THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P218 of 2021

Claim No. CV2019-04527

BETWEEN

PRIMILLA DIAL-SEEPAUL

Claimant/First Defendant to Counterclaim /Appellant

AND

GUARDIAN LIFE OF THE CARIBBEAN LIMITED

Defendant/Claimant to Counterclaim/Respondent

AND

PGM FINANCIAL SERVICES LIMITED

Second Defendant to Counterclaim

SERVUS LIMITED

Third Defendant to Counterclaim

PANEL:

P. Rajkumar JA

R. Boodoosingh JA

APPEARANCES:

Mr. E. Martinez for the Appellant

Mr. M.G Daly S.C, Ms. S David-Longe, Ms. L. Theodore for the Respondent

DATE: 25 March 2022

REASONS FOR DECISION

On 24 February 2022, an oral decision was delivered in this matter with an indication that we reserve the right to reduce that decision to writing and expand upon the reasons therefor. We now take the opportunity to do so.

1. Mrs. Dial, the claimant / appellant (the appellant) appealed the judge's order dated 19 October 2021 that having filed no defence to the counterclaim of the defendant / respondent (the respondent or Guardian), she was deemed to admit that counterclaim. Guardian Life of the Caribbean Limited is the defendant / respondent to this appeal. Her claim against Guardian was also struck out. Further, following from this, the judge's order was that there should be judgment against the appellant on admissions and the appellant was ordered to repay the sum of $633,912.00 received as Workmen's Compensation from the respondent.

2. The appellant filed several applications, dated 7 and 21 January 2022, and supported by affidavit evidence, after filing her appeal. These were:
    1. An application to **extend time** for the **filing of the procedural appeal** to 28 October 2021, (one day after the appeal should have been filed).
    2. An application to extend time for the filing of **the record of appeal** from 27 October 2021 to 1 November 2021.
    3. **An application to extend time** for the filing of s**ubmissions** in support of the appeal as provided for by CPR 64.9 (5).
    4. An application to amend the grounds of appeal.
    5. An application dated 4 February 2022 to adduce into evidence a letter sent by the respondent to the appellant dated 1 January 2016, and relief

from any sanction that may be necessary for a continuation of the appeal.

6. An application that orders of the judge be stayed pending the hearing and determination of the appeal.

3. We are at this stage concerned with the applications to extend time at 1, 2 and 3 because unless those applications succeed the others become academic. The particular focus of the hearing before us was the application at Item 3. That is because CPR Part 64.9 (5) (set out hereunder) provides that a procedural appeal shall be dismissed if no submissions are filed by the appellant within 21 days of the filing of the notice of appeal unless the court extends the time for the filing of the submissions:

   "(5) The written submissions in support of the appeal shall be filed within 21 days of the filing of the notice of appeal failing which the appeal shall be dismissed unless the court extends the time for the filing of the submissions."

4. The respondent's counsel has submitted that i. the rule is to be construed as requiring that if the submissions are not filed within 21 days of the filing of the procedural appeal, the appeal immediately and automatically stands dismissed, citing the decision of the three-member panel of the Court of Appeal in **Sonomed and Ors v RBC and Ors** C.A.CIV.P.346/2020. ii. A properly supported relief from sanctions application would then become necessary if a party wished to challenge the automatic dismissal. iii. The court must therefore consider the requirements of CPR 26.7.

5. The appellant's written submissions were not filed within 21 days of the filing of the procedural appeal. Accordingly, he contended that the appeal stood

dismissed since 24 November 2021. A belated application for relief from sanctions was filed on 4 February 2022 albeit in somewhat ambivalent terms. Counsel for the respondent further submitted that the application that was filed was not an effective application for relief from sanctions and could not be treated as such. It may be noted however that the respondent in its submissions filed on 10 February 2022 did address the application for relief from sanctions, though it alleged defects in that application which demonstrated alleged failures on the part of the appellant to meet the requirements of a relief from sanctions application.

6. Counsel for the appellant has submitted that, based upon the very wording of the rule it cannot be construed as providing for **automatic dismissal**. His construction was that the dismissal of the procedural appeal would only occur **after** a court has declined to extend the time for the filing of submissions on an application for this purpose. That being so, no sanction had yet been automatically triggered and therefore no application for relief from sanctions had yet become necessary. Put another way a procedural appeal would stand dismissed only upon a fulfilment of the **condition** that a court had not extended the time for the filing of those submissions on an (unsuccessful) application for this purpose. On this construction a party may apply for an extension of time after the date when the submissions became due rather than needing to make an application for relief from sanctions. If the court were to grant that extension, then the procedural appeal would proceed in the normal course with the respondent then having the opportunity to respond to the appellant's submissions. It would only be if or when an application for an extension of time is not successful, that the appeal shall be dismissed.

