

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Scarborough Sub- Registry (Virtual Hearing)

Claim No. CV 2019-03948

Between

**Isaac Bailey**

Claimant/Respondent

And

**The Attorney General of Trinidad and Tobago**

Defendant/Applicant

**Before the Honourable Madam Justice Eleanor J Donaldson-Honeywell**

Delivered on: 8 June 2021

**Appearances:**

Abdel Mohammed and Shabaana Mohammed, Attorneys-at-Law for the  
Claimant/Respondent

Mary Davis and Kezia Redhead, Attorneys-at-Law for the Defendant/ Applicant

**RULING**

**A. Introduction**

1. This Ruling determines an application by the Defendant for relief from sanctions for failing to file Witness Statements.

2. The parties attended for a Pre Trial Review (“PTR”) hearing on 10 May 2021. The PTR agenda items, set by directions ordered in the presence of the parties at a Case Management Conference (“CMC”) on 16 October 2020, included consideration of any evidential objections to the Witness Statements for which the filing/exchange deadline was 1 March 2021. However, when parties attended for the 10 May 2021 PTR only the Claimant had complied with the directions regarding Witness Statements.
3. The Defendant’s representative signaled an intention to apply for relief from sanctions and an extension of time to file Witness Statements. The expectation was that the Court could then consider the application in time for the Defendant, if permitted by the Court, to file/serve Witness Statements to call witnesses for the Trial, which is set for 13 August 2021.
4. The Application was filed, just after the PTR hearing on 10 May 2021. Thereafter, the Court directed that parties file Affidavits and submissions with a view to an expedited decision on the application. The final submission was filed on 26 May 2021.
5. For the reasons explained in this Ruling, the Court’s determination is that the Defendant has failed to establish the threshold requirements for relief from sanctions. Accordingly, the Application will be dismissed.

## **B. Issues**

6. The issues relevant to this decision are set out in the applicable rules of Court. Since the Defendant failed to file Witness Statements within the time permitted, the automatic sanction under **Rule 29.13 of the Civil Proceedings Rules 1998, as amended (“CPR”)** is in effect. The sanction is that the Defendant may not call witnesses unless the court permits.
7. The procedure, correctly adopted by the Defendant to seek such permission, is an application for relief from sanctions under CPR 26.7 and for an extension

of time to file Witness Statements. The application is a necessary step to obtain permission to call witnesses after failing to comply with the filing deadline.

8. CPR 26.7 lists, at sub-section (3), the threshold requirements for the Court to grant relief from sanctions. Thereafter CPR 26.7 (4) sets out some other matters to be considered once that threshold is met. The effect of these provisions, as explained by Mendonca JA in **Civil Appeal No. 52 of 2012 Rawti Roopnarine v Harripersad Kissoo et al**, at para 15 is that;

*“...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.”*

In the instant case, it is not necessary to consider the other factors, as will be further explained herein, because there is no evidence of meeting the threshold in the Defendant’s application.

9. The Privy Council and Court of Appeal’s extensive jurisprudence on the application of this rule, in cases such as **Attorney General v Universal Projects Ltd (2011) UKPC 37** and **Civil Appeal No. 52 of 2012 Rawti Roopnarine v Harripersad Kissoo et al**, provide guidance on determining whether the threshold requirements for relief from sanctions are established.

10. The cases of **Civil Appeal No. 44 of 2014 Roland James v Attorney General** and **CV2019-02053 Martin George v Attorney General et al** cited by the Defendant are not applicable to this determination. Those cases address applications for extensions of time for filing of a party’s Defence, where there is no automatic or express sanction for late filing. In those cases, unlike this one, relief from sanctions is not required.

11. The threshold issues to be determined based on CPR 26.7 are as follows:
  - i. 26.7(1) – Was the application made promptly?

- ii. 26.7(2) - Is the application supported by evidence?
- iii. 26.7(3) -
  - 1. Was the failure to file and exchange Witness Statements intentional?
  - 2. Is there a good explanation for the breach?
  - 3. Has the Defendant generally complied with all other relevant rules, practice directions, orders and court directions?

### C. Analysis and Findings

12. The Threshold requirements will be examined in turn.

#### *Promptitude*

13. The Defendant's application for relief from sanction for failures regarding Witness Statements came two and a half months after the date of the breach. In submissions, the Defendant cites **Rawti** in seeking to persuade the Court to consider its Counsels' alleged lack of knowledge of the breach in deciding whether the application was prompt.

14. Mendonca JA in **Rawti** at paragraph 26 said:

*"...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"*

15. In the same Judgment Mendonca JA opined at paragraph 8 that:

*"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".*

16. In this case, the factual circumstances are clearly distinguishable from those in **Rawti**, where, prior to a three-month delay in applying for relief, the applicant

had filed Witness Statements within the permitted deadline. Due to errors by a process server, there was failure to exchange on time.

17. Here the context is different as there is no indication of genuine lack of knowledge of the directions given in the presence of both parties to file Witness Statements by 1 March 2021. Inadvertently, forgetting that Witness Statements had to be prepared, filed and exchanged does not, in my view, amount to the type of lack of knowledge that can be considered in deciding that the application was prompt in the context of this case.

