NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1993/E 083

BETWEEN	RBTT BANK JAMAICA LIMITED	CLAIMANT
AND	Y.P. SEATON	FIRST DEFENDANT
AND	EARTHCRANE HAULAGE LIMITED	SECOND DEFENDANT
AND	Y.P. SEATON & ASSOCIATES COMPANY LIMITED	THIRD DEFENDANT

CLAIM NO. C.L. 1993/S 252

BETWEEN	Y.P. SEATON	CLAIMANT
AND	RBTT BANK JAMAICA LIMITED	DEFENDANT

IN CHAMBERS

Hilary Phillips Q.C. and Kevin Williams instructed by Grant Phillips Stewart and Company for RBTT Bank Jamaica Limited

Pamela Benka Coker Q.C., Andre Earle and Anna Gracie instructed by Rattray Patterson Rattray for Y.P. Seaton, EarthCrane Haulage Limited, Y.P. Seaton & Associates Company Limited

September 19, 25, 2007 and October 1, 2007

APPLICATION TO VARY UNLESS ORDER, OVERRIDING OBJECTIVE, RULES 1.1, 1.2, 1.3, PARTS 29 AND 33 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. It is now 2007. The claims are fourteen years old. One of the original litigants, Eagle Commercial Bank ("Eagle"), has ceased to exist.

2. The litigants in the claims are (i) RBTT Bank Jamaica Limited ("RBTT" or "the bank") and (ii) Mr. Y.P. Seaton, EarthCrane Haulage Limited ("EarthCrane") and Y.P. Seaton & Associates Company Limited ("SAC"), collectively referred to as "YP". Where necessary I shall identify the litigants by the shortened names I have given to them. I shall refer to Mr. Y.P.Seaton by his name. The bank is the claimant in Claim No. C.L. 1993/E 083 ("the first claim") and the defendant is Claim No. C.L. 1993/ S 252 ("the second claim"). YP are the defendants in the first claim and Mr. Y.P. Seaton is the claimant in the second claim.

3. The facts that gave rise to the litigation need not be gone into in any great detail because nothing turns on the facts in issue between the parties on this application. Nonetheless a very brief summary is given. The summary for the first claim comes from Eagle's statement of claim. Eagle was a bank licensed to operate in Jamaica. Mr. Y.P. Seaton is the holder of the majority of shares in EarthCrane and SAC. Eagle acted as banker for a company known as Jamaica Commodity Trading Company Limited ("JCTC") and an overseas company, Prolacto S.A. It appears that Prolacto shipped quantities of skimmed milk to JCTC. JCTC maintained accounts at Eagle from which moneys would be deducted to pay Prolacto. Mr. Seaton, EarthCrane and SAC also maintained accounts at Eagle. Eagle alleges that Mr. Y.P. Seaton and SAC were, at all material times, either servants or agents of Prolacto and would give instructions to Eagle on behalf of Prolacto. Eagle further alleged that for services provided by Eagle it was entitled to charge JA$1,514, 656.00. In error, it is said, this sum was paid into the accounts held by the three defendants. It is alleged that the defendants were not entitled to any of the money.

4. Eagle also alleged that Prolacto shipped 1879.85 metric tonnes to JCTC. Acting on the instructions of the defendants Eagle paid money out of JCTC's accounts into the defendants' accounts. The sum allegedly paid was US$131,119.54. In respect of another shipment Eagle states that it erroneously paid into the accounts of the defendants moneys from JCTC's account. The sum involved in this alleged error was JA$8,905,408.10.

5. Eagle says that it discovered the error and when this was pointed out to the defendants, they refused to return the money. Eagle responded by debiting JA$15,254,583.69 from the defendants' accounts. This sum represents the total mistaken payments and interest. Eagle claimed the sums mistakenly paid

and a declaration that they were entitled to debit the defendants' accounts in the sum of JA$15,254,583.69.

6. In the second claim Mr. Seaton's claim against the bank is simply that he had deposited money in Eagle which refused to pay over the money when asked to do so. He claims the sums deposited, interest on those sums and damages.

7. The primary issue on this application is whether RBTT should be allowed a variation of an order (paragraph 3 of the order) made by Sykes J. on April 26, 2007, in the following terms:

> *In respect of the claimant in Claim No. C.L. 1993/E 083 unless the claimant files and serves a witness statement (not a witness summary) on or before July 30, 2007 at 3:00pm the claim is struck out and judgment entered for all the defendants without further order.*

8. The application, dated July 26, 2007, by RBTT is in the following terms:

> a. That paragraph 3 of the Order of the Honourable Mr. Justice Sykes dated the 26th day of April 2007 be varied to permit the filing of a witness summary and that the witness summary of [name of witness omitted by the Court] filed on the 25th July 2007 do stand.
>
> b. That the date for the compliance with the Unless Order of the Honourable Mr. Justice Sykes be extended.
>
> c. That in the alternative the claimant/defendant RBTT Bank Jamaica Limited be granted relief from the sanction pursuant to part 26.8 of the Civil Procedure Rules and be permitted to file a witness statement in this matter at a time to be fixed by the Court.

9. What is it that led to the unless order being made? I shall attempt to summarise the story of this sorry tale of dilatory litigation. The first part of the litigation took place under the ancient regime of the Civil Procedure Code, the rules that accompanied the establishment of the Supreme Court of Jamaica by the Judicature (Supreme Court) Act of 1880, that implemented the

fusion of the administration, not a fusion of law, of the various superior courts of record of the Island of Jamaica. The second part of the litigation took place under the new Civil Procedure Rules ("CPR") which replaced the Civil Procedure Code on January 1, 2003.