7. The interpretation of this rule has been considered by a three member panel in the case of **Sonomed and Ors v RBC and Ors** C.A.CIV.P.346/2020, which delivered an oral decision recorded in a transcript. The court in that matter held that the procedural appeal would stand **automatically** dismissed if submissions were not filed within 21 days of the filing of the notice of appeal, and the appellant must then mount a successful relief from sanctions application.

8. Were it not for the ***Sonomed*** decision, by a 3 member panel of this court, we would have considered that the argument of the appellant was worthy of consideration. It -would certainly have been arguable that this rule, (unlike CPR 27.3 (4) which was considered in **Super Industrial Services Ltd and another (Respondents) *v* National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago) [2018] UKPC 17),** does not provide for **automatic** striking out. The language of the instant rule is conditional, with a qualification as to the circumstances in which the procedural appeal shall be dismissed, (i.e. unless the court extends the time for the filing). It does not contain unambiguous language such as for example the words "**stands dismissed**" or "**automatically struck out**". These matters lend themselves to the construction propounded by the appellant that it is only on the **condition** being fulfilled that the appellant is unsuccessful on an application for an extension of time, that the appeal stands dismissed or shall be dismissed. It would then be arguable that because a sanction is **not automatically triggered** after the prescribed date for filing submissions has elapsed a party may file an application for an extension of time, rather than necessarily filing an application for relief from sanctions.

9. It would not be a fair criticism to suggest that such an interpretation would contribute to any culture of non- compliance, even assuming that any such

culture could have survived the draconian interpretations of the CPR. That is because even if a construction were to be adopted which permitted an application, not for relief from sanctions, but rather for an extension of time, the factors that are to be taken into account on an application for an extension of time are to a large extent the same. (See **Roland James** infra).

10. On either application a good explanation for the breach would be required. On either application an application must be prompt. Any application which does not satisfy either of those requirements, or in fact any of the others, could be promptly disposed of by a court, if it considers that the transgression has been the result of an adherence to a culture of non-compliance. There would be ample opportunity therefore for a court to sanction any negligent or contumelious disregard of the rule. However in this case that is not what the evidence discloses.

11. Being constrained by the decision in ***Sonomed*** it is necessary to construe the rule as though the appeal had been automatically dismissed, necessitating an application for relief from sanctions, rather than an application for an extension of time for filing submissions.

12. There is nothing however, that precludes the instant application for an extension of time as being treated as an application for relief from sanctions. In fact such an application was filed on 4 February 2022. It is possible to construe the appellant's submissions and affidavit for supporting such an application as being in the alternative, in the event that appellant's primary position of no sanctions being triggered were to have failed.

13. Even if such an application had not been filed it would have been possible to consider whether the evidence that had been filed in support of the various applications, including that for an extension of time to file submissions, satisfied the requirement for a relief from sanctions application and treat it as such an application. This was a course adopted by the Honourable Gobin J at first instance in the Universal Projects case, and recognised without adverse comment on appeal to the Privy Council. There is therefore nothing that precludes the court from so considering whether the evidence that has been filed meets the criteria for relief from sanctions.

14. This is all the more so because the factors that are applicable to an application for extension of time are the same as those that are applicable to an application for relief from sanctions under CPR 26.7. See **Roland James v AG Civil Appeal No. 44 of 2014 per** Mendonça JA **(**All emphasis added**)**

> *20. Unlike rule 26.7, rule 10.3(5) does not contain a list of criteria for the exercise of the discretion it gives to the Court. The question then arises, how the Court's discretion is to be exercised. I think because no criteria is mentioned in rule 10.3(5) it was intended that the Court should exercise its discretion having regard to the overriding objective (see Robert v Momentum Services Ltd. [2003] EWCA Civ. 299).*
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> *21. The overriding objective of the CPR is identified in rule 1.1(1) as enabling the Court to deal with cases justly. Rule 1.1(2) identifies some of the considerations relevant to dealing justly with the case. This rule is as follows: "(2) Dealing justly with the case includes- (a) ensuring, so far as is practicable, that the parties are on an equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate to- (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party; (d) ensuring that it is dealt with expeditiously; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

22. It is relevant to note that the list in 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances. This begs the question, what other circumstances may be relevant. In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that the promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7(4) in considering whether to grant the application or not.