18. This is so particularly in the context of the evidence in the Claimant's affidavit in opposition to this application. The Claimant underscores that the Defendant was indeed aware of the directions for filing/exchange of Witness Statements given on 16 October 2020 as is evident from their compliance with the disclosure timelines also included in the said order. Such compliance is reflected in the Court's records, as is the fact that it was in compliance with that Order in which the Defendant was represented by counsel at the hearing on 10 May 2020, which was expressly set for consideration of objections to evidence in Witness Statements.

19. In these circumstances, the Defendant has not established that this application was made promptly. On this ground, the application fails, but for completeness, I will consider all the threshold requirements.

*Supported by Evidence*

20. The Defendant's application includes an Affidavit sworn to by its instructing Attorney-at-Law. However, some of the information in the Affidavit is not credible as evidence in support of the application.

21. The Affidavit states at paragraph two that, on 4 August 2020, the Court made an order directing the parties to file Witness Statements by 1 March 2021. Instructing Attorney states that she attended the CMC on 4 August 2020

without Counsel, who was on leave at the time. She states that she inadvertently omitted to record the directions regarding Witness Statements.

22. The Claimant's Affidavit underscores, however, that the Witness Statement directions were not given until the CMC on 16 October 2020. This is reflected in the Court's record by a perfected Order of the said date, which the Registrar emailed to both parties. Thus, although it is correct that only the Instructing Attorney attended on 4 August 2020, there could have been no failing on her part in taking note of Witness Statement directions at that time. The Court issued no Witness Statement directions on that date. The Order with the directions made thereafter in October was perfected and sent to the parties.
23. At paragraphs 5 and 6 of the Affidavit, the Defendant seeks to bolster its case that it had no knowledge of the passing deadline for filing and serving Witness Statements by contending that the Claimant also failed to comply. The Defendant suggests that if the Claimant had served them with his Witness Statement that would have alerted them to the missed deadline before the PTR hearing.
24. However, this statement by the Defendant is incorrect. The Claimant's Affidavit and the Court's record reflect that the Claimant's Witness Statement was filed on time. The Claimant brought this to the Defendant's attention by serving his Witness Statement and a Hearsay Notice on the Defendant on 8 March 2021, as indicated in exhibit "S.M.1" to the Claimant's Affidavit. The affidavit provides no evidence of what steps, if any, the Defendant took after receiving the Claimant's witness statement.
25. In light of the foregoing, there is insufficient credible evidence in support of the Defendant's application.

### *Intentional or Not*

26. In **Civil Appeal No. 91 of 2009 Trincan Oil Ltd v Schnake**, Jamadar JA as he then was, stated that:

*“[T]o establish intentionality for the purposes of Part 26.7(3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the non-compliance.”*

27. Although disputed by Counsel for the Claimant in submissions, it is my finding that there is nothing in the circumstances surrounding the breach to justify a finding that the Defendant deliberately failed to meet the deadline for Witness Statements.

28. The Defendant has established that the breach was due to inadvertence. This is clear as the Defendant’s Attorney-at-law admits to failing to record the date. This circumstance, while not an indication of intentionality, must be further considered as to whether it is a good explanation.

### *Good Explanation*

29. The Defendant submits that there are a number of good explanations for the breach. As aforementioned, the Defendant’s first explanation is that there was inadvertence in failing to record the date. There is merit to the submission of counsel for the Claimant, citing the Privy Council dicta in the **Universal Projects** decision, that this administrative error cannot *per se* be accepted as a good explanation. At paragraph 23 of the Judgment the Privy Council observed:

*“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.”*

30. Even if there was this failing to record the date for filing Witness Statements, it is clear that the Defendant was aware, generally, of the fact that directions were given in an Order issued on 16 October 2020. This is so because those directions included disclosure orders.
31. The Claimant's Affidavit and the Court's record reflect that the Defendant duly engaged in the disclosure process from December 2020 to January 2021. As such, they were fully aware of the Court's 16 October 2020 Order, which included the Witness Statement directions. The Defendant was represented at the CMC when the directions were given on 16 October 2020.
32. There must, therefore, have been further inadvertence in failing to file Witness Statements, yet attending for the PTR on 10 May 2021 when they were to be considered. Additionally, the 16 October 2021 CMC Order reflects that parties agreed to a Trial scheduled for August 2021. In the normal course of proceedings, the parties would be aware that preparation of Witness Statements is required for Trial.
33. The Defendant's Affidavit indicates that the last effort made to secure instructions from the witnesses was in December 2019, three months after the Claimant filed his case. This taking of instructions by the Defendant was long before the eventual filing of its Defence in June 2020. There is no good explanation why, after the disclosure exchanges in January 2021, the instructions in hand since 2019 were not used to prepare Witness Statements.
34. The Defendant's second explanation is that administrative difficulties due to the Covid-19 pandemic in 2020, increased emergency matters and high turnover of staff adversely affected the Department of Chief State Solicitor. Attorneys in the Department, including the instructing Attorney in the instant matter who also has "over a hundred" other active matters, were "overburdened but actively making every attempt to obtain instructions and meet deadlines".

