th 2010, at a case management conference, it was ordered by the Judge, inter alia, that:

(a) The Respondents and the Appellants file and exchange witness statement to be used as evidence in chief at the trial of the action by the October 31st, 2011 and in default no evidence will be allowed in respect of any witness for whom a witness statement has not been filed;

(b) objections to the witness statements and all pre-trial applications were to be filed by November 30th, 2011 and in default no application will be entertained;

(c) the pre-trial review is fixed for January 31st, 2012; and

(d) the trial is fixed for March 6th and 7th, 2012.

6. On October 31st, 2011, the last day for the filing and exchange of the witness statements, Mr. Raphael, attorney-at-law for the Appellants, entrusted Mr. Michael Fortune with three (3) witness statements on behalf of the Appellants, one witness statement was made by the First Respondent and the other two (2) were made by persons who are not parties to these proceedings,

namely Sheila Bapoo and Harry Narine Dally Kissoo (Kissoo). Mr. Fortune was instructed to file and exchange the witness statements.

7. At around 9:30 a.m. on October 31st, 2011 Mr. Fortune proceeded to file the witness statements. He then visited the offices of Ms. Shobna Persaud, attorney-at-law for the First, Second and Third Respondents, in order to exchange the witness statements. Mr. Fortune spoke to a clerk at the offices but was informed that the witness statements of the said Respondents were not yet available. Mr. Fortune informed the clerk that he would return later in the day to exchange the documents.

8. Sometime at around 3:00 p.m. Mr. Fortune proceeded to Stone Street in Port of Spain being the last address at which he knew Mr. Ramdeen, attorney at law for the fourth Respondent, carried on his practice. When he arrived at the address he found that the offices were "locked up" and after making enquiries, he learnt that Mr. Ramdeen had relocated his practice to Cornelio Street in Port of Spain. Despite his efforts however, according to Mr. Fortune, he was unable to locate Mr. Ramdeen's office at the new address. He then left to return to the offices of Mr. Persaud but due to heavy traffic he did not get back there until 4:30 p.m. by which time Mr. Persaud's office was already closed.

9. On the following day, November 1st, 2011, Mr. Fortune visited the offices of Mrs. Persaud and served the three (3) witness statements on her. He then obtained the exact address from Mr. Ramdeen and went to his office. Mr. Fortune through inadvertence however only served two (2) of the witness statements on Mr. Ramdeen. He neglected to serve the witness statement of Kissoo. He however did not become aware of this omission until January 31st, 2012 following a communication with Mr. Raphael.

10. Mr. Raphael was unaware that there was any problem regarding the witness statements until the pre-trial review on January 31st, 2012. At the pre trial review, it became apparent that the witness statement of Kissoo was not served on Mr. Ramdeen. Up to that point it was not discovered by Mr. Raphael, nor it seemed did it come to the notice of anyone else, that all of the other witness statements of the Appellants were served on November 1st, 2011 and therefore there was not compliance with the Judge's order requiring the exchange of the witness statements by October 31st, 2011. It was, however, indicated to the Judge at the pre-trial review that neither Mr.

Ramdeen nor Ms. Persaud had any evidential objections to the evidence contained in the witness statements that were served.

11. Rule 29.13 (1) of the **Civil Proceedings Rules 1998** (the CPR) provides as follows:

> *"If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."*

12. The rule therefore imposes a sanction for the failure to serve a witness statement within the time specified by the Court. For good measure the Judge, in effect, had imposed the same sanction in his order in the event of failure to file and exchange the witness statement by October 31st, 2011.

13. On February 1st, 2012 the day following the pre-trial review, a notice of application was filed by Mr. Raphael seeking relief from sanction arising only out of the failure to exchange the witness statement of Kissoo with Mr. Ramdeen. The application was listed for hearing on February 24th, 2012. On that date, however, both Ms. Persaud and Mr. Ramdeen indicated that the witness statements that were served on them were served on November 1st, 2011, and not October 31st, 2011. As a consequence attorney-at-law for the Appellants sought and obtained permission to amend the application to include relief from sanction arising out of the failure to exchange the other witness statements within the time as ordered by the Judge. The hearing of the application was adjourned.