Part one

10. In order to make the chronology of events easy to understand I shall relate, separately, the history of both claims from their inception to February 9, 1995, when the order for consolidation was made by the Master. Let me begin with Claim No. 1993/ E 083. In relating the account of the litigation I shall be using the language appropriate for the pre-CPR and post-CPR periods.

Claim No. 1993/E 083 (RBTT Bank Jamaica Limited v Y.P. Seaton, EarthCrane Haulage Limited and Y.P. Seaton & Associates Company Limited)

11. On August 6, 1993, Eagle launched this claim by filing a writ of summons against Mr. Y.P. Seaton and EarthCrane. One year later, on November 2, 1994, SAC was added as the third defendant. Mr. Seaton and EarthCrane entered appearances to the claim on August 17, 1993. The statement of claim was filed on September 16, 1993. Defence were filed by the first two defendants on December 8, 1993. It would appear that all was ready for trial since pleadings, on the face of it, were closed. Each side knew on what points issue was joined which would determine the evidence that needed to be adduced. The next step was the filing of a summons for directions on August 16, 1994. This summons deals with trial dates, venue of trial and other matters related to the actual trial. This summons for direction was eventually heard on February 9, 1995. Had the summons been heard and the appropriate orders made the matter in all probability would have been tried by 1999/2000, that is to say, seven years after the claim was filed.

12. I must indicate the significance of the summons for directions under the old rules. Carey P (Ag) in ***Bruce Golding (On behalf of and Representing the Standing and Central Executive Committees of the Jamaica Labour Party) v Pearnel Charles*** (1998) 28 J.L.R. 267 had to examine the significance of the summons for directions. His Lordship was speaking of litigation under the Civil

Procedure Code which is a direct descendant of the English Rules of the Supreme Court. His Lordship said at page 250B:

> *From what I have said thus far, it is clear that an order on a summons for directions is a condition-precedent to an action coming on for hearing in the Supreme Court. It is the order for trial made by the judge on the summons for directions which sets in motion the setting down process carried out by the Registrar. In my judgment, neither of the parties to an action can unilaterally or consensually set the action down for trial; the intervention of the court is a sine qua non.*

13. Carey P (Ag) precedes this passage with this observation at page 249H-I:

> *One of the orders made by the judge on a summons for direction is to fix the time within which the plaintiff is to set the action down for trial (section 342 (1)). Of course, if the plaintiff fails to comply with the order, the defendant is himself at liberty either to apply to set the action down for trial or apply to dismiss (section 342 (2)). In order to set the action down, the plaintiff makes a written request of the Registrar copied to the defendant, to do so. The rule actually requires notification of the defendant of this fact within twenty-four hours by the plaintiff but the practice is, as I have indicated. (Section 343 (2)) (sic).*
>
> *Thereupon the Registrar in the order of the receipt of the requests by plaintiffs enters (section 344 (2)) the action on one or other of the two Cause Lists which he is enjoined by section 344 (1) to keep. Section 344 (5) which is concerned with the mechanics of arriving at dates for trial was refined by a practice Direction (sic) dated January 24, 1989. For purposes of this appeal, I need say no more of it, except to comment on one aspect thereof. There is now introduced a requirement whereby the plaintiff's attorney files a document called a "Certificate of Readiness." It is intended to show that the parties are now ready to prosecute the litigation seriously, presumably because all outstanding fees have been paid.*

14. It is clear, therefore, that the filing of a summons for direction is a very, very significant step. It usually means pleadings are closed, the issues have

been joined and the matter is ready for trial. Under this party driven system, it was the litigant who actually indicated that he was ready for trial. When Carey P (Ag) referred to outstanding fees, he was referring to the fact that attorneys would be reluctant to proceed to trial until their clients had settled all fees. The filing of certificates of readiness, referred to by Carey P. (Ag), was another very significant step in litigation under the old rules. In this matter, the filing of a certificate of readiness by the claimant has assumed great importance in my decision.

15. Sadly, the litigation went off course. Eagle, on August 16, 1994, filed a notice for further and better particulars from Mr. Seaton and EarthCrane. As stated earlier SAC was added as a third defendant on November 2, 1994. SAC entered an appearance by November 23, 1994, one week after the amended writ and statement of claim were filed. SAC filed its defence on February 7, 1995. On February 8, 1995, the three defendants asked Eagle for further and better particulars. On May 30, 1995, the summons to place this claim on the cause list was heard and an order granted to that effect.

16. The summons for directions was heard on February 9, 1995. An order consolidating the claims was made on February 9, 1995. After the summons for direction was heard, the preparations for trial continued. Mr. Seaton filed an affidavit of documents on June 26, 1996. On October 7, 1996, Mr. Seaton and EarthCrane filed an amended defence. This defence referred to the third defendant and two other very minor changes the defence originally filed but beyond that it was identical to the defence filed previously.

17. Let me now relate the history of the second claim before consolidation.

Claim No. C.L. S 252/1993 (Y.P. Seaton v Eagle Commercial Bank Limited)

18. On August 26, 1993, Mr. Seaton filed his claim against Eagle. Eagle entered an appearance on September 9, 1993. The statement of claim was filed October 15, 1993. An amended statement of claim was filed on April 8, 1994. The defence was filed April 19, 1994. The reply was filed on August 11, 1994.

