[2014] UKPC 6
**Privy Council Appeal No 0056 of 2012**

# JUDGMENT

# Real Time Systems Limited (Respondent) *v* (1) Renraw Investments Limited (2) CCAM and Company Limited (3) Austin Jack Warner (Appellants)

## From the Court of Appeal of Trinidad and Tobago

**before**

**Lord Mance**
**Lord Clarke**
**Lord Sumption**

## JUDGMENT DELIVERED BY

## Lord Mance

## ON

## 3 March 2014

**Heard on 18 February 2014**

*Appellants*
William McCormick QC
Om Lalla

(Instructed by Carter Ruck)

*Respondent*
Geoffrey Robertson QC
Amy Rogers
Neal Bisnath
(Instructed by Howard Kennedy FSI)

**LORD MANCE:**

1. This appeal, by permission of the Court of Appeal, raises a short but important point on the interpretation of the Civil Proceedings Rules ("CPR"), in force since 2005.

2. Real Time Systems Ltd ("Real Time"), the respondent before the Board, claim that in October and November 2007 it paid the appellants, who trade as Dr Joao Havelange Centre of Excellence ("the Centre"), sums totalling just over TT$1.5m by way of loan repayable by 28 February 2008, in respect of which no repayments have been made.

3. In answer to a pre-action protocol letter dated 17 March 2010 demanding repayment in similarly general terms, the Centre through its attorneys wrote on 1 April 2010 requesting particulars of the loan, namely (i) whether the agreement was oral or in writing, (ii) when it was made and who were the parties and (iii) if it was oral what were its specific terms and conditions.

4. Real Time's response on 15 April 2010 was to issue proceedings, by a claim form and statement of case both again generally framed, to write on 16 April 2010, referring to the Centre's letter of 1 April and advising the Centre of the issue of the proceedings, and on 3 May 2010 to make an application for summary judgment, supported by an affidavit which vouchsafed no further details.

5. The Centre resisted this application by solicitor's affidavit alleging that the TT$1.5m had been a gift made pursuant to conversations between Mr Austin Jack Warner, the Centre's principal directing mind, and Mr Krishna Lalla, in which the latter had indicated his desire to make such a gift, for reasons which the affidavit did not explain.

6. On 22 July 2010 it was ordered by consent that the proceedings should stand as the lead matter for 22 other actions, involving further alleged loans totalling over TT$26.5m made to the Centre or in five such cases to Jamed Ltd.

7. On 10 August 2010 the Centre applied to have the proceedings struck out as an abuse of the process for, inter alia, failure to identify proper particulars of the alleged loans and non-compliance with CPR Part 8.6.

8. The applications were decided on the papers by Rampersad J, who on 8 November 2011 gave a judgment, in which he held that the statement of case did not comply with Part 8.6. But he went on to say that

> "…. the court further upholds the defendants' attorney's submission that a request for information pursuant to Part 35 would be premature at this stage since the sanction for non-compliance with such a request is not exercisable before the time for serving of witness statements has expired …. In any event, the claimant refused to respond positively to the defendant's written request made on 1 April 2010 for details of the alleged loan so that in any event, no further information seems forthcoming. As such, the court strikes out the statement of case pursuant to Part 26.2 of the CPR."

9. Real Time appealed, relying on a presumption of a loan arising it submitted from the payment itself. Only in submissions before the Court of Appeal, did Real Time say in answer to the Court that it was ready, willing and able to provide the details. The Court of Appeal regarded the Centre's pre-action request for particulars as eminently reasonable, and considered that, if there was no power to order particulars, the judge's decision could not be said to be plainly wrong. But, in a judgment given by Jamadar JA, it went on to take a different view of the CPR, and in particular of the inter-relationship of Parts 25, 26 and 35. It concluded that the judge was plainly wrong to hold that he could not, in particular under Part 26.1(1)(w), order particulars of a statement of case at the stage when the matter came before him, although it noted Real Time's failure at any time prior to the Court of Appeal hearing to offer to supply particulars, or indeed to make any specific submission contrary to the judge's view of Part 35. The Court of Appeal thus reversed the judge's decision to strike out the statement of case, and remitted the matter to him for reconsideration of the appropriate order to make on the striking out application.

10. The Civil Proceedings Rules include these:

> "*The overriding objective*
>
> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly, …
>
> *Claimant's duty to set out his case*

8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.

*Changes to statements of case*

20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court's permission.

(2) The court may give permission to change a statement of case at a case management conference.

(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.

*Court's duty to manage cases*

25.1 The court must further the overriding objective by actively managing cases, which may include—

(a) identifying the issues at an early stage; …

*Court's general powers of management*

26.1 (1) The court (including where appropriate the court of Appeal) may—

….

(w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

(2) When the court makes an order or gives a direction, it may make the order or direction subject to conditions.

*Sanctions—striking out statement of case*

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—

*(a)* that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;

*(b)* that the statement of case or the part to be struck out is an abuse of the process of the court;

*(c)* that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or

*(d)* that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

*Court's general power to strike out statement of case*

26.3 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for noncompliance has been imposed the other party may apply to the court for an 'unless order'….

(5) If the defaulting party fails to comply with the terms of any 'unless order' made by the court his statement of case shall be struck out.

*Court's powers in cases of failure to comply with rules, orders or directions*

26.6 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.

(Rule 26.7 deals with the circumstances in which the court may grant relief from a sanction, Part 66 deals with the power to make orders as to costs by way of sanction)

*Relief from sanctions*

26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.

(2) An application for relief must be supported by evidence.