14. Rule 26.7 deals with relief from sanctions and provides as follows:

> *"26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
>
> *(2) An application for relief must be supported by evidence.*
>
> *(3) The court may grant relief only if it is satisfied that -*
>
> *(a) the failure to comply was not intentional;*
> *(b) there is a good explanation for the breach;*
> *(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 interest of the administration of justice;
(b) whether the failure to comply was due to the party's 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."

15. The interpretation of the rule is not in doubt. An application for relief must be made promptly and must be supported by evidence. Rule 26.7 (3) establishes a threshold test. In other words the three (3) conditions stipulated in that rule must all be satisfied before the court may grant relief. If any of the conditions are not satisfied the court cannot grant relief. If the conditions are satisfied, however, relief is not automatic but the court may grant relief and in considering whether to do so must have regard to the factors outlined at rule 26.7 (4) (see Civil Appeal 65 of 2009 **Trincan Oil Limited and another v Chris Martin**).

16. The application for relief from sanction was determined by the Judge on March 1st, 2012. The Judge stated that for the purpose of determining whether the application was made promptly, time began to run from the date of the breach rather than the date the party became aware of the breach. The date the defending party became aware of the breach was not relevant as "non compliance does not rely upon active awareness of the breach - it applies automatically... upon the occurrence of an event which was, in this case the failure to file and exchange the witness statements by October 31st, 2011." The Judge noted that the application was made "three (3) months after the engagement of the sanction." He was of the view that that could not "by any stretch of the imagination be deemed to have been prompt." The Judge therefore concluded that the application was not made promptly and on that basis alone the Appellants' application was "doomed to failure."

17. Notwithstanding the Judge's conclusion on promptness which meant the failure of the Appellants' application, he nevertheless considered whether the rule 26.7 (3) factors had been satisfied. He concluded that the Appellants had not shown that there was a good explanation for the breach and therefore the Appellants had failed to satisfy rule 26.7 (3)(b). The Judge alluded to

rule 26.7 (3)(c), which refers to the general compliance by the applicant with other relevant rules, practice directions, orders and directions, and observed that the Appellants were granted permission to amend their defence and counterclaim on or before July 6th, 2009 but failed to comply as it was not amended until two (2) days later on July 8th, 2009. The Judge however, did not make an express finding that the Appellants had failed to satisfy rule 26.7 (3)(c).

18. In the circumstances the Judge dismissed the Appellants' application with costs to be paid by them to the Respondents.

19. The Appellants have appealed and they contend that the Judge was plainly wrong to come to the conclusions he did as to the promptness of the application and whether there is a good explanation for the breach of the Judge's order. They submit that they should have been granted relief. The Respondents, on the other hand, argue that it cannot be said that the Judge was plainly wrong and this Court ought not to interfere with the exercise of his discretion to refuse the Appellants' application.

20. This is an appeal from the exercise of the Judge's discretion (see Civil Appeal 79 of 2011, **The Attorney General of Trinidad and Tobago v Miguel Regis**). It is well settled that an appellate court should not interfere with the exercise of the Judge's discretion simply because it would have decided the matter differently. An appellate court would only interfere where it can be said that the Judge was plainly wrong such as, where he acted in disregard of principle, or acted under a misapprehension as to the facts, or where he took into account irrelevant matters, or failed to take into account relevant matters or that his conclusion in the exercise of his discretion was outside the general ambit within which reasonable disagreement is possible.

21. I will first consider the issue of promptness. Whether an application for relief is made promptly depends on the facts of each case. What is prompt in one situation may not be so considered in other circumstances. Promptness is therefore influenced by the context and facts of each case (see Civil Appeal 91 of 2009, **Trincan Oil Limited v Keith Schnake**).

22. In this case the Appellants had until October 31st, 2011 to file and exchange their witness statements. As is apparent from the above, the witness statements were filed within the time prescribed by the Judge's Order. They were not exchanged with the time ordered. The application

for relief from sanction was not filed until February 1st, 2012, and then it was only filed in relation to the default in exchanging Kissoo's statement with Mr. Ramdeen. The application was amended on February 24th, 2012 to seek relief in relation to the failure to exchange all the other witness statements within the time prescribed. The explanation for not making the applications sooner may be summarized as follows:

(1) Mr. Raphael, who at the time had conduct of the matter on behalf of the Appellants, only became aware at the pre trial review that Mr. Ramdeen was not served with the statement of Kissoo.