19. The summons for directions was filed on September 19, 1994, but was not heard until February 9, 1995 along with the summons for directions filed in Claim No. C.L. 1993 / E 083 when orders were made indicating to the parties the necessary preparations for trial.

Consolidation and beyond

20. One of the orders usually made on the summons for directions was that the matter has to be set down for trial within thirty days of the date of the hearing of the summons. When the consolidation order was made, the matter was ordered to be set down within thirty days of the order. On May 30, 1995, an order was made granting Eagle a further twenty one days to get the matter on the cause list.

21. I need to make a correction to my oral judgment. I had said that Eagle filed a certificate of readiness on June 14, 1996. I got this information from the respondent's chronology. I have examined the files and I have not seen this document. I am not saying it was not filed. I have not found it. It is not clear which party, if any, filed a certificate of readiness on June 14, 1996.

22. What is clear is that Eagle filed a certificate of readiness on November 23, 1999. It is important to look at the terms of this document. It states:

> *We, the Attorneys-at-law for the Plaintiff hereby certify that:*
>
> *1. Our clients and ourselves are ready to proceed to trial.*
>
> *2. We expect to call witnesses as follows:*
>
> | *NUMBER OF ORDINARY WITNESSES* | *NUMBER OF EXPERT WITNESSES* |
> |---|---|
> | *3* | *3* |
>
> *3. We hereby certify that: All orders made on the Summons for Directions have been complied with.*
>
> *4. This action is on the Cause List as of the 5th day of June, 1995.*

23. The certificate speaks for itself and needs no comment. The ***Pearnel Charles*** case cited above establishes the significance of the certificate.

24. On June 26, 1996, the defendants filed an affidavit of documents. This was the equivalent of what is now called disclosure of documents.

25. I had in error said in my oral judgment that Eagle filed a certificate of readiness on June 18, 2002. The actual certificate shows that it was the attorneys for YP who filed that certificate of readiness and served it on the attorneys for the bank. After June 18, 2002, there was not much activity in the case.

26. The financial sector crisis took its toll on this case. Eagle was one of the financial institutions that collapsed. From the rubble emerged Union Bank Jamaica Limited which was substituted as claimant on July 27, 2000. Union Bank eventually disappeared and was substituted by RBTT in 2004. This explains why RBTT is now the current claimant/defendant.

27. This case that began under the ancien règime came under the case management system of the CPR.

Part two (post-CPR introduction)

28. On November 3, 2004, Donald McIntosh J. made orders on case management. There is no evidence that the learned judge was told that RBTT had any problems producing witnesses. The case management conference proceeded on the apparent assumption that RBTT was indeed in a position to prosecute its claim by producing witnesses. The relevant orders were:

a. Standard disclosure by each party take place by January 31, 2006;

b. Inspection of documents on or before 28th February 2005;

c. Filing and exchange of witness statements and expert evidence on or before August 31, 2005;

d. Both parties respond to filed question and answer by 28th February 2005;

e. Each party prepare statement of facts by 28th February 2006;

f. List of authorities to be filed by each party;

g. Listing questionnaire to be filed by 9th February 2007;

h. Pre-trial review on 23rd February 2007 at 10:00am for half an hour;

i. Trial before judge alone on 23rd to 27th April 2007

29. One would have thought that having regard to the stage that the matter had reached under the old rules, that the orders made would be complied with without great effort. Affidavits of documents indicating which documents the parties were relying on had been filed. In fact, the only requirement that could be regarded as entirely new was the necessity to file witness statements and a listing questionnaire. There is clearly no reason why these dates could not be met. The trial date was approximately 2 ½ years from the case management conference.

30. On February 23, 2007, the pre-trial review took place before Straw J. YP had filed the witness statements of Mr. Milton Daley and Mr. Hugh Bonnick on February 22, 2007. RBTT had not filed any witness statements or witness summaries. Standard disclosure and inspection of documents had not taken place. There was partial compliance with the orders by the other litigants. Thus Straw J. varied the case management orders and made these orders:

a. Claimant/defendant [RBTT] to carry out all case management orders on or before April 2, 2007;

b. Defendant/claimants' [YP] documents filed on 22nd February 2007 to stand;

c. Defendant/claimant witness statement of Y.P. Seaton and Michael Salmon to be filed on or before April 2, 2007;

d. Defendant/claimant list of authorities to be filed and served on or before 2nd April 2007;

e. Response to questions and answers to be carried out on or before 16th March 2007;

f. Pre-trial review adjourned to 18th April 2007 at 12:30pm.

31. I pause to make an observation about Straw J.'s orders. Her Ladyship specifically stated that YP were to file witness statements of Mr. Y.P. Seaton and Mr. Michael Salmon on or before April 2, 2007. This could only mean that those witnesses were brought to the specific attention of the judge and she

made an order concerning them. There is no evidence put before the court to show that Straw J. had been told of RBTT's difficulty of finding witness. In addition, RBTT had not complied with a single order made at the case management conference. Thus at the pre-trial review before Straw J. it seems that all present proceeded on the basis that RBTT was really in a position to produce witnesses at the trial. There was no variation of the trial date of April 23 - 27, 2007.

32. After the pre-trial review before Straw J. this is what happened. The statement of Mr. Y.P. Seaton was filed on February 26, 2007. The witness summary of Mr. Michael Salmon was filed on April 2, 2007. RBTT responded to the request for further information on April 17, 2007. YP had filed its list of authorities on April 2, 2007. YP had also filed its supplemental list of documents on April 2, 2007. The bank's list of documents was filed on April 5, 2007. RBTT also filed a statement of facts and issues on April 17, 2007.