23. In an application for relief from sanctions there is of course a threshold that an applicant must satisfy. The applicant must satisfy the criteria set out at rule 26.7(3) before the Court may grant relief. In an application for an extension of time it will not be inappropriate to insist that the applicant satisfy that threshold as ***the treatment of an application for an extension of time would not be substantially different from an application for relief from sanction.*** *Therefore on an application for extension of time the failure to show, for example, a good explanation for the breach does not mean that the application must fail. The Court must consider all the relevant factors. The weight to be attached to each factor is a matter for the Court in all the circumstances of the case.*

24. Apart from the factors already discussed the Court should take into account the prejudice to both sides in granting or refusing the application. However, the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all the relevant factors. Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application. The Court must take into account the respective disadvantages to both sides in granting or refusing their application. I think the focus should be on the prejudice caused by the failure to serve the defence on time.

51. In giving effect to the overriding objective I must weigh the material considerations that favour the refusal of the application namely, from what I have said above, the failure to provide a good explanation for the

breach as well as the failure to comply with the direction governing preaction protocols, against the prejudice to the defendant in not being able to serve the defence and where the administration of justice in this case would favour the grant of the extension. As I have mentioned before, ***the weight to be attached to the relevant factors is a matter for the Court in each case depending on the circumstances****. In determining that aspect it is relevant to adopt a calibrated approach to the question of delay and the failure to provide a good explanation. The greater the delay the greater the weight to be attached to the absence of a good explanation. In this case the delay is not significant and the absence of a good explanation should not outweigh the considerations that favour the grant of the application….*

52. The aim of the overriding objective is to deal with cases justly. Dealing with this case justly requires the grant of the extension. To refuse to do so in the circumstances of this case will be a wholly disproportionate response and unjust…

15. As stated by the Honourable Mendonça JA at paragraph 23 the treatment of an application for extension of time will not be substantially different from an application for relief from sanctions.

16. There are some differences between the two applications. These include the following:

    I. The court must consider the overriding objective;

    II. A court can consider any or all of the relevant factors in CPR 26 .7 (1), 26.7 (3),26.7 (4) and 1.1 (2) and ascribe to them such weight as it thinks fit;

    III. The issue of prejudice to either party must be considered.

On the appellant's applications all of the relevant factors were addressed.

THE APPLICATION BEFORE THE COURT

The appellant's evidence on affidavit was as follows:

17. The judge's order was made on 19 October 2021. The appeal was filed on 28 October 2021. On 1 November 2021 the record of appeal was filed. On 3 January 2022 the then attorney for the appellant received an email from the court indicating that the appeal was wrongly filed as a substantive appeal and the matter was a procedural appeal and due to be heard on 14 February 2022.

18. Ms Dial's affidavit, filed 21 January 2022, gave the history and reasons. She stated the claim was filed on 5 November 2019 alleging negligence. This claim resulted from an injury she received on the job for which she was paid workmen's compensation by the respondent. She disclosed in the claim the payment to her of workmen's compensation. The defence and counterclaim were filed on 23 September 2020. She was advised by her previous attorneys that no defence to the counterclaim was filed because the counterclaim was based solely on an indemnity. When she was paid workmen's compensation it was never advanced by the respondent that she was never an employee. The Commissioner's order for workmen's compensation was not appealed.

19. The respondent applied on 4 May 2021 to obtain judgment on admissions and for the claim against it to be struck out. The application was heard, submissions were made, and she was awaiting a ruling.

20. She thought she would be informed of the ruling once given. However, she had spoken to her attorneys and given instructions to them to appeal if the ruling was not favourable to her.

21. On 6 January 2022, while searching her name on the internet, she came across the judiciary website and was surprised to learn that on 19 October 2021 an

order was made by the judge. She did not know this before. On seeing this she contacted her previous attorneys and was told that an appeal had in fact been filed since 28 October 2021.

22. Ms. Dial states she is severely prejudiced by the order striking out her claim. Additionally, she indicated she was in quarantine from mid-October after a close relative tested positive for Covid 19. That relative died on 21 November 2021. It took 16 days to have the arrangements made for the funeral. Having attended the funeral she had to undergo quarantine again for 21 days from the date of the funeral. She deposed the delay was not her fault. She changed attorneys in January 2022. She notes that her appeal is raising the argument that the respondent should not benefit from the order for reimbursement as the judge had no jurisdiction to deal with that aspect of the claim. She therefore advances that she has good prospects on her appeal.

23. The submissions were filed on 21 January 2022 along with the extension of time application. The appeal having been due on 27 October 2021, submissions were due just after the middle of November 2021.