(2) Mr. Raphael was only aware that there was a problem with the other witness statements on February 24th, 2012. On that date he was informed by Mr. Ramdeen and Ms. Persaud that the witness statements were not exchanged on October 31st, 2011 as ordered by the Court. It was only then he became aware that objections were being taken to those witness statements on that ground.

23. The Judge in coming to his conclusion that the application was not made promptly reasoned that as time began to run from the date of the sanction, and as Mr. Raphael's knowledge of the breach was not relevant, the application was filed at least three (3) months after the engagement of the sanction.

24. I would not say, as the Judge did, that knowledge of the breach is not relevant to the question of promptness under rule 26.7 (1). As I have said above, whether an application is made promptly depends on the facts of each case. The knowledge that there was a breach and hence the need for an application for relief must be a relevant factor. The weight to be attributed to it would depend on the explanation as to the time the applicant became aware of the breach.

25. If, however, this matter turned only on the question whether the Judge failed to take into account the date on which Mr. Raphael became aware of the breach, I could see no justification for interfering with the exercise of his discretion, as in this case it is difficult to attribute much weight to the fact that Mr. Raphael was not aware that the order was not complied with for at least three (3) months after the fact. There is simply no good explanation for the failure to be aware of the breach earlier.

26. However, even though the exercise of the Judge's discretion could not be faulted for having failed to consider the date Mr. Raphael became aware of the breach, it does not follow

that the only relevant consideration was the length of time that elapsed between the date the sanction took effect and the date the application was made for relief. The Judge seemed to be of this mind as he concluded that the application, having been made three (3) months after the engagement of the sanction, cannot be considered prompt. But whether an application is prompt does not depend simply on the time that has elapsed from the date the sanction took effect to the date the application for relief was made. It depends on the factual context and there are other relevant and more significant matters in this case that the Judge did not consider.

27. In considering those matters it is necessary to consider separately the statements that were served on November 1st, 2011 and the witness statement of Kissoo which was not served on Mr. Ramdeen as they give rise to different considerations in relation to promptness. I will first consider the witness statements which were served on November 1st, 2011.

28. As mentioned above all three of the Appellants' witness statements were served on Ms. Persaud on November1st, 2011 as attorney-at-law for the first, second and third Respondents and two of the three witnesses statements were served on Mr. Ramdeen as attorney for the fourth Respondent. The application for relief only sought relief from sanction in relation to these witness statements on February 24th, 2012 when it was amended. It is therefore appropriate, in my view, to regard February 24th, 2012 as the date when the application for relief from sanction was made. The application was therefore made almost four (4) months after the date the sanction took effect in relation to these witness statements. But it was made in the context where the witness statements were filed in time and served the following day. This was well before the pre-trial review and the trial date. The parties appeared at the pre-trial review and, having read the statements indicated that they had no evidential objections to them. The application for relief was therefore made long before the trial date and in circumstances where it could cause no prejudice to the parties nor delay of the trial. Such considerations are relevant and form an essential part of the context in which promptness must be considered. When those considerations are taken into account it is not possible to regard the application as not having been made promptly. Indeed when those circumstances are taken into account the application for relief is best viewed in the nature of a house-keeping exercise and it is surprising in those circumstances that there were objections to the application by attorneys-at-law for the Respondents. The Judge did not consider those factors and I am therefore of the view that he was plainly wrong in the exercise of his

discretion. In my judgment, the application for relief from sanction in relation to the witness statements that were served on November 1st, 2012, was made promptly within the meaning of rule 26.7 (1).

29. In relation to the application for relief in respect of Kissoo's statement, the application was in fact made earlier but the context was very different. The witness statement was not served on Mr. Ramdeen at all. Indeed at the time of the hearing of the appeal, this Court was informed that he has yet to have sight of it. Mr. Ramdeen therefore could not have been in a position to inform himself whether he had any objection to the witness statement and by the time the application for relief was made, the time for taking objection to it and making pre-trial applications had passed. The delay therefore in the making of the application had the potential of causing prejudice to Mr. Ramdeen's client and the Court cannot be satisfied that no prejudice could be caused by the failure to make the application earlier or that the time of the application would not have impacted on the management of the case and the trial date.

30. All that there is therefore in relation to Kissoo's written statement is that the application was made three (3) months after the breach, in circumstances where there is no good explanation for the delay in doing so. I agree with the Judge that the application for relief from sanctions in relation to this witness statement was not made promptly in the circumstances.