33. On April 18, 2007, Cole-Smith J. presided over the second pre-trial review. By this date, RBTT still had not complied with any of the orders save that it provided answers to the request for further information. At this pre-trial review the bank apparently was not able to file any witness statements. The reason appears in the bank's listing questionnaire which was filed **after** the pre-trial review before Cole-Smith J. RBTT disclosed in its listing questionnaire that it had not filed any witness statement because (and here I quote directly from the listing questionnaire) *[d]espite the Claimant/Defendant's best efforts* ***since, and prior to, the case management conference*** *to locate potential witnesses to give oral evidence on its behalf the claimant/defendant has been unable to do so. This arise (sic) from the fact that the original claimant/defendant in this matter Eagle Commercial Bank Limited, is now defunct and the whereabouts of all its former employees are not now known to the claimant/defendant* (my emphasis). The bank then said that it was now trying to ascertain from a former employee who had "some knowledge" of the transactions whether he would be willing to assist the bank. If that former employee was willing then his witness statement can be settled in the next two to three months. The bank sought new trial dates. This was resisted by YP and the judge affirmed the trial dates.

34. After this pre-trial review supplemental witness statements of Mr. Y.P. Seaton, Mr. Milton Daley and the witness statement of Mr. Michael Salmon were filed on April 20, 2007. The filing of these three statements was in

breach of Straw J.'s orders but they were filed before the date of trial. A further supplemental list of documents was filed by YP on April 20, 2007. Other than failing to file a bundle of documents in accordance with the CPR (as there was no specific order at case management or at pre-trial review dealing with bundles), YP had complied with all the case management and pre-trial review orders by April 20, 2007.

April 23, 2007 - the day of trial and its aftermath

35. On April 23, 2007, the first day of a five day trial, the picture is this: RBTT had not filed any statements or witness summaries. However, no bundles were filed in accordance with the CPR (see rule 39.1) on the morning of the trial. The matter was adjourned to 2:00pm. On the resumption, YP had filed a bundle containing, (a) the pleadings, (b) their witness statements and supplemental witness statements. No agreed or indeed any bundle containing documents to be used at the trial had been filed. The matter was adjourned to April 26, 2007, for the bundle of documents to be filed. On April 23, it was ordered that the bundle of documents were to be filed by 2:00pm on April 26, 2007, if agreed and if there was no agreement each party to file its own bundle of documents. An agreed bundle was filed at 1:45pm on April 26, 2007. There was still no witness summary or statement from RBTT. In short, on the morning of trial the bank would not have been able to proceed with its case even if documents were agreed because it had no witness. RBTT's position was to apply for an adjournment.

36. I shall at this stage set out the provisions of rule 29.6 (3) of the CPR relating to witness statements. This is necessary so that the analysis which follows is more intelligible. The rule states:

> *A "**witness summary**" (emphasis supplied) is a summary of -*
>
> a. *the evidence, so far as is known, which would otherwise be included in a witness statement; or*
>
> b. *if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.*

37. I shall also refer to part 33 which makes provision for the summoning of witnesses. Miss Phillips Q.C. placed reliance on this part of the CPR to say that if the witness summary filed stands or more time is granted to file a witness statement, the court could issue the summons requiring the proposed witness to attend.

38. I proceed with the analysis of the relevant evidence regarding witness statements and witness summaries. Miss Rose Ann Davis, one of the attorneys at law employed to the bank, sought to explain why the bank could not have filed a witness summary prior to April 23, 2007. In her affidavit dated September 18, 2007, she stated that the bank could not have filed a witness summary without first securing the agreement of the witness to attend. She added that the bank could not file a witness statement until there was a clear indication from the proposed witness that he was willing to execute a witness summary (see para. 8).

39. Regrettably, Miss Davis' explanation is at odds with the express and unambiguous position stated in rule 29.6 (3) (b) cited above and with part 33. Rule 29.6 (3) contemplates at least two situations. The first situation is that where the evidence is known, that is to say, the witness was interviewed but for some reason is unable to sign the witness statement. The second arises where the witness might not have been interviewed and his proposed evidence is unknown but there is some indication that the witness can speak to some aspect of the case. The difference in wording between paragraphs (a) and (b) of rule 29.6 (3) is deliberate. Paragraph (b) seems to contemplate that the witness may not be available until trial. This explains why the paragraph uses the expression "proposes to question the witness". The questioning here could not be referring to the interviewing process in counsel's chambers. It must be the trial. When coupled with part 33, the CPR makes clear provision for difficult witnesses.

40. The conclusion in the immediately preceding paragraph is supported by the requirement that the party filing a witness summary "***must*** *[not may] certify on the witness summary why a witness statement could not be obtained"* (see rule 29.6 (2)). The rationale is plain. The court and other parties at the pre-trial review, or trial where there is no pre-trial review, would immediately be put on notice that the witness has not vouched for the proposed evidence and the reasons for that. The court is then placed in a position to deal with the case justly by making the necessary and appropriate orders to dispose of the case. I

do not see any reason that prevented RBTT, well before the pre-trial review dates, from filing a witness summary of the proposed witness and indicating on it, as required by the rules, why summary is being filed. RBTT could have indicated, for example, that it was making efforts to find him but to the best of its knowledge what is contained in the summary are matter to which he can speak and about which then intend to ask him.