PROMPTITUDE

24. An application for relief from sanctions must be made promptly. Promptitude is however contextual. The application of 4 February 2022 was filed 73 days after the submissions would have been due. Her previous attorneys did not file the submissions, there being a misunderstanding whether the appeal was a substantive appeal or a procedural one. However they were filed within 21 days of the appellant's becoming aware of the fact that the appeal was actually a procedural one. The reasons for this misapprehension were explained in

sufficient detail to establish that the error was due to a genuine misunderstanding without fault of attorneys, and steps were taken to remedy it at the first opportunity by current attorneys. It did not involve substantial fault nor inexcusable oversight on the part of the appellant or her current attorneys. Oversight may be excusable in certain circumstances[1].

25. The delay in filing submissions was a matter within the control of the attorneys and not the appellant. She has explained the difficult circumstances she faced during the October to December period. Without attributing fault, there appeared to be some misunderstanding involving the previous attorneys and the court office neither of which was within her knowledge or control. She did what was within her control in early January by instructing new attorneys who filed the application promptly thereafter. In these circumstances the application cannot be said to be not prompt.

WHETHER GOOD EXPLANATION FOR THE BREACH

26. In the circumstances outlined above there existed a sufficiently good explanation for the breach which did not amount to **inexcusable** oversight.

PREJUDICE

27. It is clear that the appellant would be severely prejudiced by the inability to advance her appeal for reasons which cannot be laid at her doorstep. By the

[1] Paragraph 23 AG v Universal Projects [2011] UKPC 37
23. The Board cannot accept these submissions. First, if the explanation for the breach i.e. the failure to serve a defence by 13 March 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.

order of the trial judge she would be required to repay substantial monies already paid to her for Workmen's Compensation, when no appeal was lodged to that initial award. Having regard to the nature of the appeal which raises the issue of jurisdiction to even order that repayment, the prejudice to the appellant is patent. The prejudice to the respondent would be far less severe. It would have to wait for repayment of that compensation which had been paid in prior proceedings.

28. The other factors in CPR 26.7 are not of relative significance in these circumstances and they do not outweigh the obvious prejudice to the appellant if she is not permitted to pursue her appeal.

WHETHER FAILURE TO COMPLY WAS INTENTIONAL

29. The failure to comply could not be characterised as intentional on the basis of the affidavit evidence filed. There was a misunderstanding by attorneys which was rectified at first discovery, and opportunity. That failure to appreciate that the appeal was actually a procedural one was not a matter that could be characterised as intentional. In any event the appellant's current attorneys acted with reasonable dispatch in filing their applications.

GENERAL COMPLIANCE WITH COURTS ORDERS, RULES, DIRECTIONS

30. The late filing of the appeal by one day, and the filing of the notice of appeal without the simultaneous filing of the bundles of documents, were both matters remedied within an extremely short period of time. They would not amount to such general non-compliance as to weigh against the court's exercise of discretion in the appellant's favour.

31. Having surmounted those threshold considerations in order to consider whether relief from sanctions should be granted the following matters are relevant.

I. INTERESTS OF THE ADMINISTRATION OF JUSTICE

32. For all the reasons considered herein previously, including the disproportionate effect on the appellant of not granting relief, and the substantial prejudice to her, it would be appropriate to grant relief from sanctions and permit the late filing of the appellant's submissions to stand. The respondent would have the opportunity to respond to those submissions as provided below.

II. WHETHER THE FAILURE TO COMPLY WAS DUE TO THE PARTY OR HIS ATTORNEY

33. Any default in compliance was not due to the appellant herself. Such default as did occur on the part of her attorneys was explicable, and in the circumstances, excusable, especially given that they then acted with dispatch to ensure that submissions were eventually filed before the hearing date set for the procedural appeal. The consequences of not granting relief from sanctions would be draconian and should not be visited upon the appellant in the present circumstances.

III. WHETHER THE FAILURE TO COMPLY HAS BEEN OR CAN BE REMEDIED WITHIN A REASONABLE TIME

34. In this case it can.

IV. WHETHER THE TRIAL DATE CAN STILL BE MET IF RELIF GRANTED

35. The date for the procedural appeal was 14 February 2022.The submissions were filed sufficiently in advance of that date to have allowed it to proceed were it not for the objection to their filing.

V. THE QUESTION OF PREJUDICE

36. There is no impediment to treating the applications filed as being, on the facts of this case, an application for relief from sanctions or equivalent to one. That is because the application of 4 February 2022 was clearly such an application and/ or because the applications before the court and the affidavits in support thereof provided the equivalent evidential basis for such an application. Therefore, relief from sanctions should be granted. A consequential order for the respondent to file its submissions within 28 days would be appropriate, with the hearing of the procedural appeal thereafter being adjourned.

37. After hearing the parties on costs and having considered CPR 26.7(5) it was ordered that each party bear her/its own costs.

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Peter A. Rajkumar
Justice of Appeal

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Ronnie Boodoosingh
Justice of Appeal