31. Where the applicant has failed to satisfied rule 26.7 (1) it is fatal to his application. Therefore in so far as Kissoo's statement is concerned, the Appellants have failed at the first hurdle and there is no need to consider whether the Judge was plainly wrong to say that there is no good explanation for the breach. It is however necessary to consider that, in relation to the statements that were served on November 1st, 2011 in respect of which the application was made promptly.

32. In the **AG v Universal Projects Limited** [2011] UKPC 37, the Privy Council rejected a submission that a good explanation is one which properly explained how the breach came about, but which may involve an element of fault, such as inefficiency or error in good faith. The Privy Council in its judgment stated (at para. 23):

> *"The Board cannot accept these submissions. First, if the explanation for the breach, i.e. the failure to serve a defence by March 13th, connotes real or substantial fault on the*

part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

33. An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in **Regis,** supra, what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection.

34. The Judge's explanation for concluding that the explanation was not good turned on two (2) things. First he considered that it was the fault of the clerk. He was the agent of the attorney-at-law. The fault of the clerk was therefore the fault of the attorney-at-law, and consistent with this Court saying that the fault by attorneys-at-law will not constitute a good explanation for non compliance with the rules of the Court that could not be a good explanation. Secondly, he indicated that in any event the attorney-at-law was at fault for waiting until the last day to seek to file and exchange the witness statements. By waiting until the last day the attorney -at-law failed to "adequately take into account exigencies such as those which took place on October 31st. The [Appellants'] attorney failed to properly manage the more than ample time given and created a crisis of his doing."

35. In coming to the conclusion that the Attorney's clerk was at fault the Judge appeared to me to have lost sight of the breach that required an explanation. He stated in his reason that "the oversight in this case is the failure of the clerk to inform the principal of the default". That of course was relevant to the issue of promptness, but had little to do with the failure to exchange the witness statements on October 31st. Nowhere in the Judge's reasons did he give any consideration to the explanation advanced by the ckerk for the failure to exchange the witness statements by October 31st.

36. It is relevant to note the order in this matter was not simply for the service of the witness statements but for their exchange. That required a measure of co-operation by the parties. There

was none. There were no arrangements made by any of them for the exchange of the witness statements, and when efforts were made by Appellants to do so they found obstacles that were not of their own creation. Ms. Persaud was not ready with her witness statements and Mr. Ramdeen had changed the location of his practice. It has been accepted by Mr. Ramdeen that he did not file a notice of change of address. The clerk was unable to locate the new address and when he attempted to attend on Ms. Persaud it was already past 4:00 p.m. and her offices were closed.

37. It is not disclosed on the evidence when and in what circumstances the Respondents' witness statements were served on the Appellants. In view of the order for the exchange of the witness statements and in the light of the fact that no arrangements were made for so doing it is arguable that all parties were in breach of the Judge's order. That apart however, in my judgment the failure to exchange the witness statements on the October 31st was in the circumstances of this case excusable. I would regard the explanation advanced to be a good explanation.

38. As I mentioned, the Judge was also of the view that the fault also lay with the Attorney-at-law for leaving the filing of the statements until the last day. He was of the view that the attorney did not properly manage the ample time given to him for the filing and exchange of the witness statements, and accordingly failed to take account of exigencies such as those that occurred.

39. I agree with the Judge that it is proper for an attorney-at-law to anticipate the usual problems that may be encountered. However what occurred on the October 31st when Mr. Fortune attempted to exchange the witness statements cannot be described as usual. It should be noted that this is not a case where the attorney-at-law waited until the court office was almost closed to attempt to file and exchange the witness statements. He appeared to have been early. Mr. Fortune attended the court office to file them around 9:30 a.m. That should have provided him with ample time to file and exchange the witness statements in the usual run of things. The Judge's criticism does not take account of the facts of this case. I do not think that the Attorney can be faulted for failure to anticipate the events that did occur.

40. In the circumstances I think that the Judge is plainly wrong to conclude that the explanation advanced was not a good one.

41. The Judge noted that the Appellants were in breach of a previous order with respect to the amendment of their defence and counterclaim, but made no finding that they had not generally complied with all relevant rules, directions and orders. I think he was right to do so. What rule 26.7 (3)(c) of the CPR requires is general compliance and not absolute compliance. On the facts of this case it cannot reasonably be concluded that there was not general compliance.