41. Orders directed to securing the attendance of the witness could have been made. For example, orders directing that advertisements be placed in the press which could be appropriately worded so as not to convey the impression that the witness is hiding from the court or the litigant. It may be that the witness might be in Jamaica but did not know he was required to give evidence. In short, the rules do not prevent a witness summary being filed unless the witness had indicated that he is willing to come forward. Unfortunately, I am unable to accept RBTT's explanation as a satisfactory explanation for failing to file a witness summary in the time stated, at the case management conference and the pre-trial reviews, to file the witness statement. To put it bluntly, the CPR provided a solution to these difficulties being raised by Miss Davis and should have been utilised.

42. Added to this apparent failure to follow the rules on witness statements there is the apparent non-disclosure of the difficulties with the witnesses to her Ladyship Straw J. at the first pre-trial review. There is no evidence that the bank informed Donald McIntosh J. that it was not just a problem with witnesses but no witnesses at all. This looks like a breach of the duty of all litigants to assist the court in furthering the overriding objective. Had this been known, it is extremely unlikely that his Lordship would have set aside five days for trial. The courts' resources could have been allocated to other litigants who could have appropriately utilised the five days set aside in April 2007 for the hearing of this matter. I make this comment in light of the bank's admission in its listing questionnaire that it was unable to *since, and prior to, the case management conference to locate potential witnesses to give oral evidence on its behalf".*

43. The bank has now filed a witness summary in an envelope and deposited it with the Registrar of the Supreme Court. From the affidavits filed on behalf of the bank, the potential witness, if anything has stated that he has no intention of coming to court or signing any witness statement. What this means is that the bank without the fulfilment of what it considered to be its own

self-imposed necessary condition has found it possible to file a witness summary. Thus the bank's conduct in the final analysis is not consistent with its stated understanding. Therefore if the bank found it possible to file a witness statement in July 2007 without any assurance of the witness that he would attend, why was this not done before?

44. My view was confirmed during the hearing of the application. Miss Phillips Q.C. was at pains to point out that all the information that led the bank to file the claim in the first instance came from the proposed witness. This can only mean that the bank had all the information necessary to prepare a witness summary prior to the pre-trial review dates. Let us not forget that the claim was filed fourteen years ago. To file the claim some one must have provided that information.

45. It may be said that on June 7, 2007, when the witness indicated that he would sign a witness statement this would have enabled the bank to file a witness summary should he fail to sign the witness statement because the bank would now have been assured that the witness is now willing to come forward. Thus my conclusion above is set at nought. What the evidence shows is that it was after he made this indication that the witness statement was sent to him. It was sent to him on June 7, 2007. He declined to sign and has still not signed. It means that when the clock was running down to July 30, 2007, when the *unless* order would take effect the bank knew that it had an unwilling witness. The bank knew that it had a witness who was not happy about signing the witness statement. All this was evident from his conduct. Thus when the witness summary was filed on July 25, 2007, the bank was able to do this without the assurance of a witness. All this reinforces my conclusion that I am not satisfied that the bank could not have filed a witness summary to meet the pre-trial reviews before Straw and Cole-Smith JJ.

The resolution

46. The application to vary the *unless* order was made before the date it was to come into effect. It would seem to me that that fact means that there can be no alternative relief of relief from sanctions on this application for the reason that the sanction has not yet been imposed and logically, a person cannot seek relief from something he has not suffered. The relief from sanctions application is premature. That would, at the very least, have to be a separate

application where the matters set out in rule 26.8 would be considered. This means that I cannot consider the alternative relief at this time. It follows too, that the checklist applicable to a relief from sanctions applications is of no relevance on this application. The consequence is that I have to consider this application taking into account rule 1.1 which states the overriding objective. In any event, the affidavits in support of the application and those in response do suggest that the parties were not focussing on relief from sanctions but rather on the variation of the order and the extension of time

47. I am not alone in this view. Lord Justice Dyson said in ***Roberts v Momentum Services*** [2003] 1 W.L.R. 1577 at paragraph 34:

> *I see no reason to import the rule 3.9(1) [rule 26.8 of the CPR Jamaica] checklists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the checklist set out in rule 3.9(1) should be applied when the court is exercising its discretion under CPR 3.1(2)(a) [rule 26.1 (2) (c) of the CPR Jamaica] in such a case, then he could and, in my judgment, would have said so. By not spelling out a checklist in rule 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in rule 1.1(2).*

48. Mrs. Benka Coker Q.C., made the point that under the CPR old cases from the Civil-Procedure-Code era are inapplicable and should be avoided. She relied on rule 1.1 (2) which states that these rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. While I

would not go as far as saying that the previous cases are completely useless in dealing with matters under the CPR, learned Queen's Counsel makes a valid point. Mrs. Benka Coker's views have judicial support. Lord Justice May in ***Vinos v Marks & Spencer*** [2001] All ER 784, [2000] C.P.L.R. 570, [2001] C.P. Rep. 12 at paragraph 17 in rejecting submission based on the old rule said:

> *Mr Lord, on behalf of the respondents, made written submissions and Mr Peirson made oral submissions by reference to what they submit the position would have been under the former Rules of the Supreme Court. In my judgment, these submissions are not in point. The Civil Procedure Rules are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules.*