(3) The court may grant relief only if it is satisfied that—

*(a)* the failure to comply was not intentional;

*(b)* there is a good explanation for the breach; and

*(c)* the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

*General power of the court to rectify matters where there has been an error of procedure*

26.8 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.

*Right of parties to obtain information*

35.1 (1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.

(2) To do so he must serve a request for information that he wants on that other party.

(3) He must state in his request precisely what information he wants.

*Orders compelling reply to request for information*

35.2 (1) If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so.

*Time limits for compelling reply*

35.3 An application for an order compelling a reply to a request for information may not be made before the time for serving witness statements has expired nor less than 42 days before the date fixed for the trial.

(The time for serving witness statements will be specified in directions given by the court under Part 27)"

11. At the core of the Centre's case, advanced with force and realism by Mr McCormick QC, is the proposition that a claimant must under rule 8.6 include in its statement of case all facts on which it relies, that the drafters of Part 35 deliberately restricted the right to request information before exchange of witness statements, that the corollary is that they cannot have intended a statement of case which is from the outset deficient in facts to be capable of remedy by a request or order for further information, and that they cannot have intended rule 26.1(1)(w) to be used "to circumvent the clear words" of rule 35.3. Mr McCormick points out that in proceedings against (or it seems by) the State, rule 58.4(2) does exceptionally permit a defendant to request information under rule 35.1 "at any time during the period for entering an appearance". That, McCormick submits, underlines the more restrictive choice made by rule 35.3.

12. More generally, Mr McCormick underlines the problems of progressing civil litigation in Trinidad and Tobago, which Jamadar JA has himself highlighted in *Trincan Oil Ltd v Schnake* (Civil Appeal No 91 of 2009) and which the Board recognised in its decision in *Bernard v Seebalack* [2010] UKPC 15, [2011] 2 LRC 176 when interpreting rule 20.1(3), which was in terms more stringently framed than its English equivalent, with the aim of seeking to address those problems.

13. It is clear from the location of Part 35 and the wording of rule 35.3 that its focus is on information which one party is likely to want at a relatively late stage of the proceedings, after the time for serving witness statements, though not less than 42 days before trial. Its subject matter is "information about any matter which is in dispute in the proceedings". While it is capable of being used to elicit more about the matters pleaded, the normal expectation is that, by the time of exchange of witness statements, the pleadings would have been settled and the issues would be being explored in greater depth at the evidential level. The State (and it may be any defendant in proceedings by the State) is enabled to ask for details under rule 35.1 at an earlier stage than other litigants, but, whatever the reason for that indulgence, it does not, in the Board's view, shed any real light on the present issue.

14. It does not follow from rule 35.3 that, if the pleadings are not satisfactory prior to exchange of witness statements, there is nothing that can be done about it. That would be a very strange conclusion, particularly under a new system of rules designed to enable matters to proceed smoothly and efficiently. Mr McCormick pointed out that, even after a claim has been struck out, a claimant can apply for relief from the sanction under rule 26.7 or commence fresh proceedings (as rule 26.2(2) contemplates). But the conditions for obtaining relief under rule 26.7 are stringent, and it is far from clear that they could or would be satisfied. The ability to commence fresh proceedings (during

the limitation period, which is in practice now long expired) is a double-edged factor, raising the question whether it is in the circumstances really proportionate to put the parties to the expense of a fresh start.

15. The present proceedings have never reached the stage of a case management conference. Rule 20.1 enables a party at any time prior to a case management conference to change its statement of case. Since Real Time's statement of case was insufficiently particularised, it seems that it could without permission have changed it by adding the required details: see *Bernard v Seebalack*, para 27. And, even if a more restricted view of "change" were taken, that would lead to the odd consequence, on the Centre's case, that a party could, without permission, correct a major omission by "changing" its statement of case under rule 20.1, but could not remedy a more minor error consisting of failure to include sufficient details in its statement of case.

16. In the Board's opinion, the Centre's submissions involve a misconception as to the scheme of the Civil Proceedings Rules and the role of the court under them. Rule 35.3 involves a restriction on the ability of a party to request information. But it says nothing about the court's powers. In the present case, the Centre is not applying for information. It is applying to strike out, and it is in these circumstances for the court to decide upon the appropriate response.

17. In that connection, the court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to "give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective", which is to deal with cases justly. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period.

18. The Centre could in the present case have applied not under rule 26.2 to strike out, but under rule 26.3 for an "unless" order, requiring Real Time to serve an amended statement of case or adequate details within a specified period, failing which the statement of case would be struck out. Since the Centre's interest was in getting rid of the proceedings, it did not so apply. But it would again be very strange if, by choosing only to apply for the more radical than the more moderate remedy, a defendant could force the court's hand, and deprive it of the option to arrive at a more proportionate solution.

19. The judge was concerned about Real Time's reticence and made some references in paragraphs 49 to 51 to the court's role in relation to "any transaction tinged by illegality" to the transactions not being "at arm's length" but carrying "some deeper purport", to the proceedings having been filed just prior to local national elections held on 24th May 2010 and to the transactions calling in the circumstances for "greater details and greater explanation and greater vigilance". These were speculations going beyond any evidence before the judge; moreover, whatever the background, the Centre's case that there were large unexplained gifts fails to give any account of it as much as Real Time's case that they were loans. Now that Real Time has offered to provide details, the focus is in any event likely to shift to its compliance with that offer, which can always be tested by an "unless" order.

20. For the reasons given, the Board considers that the Court of Appeal was clearly right in the decision it reached, and this appeal is dismissed accordingly. There has been no cross-appeal seeking any order other than that made by the Court of Appeal for remission to and reconsideration by the judge.