42. There was no issue of intentionality within the meaning of rule 26.7 (3)(a). The Judge therefore should have been satisfied that the application, so far as the witness statements that were exchanged on November 1st were concerned, had satisfied the rule 26.7 (3) threshold test and should have gone on to consider the factors in rule 26.7 (4) and determine whether relief should be granted. The Judge, however, having found that the Appellants had not satisfied rule 26.7 (3), did not consider rule 26.7 (4). It now lies with this Court to do so.

43. Rule 26.7 (4) sets out four (4) factors to which the Court must have regard in deciding whether relief should be granted. The Court should consciously go through the list of factors to be considered. I, however, do not think that the list is meant to be exhaustive and the Court should ask itself if there are any other relevant circumstances that need to taken into account. Having done so the Court has to engage in a balancing exercise taking into account all the circumstances and determine whether it is in accordance with the overriding objective that relief should be granted.

44. The first of the four (4) factors is the interests of the administration of justice. The administration of justice is not assisted when orders are not obeyed and it is burdened with applications for relief from sanctions or extensions of time. On the other hand the delay in the exchange of the witness statements did not prejudice the Respondents. They had the witness statements before the pre-trial review and indicated that they had no evidential objections to them. The late application for relief could not therefore have affected the fairness of the trial so far as the Respondents are concerned nor could it have affected the trial date. I think in all the circumstances the interests of the administration of justice favour the grant of relief.

45. The second factor is whether the failure to comply was due to the party or his attorney-at-law. There was no indication that the failure to comply in this case is in any way attributable to

the fault of the litigant. The fault lay with the Appellants' attorney-at-law. If relief were refused the Appellants would have no evidence before the Court. They would in all probability fail. They may have a claim against their attorney which would be determined on a percentage basis for loss of a chance. The Appellants would therefore suffer real loss in the sense of being caused further delay and expense and also a likely reduction in the value of their claim. On the other hand if relief is granted the Respondents would suffer no prejudice and the Appellants would be able to resist what may turn out to be an unmeritorious claim. This factor seems to favour the grant of relief

46. The third and fourth factors may be considered together. In doing so I think it is appropriate, this being an appeal, to consider those factors in the circumstances as they were at the time when the Judge considered the application. In relation to whether the failure to comply could have been remedied within a reasonable time it is clear that at the time of the application the answer was in the affirmative. All that was required was for the Court to extend the time to the date the witness statements were in fact exchanged. With respect to whether any trial date could have been met if relief were granted, I think that it is clear that the trial date would not have been affected. The Respondents had the witness statements for some time before the trial date and did not intend to make any applications in respect of the witness statements.

47. The other factor I think of relevance is the question of prejudice which I have touched on before. It is clear that the Respondents suffered no prejudice by the exchange of the witness statements on November 1st. This was well before the pre trial review and the trial date and this must be a factor in considering whether or not to grant relief.

48. I think the weight of the factors lay in favour of the Appellants and when the overriding objective is considered, this is a patent case where relief should have been granted.

49. In the circumstances I would allow the appeal and set aside the Judge's Order in relation to the witness statements served on November 1st, 2011. The appeal is however dismissed in relation to the witness statement of Kissoo which was not served on November 1st, 2011 on Mr. Ramdeen. That witness statement and the evidence of the witness would therefore not be admissible in evidence as against the Fourth Respondent.

50. With respect to costs, I think as a general rule on an application for relief from sanctions, the applicant should pay the respondent's costs even if successful on the application. In this case however there is the consideration that the Respondents took objection to the application for relief from sanctions in relation to the witness statements that were served on November 1st which I am surprised that that they took. This no doubt would have added to the cost and expense of the application. On appeal, notwithstanding the applicant in the Court below should usually pay the costs of the application for relief from sanctions, he may still receive his costs of the appeal if the appeal succeeds as the respondent would have wrongly persuaded the Judge to refuse the application. In the circumstances of this case, therefore, where costs were unnecessarily inflated before the Judge and the Respondents failed, at least, in part on the appeal I would make no order as to costs both here and in the Court below.

Dated this 22nd day of June 2012.

Allan Mendonça
Justice of Appeal