49. The idea behind these new rules was that the courts should no longer be shackled and barnacled by the case law that had built up around the Civil Procedure Code, the immediate predecessors of the current rules. The guiding concept of the new rules is that judges should be free to deal with the particular case in light of the overriding objectives merits without being straight jacketed by previous case law. I believe that Ward L.J. in ***UCB Corporate Services Limited v Halifax (SW) Limited*** [1999] C.P.L.R. 691 at paragraphs 23 and 24 puts the matter well when he said:

> *Mr Phillips QC suggests that the Biguzzi is some landmark decision which throws all of the previous law on its head, though he does not put it as inelegantly as that. That, however, is not how I read that judgment. When the Master of the Rolls said at page 1934G-H:*
>
> *"Earlier authorities are no longer generally of any relevance once the CPR applies,"*
>
> *he was not saying that the underlying thought processes that informed those judgments, especially those such as Arbuthnot, which were written mindful of the way the new wind was blowing, should be completely thrown overboard.*

50. Rule 1.1 (2) of the CPR states that dealing with a case justly includes -

a. ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

b. saving expense;

c. dealing with it in a way which take into consideration -

   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 fairly; and

e. allotting to it an appropriate share of the court's resources whole taking into account the need to allot resources to other cases.

51. The adverb *justly* in the expression *deal with cases justly* is not defined. Nonetheless I shall try to give some idea of the scope of this word. From this list, it is clear that the framers of the rules are saying that there are multiple dimensions to justice. The court cannot focus solely on the parties in the immediate case but must take account of a whole range of factors including the time and resource constraints of the courts' resources. Under these rules the courts are expressly mandated to manage cases actively (see rule 25.1) and have empowered the courts to act on its own initiative (rule 26.2 (1)). The court has to look at the range of powers open to it and then select the most appropriate one for the case before it. In a word, the response of the court ought to be *proportionate* to the facts.

52. It is to be noted as well that the list in rule 1.1 (2) is not exhaustive. That is evident from the phrase *dealing with a case justly includes* (my emphasis). This recognition led Miss Hilary Phillips Q.C. to submit that one of the crucial factors and perhaps the most decisive factor is prejudice to the defendant. She submitted that the defendant must prove that he has suffered prejudice or that a fair trial is no longer possible. She relied on the Judicial Committee of the Privy Council's decision of ***Warshaw v Drew*** (1990) 38 W.I.R. 221. It would appear that Miss Phillips is adopting the summary of the holding of the case found on page 221 of the report which reads: *On an application to strike out proceedings for want of prosecution, the onus is on the applicant (assuming*

there is no substantial risk to the fairness of the trial) to show that the delay had caused him serious prejudice.

53. Miss Phillips also submitted that in making the assessment of whether the unless order should take effect I should take into account the likely impact of an extension of time on the other litigants in the particular matter and the impact on the overall administration of justice. She added that in making that assessment I should have in mind the following:

a. is it still possible to keep the case management, pre-trial review and trial dates?

b. has the delay caused undue hardship to the other parties?

c. will an extension of time create difficulties for the other parties?

d. how has the applicant for the unless order behaved in the proceeding so far?

54. It seems to me that ***Warshaw v Drew*** cannot fit comfortably into the new regime. I would go as far as saying that ***Warshaw*** is now at odds with the House of Lords decisions in ***Department of Transport v Chris Smaller*** [1989] A.C. 1197 and ***Grovit v Doctor*** [1997] 2 All ER 417. These two cases from the House acknowledged the weight of the criticism levelled against ***Birkett v James*** [1978] A.C. 297, the case which formed the basis of the decision in ***Warshaw***. ***Grovit's*** case in particular accepted that if there was evidence that the claimant began litigation with no intention to bring it to an end that in and of itself would amount to an abuse of process without any proof of specific prejudice to the defendant. The significance of ***Grovit*** is that the House was now prepared to wend its way around ***Birkett*** although the House, some eight years earlier, in ***Smaller*** adhered to the ***Birkett*** doctrine and held that the defendant had to show that a fair trial was impossible. The Jamaican Court of Appeal in ***West Indies Sugar v Stanley Mitchell*** (1993) 30 J.L.R. 542 (decided six years before ***Grovit***) had done the same thing. The ***Birkett*** doctrine had very few supporters by the end of the 1990s. The ***Birkett*** experiment simply did not work. It is safe to say that by the end of the decade of the 1990s ***Warshaw's*** foundation had all but collapsed.

55. The new rules have been implemented. It would be quite remarkable if a case which rested on such insecure foundations under the old rules could have pride of place under the new rules which were designed to give the courts greater

flexibility in dealing with cases. If the law had developed under the old rules to the point where a defendant no longer had to prove that he could no longer secure a fair trial, how then can it be said that under the new rules where a multi-dimensional approach to the management of cases is required, a defendant must establish that a fair trial is impossible before the case against him can be dismissed and that the impossibility of a fair trial has the same weight as before? It would seem to me that proper way to approach the matter is to appreciate that the inability to obtain a fair trial is one of the factors, albeit an important factor, to be considered. Its presence in any given case may well prove decisive but its absence does not mean that a claim cannot be struck out. This is so because there may be other dimensions in the now require multi-dimensional approach to case management that come to the fore in a particular case that makes striking out of the claim the just result. It is not that the underlying thought processes in ***Warshaw*** are utterly irrelevant but they now form part of the matters to be considered in any given case when deciding how to deal with a case justly and no longer have a controlling and decisive influence. I therefore do not agree with Miss Phillips' assertion that there must be proof that a fair trial is no longer possible before this claim can be struck out.