35. These difficulties do indeed appear to be extremely daunting, especially taking into account the need to cope mentally and administratively with the unprecedented work arrangements during the Covid-19 Pandemic.

36. Counsel for the Claimant underscored in submissions however, that Kokaram JA in **Civil Appeal No. S035 of 2020 Well Services Petroleum Company Limited v Darlington Francois** provided guidance on whether Covid-19 circumstances amount to good explanation for breach. He said:

*“34. Ultimately, the consideration of the impact, if any, the Covid-19 pandemic has had on a party in complying with particular timelines, orders or directions remain context specific. The following should be noted in relation to the impact of the pandemic on applications for extensions of time:*

*a) The Covid-19 pandemic does not relax the legal standard or test to determine an application for an extension of time under Rule 26.7 CPR.*

*b) The Court will be guided by the factors of promptitude, good explanation for the breach, intentionality, general compliance, the interests of the administration of justice, whether the failure to comply was due to the party or his attorney, whether the failure to comply has been or can be remedied within a reasonable time, whether the trial date can still be met, prejudice, (merits in the instance of a substantive appeal) and the overriding objective.*

*c) The culture of compliance and trial date certainty developed under the CPR has not been suspended by the pandemic.*

*d) The Court will expect parties to continue to make appropriate use of technology in the delivery of legal services and in meeting deadlines.*

*e) Parties ought not to rely on bald or vague statements of hardship in relation to the Covid-19 pandemic but must condescend to particulars to demonstrate how the pandemic has impacted the party’s ability to comply with the Court’s directions for the Court to properly attribute the relevant weight to that explanation. Indeed, the impact of the Covid-19 pandemic may give context to an assessment of promptitude,*

*good explanation for the breach, whether failure is due to the attorney or client. It is for the applicant to provide the details of any serious challenges and not to have the Court speculate on them. The Court must be cognisant of the real (as opposed to fanciful) challenges posed to litigants caused by the Covid-19 pandemic.*

*f) In setting deadlines during this time, the Court should work with the parties to establish realistic targets and deadlines having regard to the challenges presented with the use of technology and online services and the lack of access to it where it exists in relation to some clients.*

*g) Parties should first seek agreement and co-operate with each other when deadlines are drawing near, when the difficulties that this “new normal” has genuinely placed litigants and their representatives can be explained and appreciated. I continue to encourage a credo of procedural consensus to avoid procedural disputes to further the overriding objective.”*

37. Applying this guidance to the instant case, it is my finding that the Covid-19 pandemic circumstances do not provide a good explanation for the failure to record the deadline date for Witness Statements or to take appropriate action when the perfected Order and the Claimant’s Witness Statement were received.

38. The Defendant’s third explanation for breaching the deadline is that limited flight availability due to the pandemic restrictions made it difficult to meet with the witnesses who reside in Tobago. This too is not a good explanation. Travel to Tobago is not necessarily required in order to take instructions from witnesses or to have Witness Statements signed. Technology, such as online meetings or even telephone interviews, can be used. There can be electronic signing of documents.

39. The extract above from the **Well Services Petroleum** case highlights that it is the “*use of technology and online services and the lack of access to it where it*

*exists in relation to some clients*” that may be of relevance in setting or meeting case management deadlines. The Defendant does not rely on such difficulties in this case. Furthermore, even if they had technical difficulties, no good explanation is provided for not seeking a timely extension of time before the sanction for failure to file Witness Statements took effect.

40. Having considered all the reasons given it is my finding that there was no good explanation by the Defendant for the breach.

#### *General compliance*

41. The Defendant contends that there has been general compliance by the Defendant with other rules, court orders and practice directions. This is not correct. As pleaded by the Claimant at paragraph 27 of the Statement of Case filed on 30 September 2019, the Defendant failed to respond to a pre-action protocol letter sent by the Claimant’s Attorneys. This failing breached the Practice Direction on Pre-Action Protocols issued in 2005 pursuant to the CPR. The failing is admitted at paragraph 17 of the Defence.
42. Additionally, the Defendant failed to file a Defence within the time prescribed in the Rules. There were three extensions of time for this filing, which was not completed in a timely manner. As a result, pleadings in a Claim commenced in September 2019 were not closed until nine months later in June 2020.
43. The Defendant fails in meeting the threshold requirement of proving general compliance.

#### **D. Conclusion**

44. The Defendant has not established meeting the threshold requirements under any of the applicable sub-sections of the rules, namely CPR 26.7 (1), (2) and (3). Failure to meet any one of these requirements is sufficient basis for ruling against relief from sanctions. Accordingly, the Claimant’s objection to the application will be upheld.

**45. IT IS HEREBY ORDERED** that

- i. The application filed on 10 May 2021 is dismissed.
- ii. The Defendant is to pay the Claimant's costs of the application in an amount to be assessed by the Court if not agreed.

*EJD. Honeywell*

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Eleanor Joye Donaldson-Honeywell

Judge