56. The court, as stated earlier, is mandated to look at the various dimensions involved in dealing with cases justly including the impact on other litigants. It is entirely possible that a case can be struck out even if a fair trial is still possible if the striking out is the just thing to do. I agree with Lord Lloyd in ***UCB Corporate Services Limited v Halifax (SW) Limited*** [1999] C.P.L.R. 691 at paragraph 17:

> *It would indeed be ironic if as a result of the new rules coming into force, and the judgment of this court in the Biguzzi case, judges were required to treat cases of delay with greater leniency than they would have done under the old procedure. I feel sure that that cannot have been the intention of the Master of the Rolls in giving judgment in the Biguzzi case. What he was concerned to point out was that there are now additional powers which the court may and should use in the less serious cases. But in the more serious cases, striking out remains the appropriate remedy where that is what justice requires.*

57. Lord Justice May in ***Purdy v Cambran*** [1999] C.P.L.R. 843; [2000] 2 C.P. Rep 67 said it well at paragraphs 50 and 51:

> *50. Lord Woolf MR in Biguzzi drew attention to the armoury of powers which the court has under the Civil Procedure Rules in addition to that of striking out: see in particular his judgment at 1932G to 1934C. In doing so, he was doing no more than emphasising the range of powers available to the court in its search for justice, indicating that the court should consider such powers as may be relevant to a particular case before deciding which to use. He was not indicating that any one of those powers was inherently more appropriate than any other. Mr Lewis has, correctly in my view, not suggested otherwise.*
>
> *51. The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities.* ***There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case.*** *As I read the judgments of Lord Lloyd of Berwick and Ward LJ in the UCB case, they are saying nothing different from this. As Ward LJ said in the UCB case, Lord Woolf MR in Biguzzi was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective.* (My emphasis)

58. Miss Phillips also submitted that if the conduct of the bank was not contumelious and it acted in good faith that should go a far way in exercising the discretion in favour of the bank. It was also submitted that since the *unless* order of April 26, 2007, the bank has been making extreme efforts to secure the witness statement from the proposed witness. Finally, Miss Phillips submitted that the court can issue a witness summons under part 33 to secure

the attendance of the witness. According to Miss Phillips, if he turns up and refuses to answer legitimate questions the court can hold him in contempt.

59. In support of her submission in the immediately preceding paragraph Miss Phillips relied on a decision of the Supreme Court in ***R.E. Forrester v Holiday Inn (Jamaica)*** Claim No. C.L. 1997/F - 138 (unreported delivered June 1, 2000). She relied in particular on paragraph 29. I fully accept what was stated there. The court, I believe, in that case was indicating the broad guidelines that should guide the court in exercise of its discretion. The listed criteria were not in order of importance. In any given case, one of the stated criteria might loom larger than others. Paragraph 29 (f) in ***Forrester*** is of particular relevance here. I am satisfied that RBTT has had more than sufficient opportunities to present its case. It could have utilised the provisions of the CPR to file a witness summary well before the *unless* order was made. Indeed RBTT could have asked for a witness summons under part 33 to meet the April 23, trial dated if the witness could be found.

60. I am concerned that this case, if the application succeeds, would have been allocated ten trial days, two pre-trial reviews and one case management in circumstances where the courts resources could have been better utilised not only in respect of other litigants but also with respect to this particular case. As stated earlier the bank's listing questionnaire confessed to its inability to find witnesses before the case management conference. The apparent omission to bring this very important fact to the attention of the case management judge prevented the court from managing the case in a more cost effective and efficient manner. The lack of information caused the court to set a trial date nearly three years into the future when the bank apparently knew that it would have severe difficulty producing a witness. It is one thing for a litigant to have witnesses at the time of the case management and they are unavailable at trial but quite another to know that he has no witnesses and has no realistic hope at the time of the case management conference of finding any but nonetheless allows the court to proceed on the basis that witnesses were indeed available and that the trial needed five days. Behaving in this matter amounts to a breach of the express obligation on litigants to assist the court in furthering the overriding objective (see rule 1.3). The defendants were forced to expend 2 ½ years in time and money to prepare for case that was not to be. It had to secure witnesses, retain lawyers, prepare witness summaries and statements when the claimant knew that it had no realistic prospect of success because it could not adduce the requisite evidence. Given that two of the defendants are

companies, if the companies are properly run (and there is no evidence that they are not) then they would have had to have made provision in their accounts to accommodate an adverse decision. This means that the company may well have been deprived of valuable resources because the money to meet any adverse decision would have to be sterilised. Should any of the companies wish to borrow money they would have had to have made this disclosure to the lender who might well impose more stringent conditions because of the risk that the company may be subject to hefty blow. The rules were designed to prevent this kind of waste of resources of other litigants in the particular claim and the courts' resources. In these circumstances silence is not golden. This non-disclosure continued before Straw J.

61. What then is the appropriate sanction? After much reflection I have come to the conclusion that the most appropriate response is to allow the *unless* order to take effect. In addressing the matter mentioned in rule 1.1 (2) (a) I conclude that much expense could have been saved had the court been told about the witness problem from 2004 at the case management conference. The other litigants in the case would not have been put through the expenses referred to in the immediately preceding paragraph. The problem in this case did not arise because of the complexity. The case is an important one but that does not mean that the apparent withholding of information is justified.

62. Rule 1.3 imposes a high duty on litigants. The rule states: *It is the duty of the parties to help the court to further the overriding objective.* This means that litigants are under an obligation to disclose information that would assist the court in managing the case justly. I am obviously not referring to matter covered by legal professional privilege. Regardless of the scope of the duty, it seems to me that if there is a serious problem with the availability of witnesses this cannot be privileged or confidential information. The court ought to be informed so that it can act appropriately. It could be said that the *unless* order has produced the desired result, that is to say, the defaulting party has been making every effort to comply with the order. The fact that the next trial date is in 2009 is no answer to the point. Why should the other litigants be exposed to an additional two years cost when at this point the proposed witness has declined to commit his proposed testimony to a witness statement? How can it be just to endure a further two years of expensive litigation after the ordeal of a fourteen year wait? There is no realistic guarantee as far as one can guarantee the appearance of a witness that in two year's time the witness will be available. The witness may not respond to the

summons and if he comes he may prove quite uncooperative. If he turns up on the new trial dates and gives evidence, the other litigants may be hearing testimony that may depart from the witness summary. In the event that the evidence does depart from the summary the other parties would need time to digest his evidence - a development which points to more costs.

63. At the time the *unless* order was made I had not appreciated how long this witness problem existed and how much of the courts' resources were being allocated on a case which undoubtedly would have been dealt with differently if the full extent of the problem had been understood. I do not believe that had Donald McIntosh, Straw and Cole-Smith JJ. understood that RBTT's problem was not so much tardiness in getting the statement as it was the lack of witnesses that they would have dealt with the matter in the way that they did. It may be going to far, but I am hard pressed to see how any judge properly advised of the witness problem would have failed to dismiss the claim years ago after giving RBTT sufficient time to see if it could locate its witness. I am not convinced that any judge being told by a litigant that there is really no witness to prove the case would have allocated pre-trial review dates and five days for trial. What quite likely would have happened was that RBTT would have been given sufficient time to locate a witness and any trial date set would have been in respect of the claim by Mr. Y.P. Seaton alone. If RBTT could not find a witness after a reasonable time in all probability the claim would have been dismissed because of the inability to prove what was being alleged against the defendants. But to have the court acting on the premise that witnesses are available is something that cannot be condoned.

64. One of the main objectives of the new rules is that litigation should be undertaken with proper expedition. The bank failed to assist in this process. I do not think that granting the application and making a costs order against the bank is the correct response. The court does not wish to encourage other litigants to engage in this kind of behaviour, that is to say, attend a case management conference and a pre-trial review with knowledge that there are no witnesses to prosecute the claim but nonetheless behave as if the claim can be effectively prosecuted. The better route is candour with the court so that the problem can be addressed. The aim of case management is to manage the particular case properly. The rules do not contemplate that all cases are managed in the same way. The rules presuppose that within the broad framework of the CPR, individual cases will be managed in a manner appropriate for the issues, complexity, money involved and making sure that it does not

consume more resources than is necessary. Included in this is not imposing on other litigants high costs for an indefinite period.

65. In the final analysis, we have two competing values. The right of a litigant to pursue his claim as best he sees fit as well as to have his day in court on the one hand and the duty of the court to see that is resources and processes are not squandered. The right of the litigant is circumscribed by the express duty on him to assist the court to further the overriding objective. Included in that duty is an affirmative obligation to prevent the courts' resources being misallocated and not depriving other litigants of their day in court by withholding vital information and so causing the court to allocate time to case which has serious impediments on the way to the commencement of the trial when other cases could have been set down in the trial time allocated to the particular case. It is my view that the omission by the bank is sufficiently serious to have its claim struck out for failure to comply with the *unless* order and judgment entered for the defendants in Claim No. E 083/ 1993. RBTT has had more than its day. It has had fourteen years multiplied by three hundred and sixty five with adjustments for leap years and public holidays as well as days lost for other reasons. The bank caused the court to act on the premise that witnesses were available from the time of the case management conference and would have been available at the trial dates. For how long before the case management conference in 2004 did this problem exist? If this problem with witnesses existed since the demise of Eagle on what basis did the bank file a certificate of readiness in 2002? To use the words from one of the case cited by Mrs. Benka Coker, enough is enough.

66. There was mention of efforts at mediation in the affidavits but that evidence is not very specific. There is no clear unequivocal statement indicating when these efforts began and when they ended. I say no more about that.

67. Finally, let me assure counsel for the claimant that I am not saying that she or any member of her firm attempted to mislead the court on the true state of affairs. What I am saying is that the bank should have been more forthcoming with information. Counsel can only act on the instructions and information passed on to them.

Conclusion

68. Paragraphs one and two of RBTT's notice of application for court orders dated July 26, 2007, are dismissed. Paragraph three of the notice does not properly arise for adjudication because the sanction has not yet been imposed and one therefore cannot get relief from something not suffered. The *unless* order stands and takes effect. Costs to the respondents to the application to be agreed or taxed. The orders are:

1. Paragraphs one and two of the notice of application for court orders dated July 26, 2007 are dismissed with costs to Mr. Y.P. Seaton, EarthCrane Haulage Limited and Y.P. Seaton & Associates Company Limited.

2. Special costs certificate for two counsel granted with costs to be agreed within the range of $150,000 - $250,000 and the costs to be agreed within seven days of the date of this order and to be paid within fourteen days of agreement.

3. Claim No. C.L. 1993/S 252 to be brought forward by the Registrar and to be set for trial within the first six months of 2008.

4. Leave to appeal granted

5. Stay of effect of unless order granted for thirty days.