TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2006-00337

BETWEEN

ELISHA PRINCE
(BY HIS MOTHER AND NEXT OF KIN MORNA CHANCE) Claimant

AND

KENNETH O'BRIEN Defendant

BEFORE THE HONOURABLE MR. JUSTICE P. JAMADAR

APPEARANCES

Mr. A. Ramlogan for the Claimant.

Mr. K. Harrikissoon, Mr. T. Cunningham and Mr. S. Alsaran for the Defendant.

REASONS

INTRODUCTION

On the 12th July, 2007, the first day allocated for the trial of liability in this action, counsel for the Defendant, Kenneth O'Brien an attorney at law, made two applications both of which were refused. These were first for an adjournment of the entire trial, and second for leave to amend the defence. Having heard and determined both applications on the 12th July, 2007, the written reasons for the Court's decisions are now set out.[1]

BACKGROUND

This action is a suit by the Claimant, Elisha Prince, against the Defendant for damages for breach of the contract of retainer and/or for negligence in failing to institute proceedings on his behalf against Tobago Plantations Limited within the relevant

[1] Oral reasons were given at the time of the decisions.

limitation period or at all, for loss and damages he incurred as a consequence of an injury to his eye sustained during the course of his employment with the company.

After at least four case management hearings, on the 27th April, 2007 (the final case management hearing) it was confirmed that pleadings were closed,[2] documents were agreed, and witness statements finalized.[3] In fact the witness statements were to have been initially exchanged by the 17th November, 2006, but this was not done and two subsequent extensions had to be granted – first on the 24th November, 2006 to the 12th January, 2007, and second on the 9th February, 2007 to the 2nd March, 2007. In fact the Defendant's witness statements were only filed on the 27th April, 2007, the Claimant's having been filed on the 21st February, 2007. On the 27th April, 2007 it was also agreed that the issue of liability only be tried first,[4] and that the case could be dealt with justly without a pre-trial review,[5] and that the hearing on the issue of liability would take place on the 12th and 13th of July, 2007 in Tobago.

THE APPLICATION FOR AN ADJOURNMENT: PART 40.4, CPR, 1998.

By a letter dated the 11th July, 2007 (and received by the Court in Tobago on the morning of the 12th July, 2007) from Harrikissoon and Company on behalf of Mr. Kemrajh Harrikissoon the following were indicated:

(i) the Defendant would be "unable to attend the trial of this matter upon urgent medical advice due to his increased levels of blood pressure and stress and the great concern that the stress caused to him by undertaking a trial at this stage may initiate another heart attack";

(ii) the Defendant had sustained a heart attack in 2005 and had been suffering from hypertension and hyperlipidaemic since that time; and

(iii) that "an adjournment of the trial" was being sought.

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[2] This had been indicated since the 24th November, 2006.

[3] On the 28th July 2006 it had been agreed that witness statements would be filed and would stand as evidence in chief – See Part 29.4, CPR, 1998.

[4] See Part 27.7, CPR, 1998.

[5] See Part 27.6 (3), CPR, 1998.

A copy of a medical report dated the 5th July, 2007 was attached to that letter. Though that report stated that the Defendant had been advised "to be confined to immediate bed rest with medication", Mr. K. Harrikissoon informed the Court that the Defendant had been "around the courts" but not doing too much.

Part 40.4 of the CPR, 1998 permits an adjournment of a trial on terms that are just. Part 1.1 of the CPR, 1998 specifies the considerations that involve dealing justly with a case. The Court is mandated to seek to give effect to this Overriding Objective whenever it exercises its discretion.[6]

In this case two days had been assigned in the Court's calendar for the trial of the issue of liability. Prior to the receipt of the letter of the 11th July, 2007 the Court had been given absolutely no indication that any application for an adjournment was being considered or intended to be made. This was so despite the fact that the Court's Judicial Support Officer had been in communication with attorneys for both sides (and their offices) from Monday the 9th July through to Wednesday the 11th July about matters relating to the trial, and the fact that the medical report was dated the 5th July, 2007 and indicated that the issuing doctor had seen the Defendant on two occasions prior to the 5th in the preceding week.

Given all of these circumstances and considering the value of trial date certainty, the need to allocate appropriately the Court's resources,[7] and the fact that this Court's trial calendar is such that trial dates are now available from May 2008 onwards,[8] this Court in the exercise of its discretion refused the application to have the entire hearing on liability adjourned. Instead, in an effort to deal with this case justly and bearing in mind that witness statements were filed, this Court ordered that the hearing on liability proceed with the cross-examination of the Claimant's witnesses and the witness for the

[6] See Part 1.2, CPR, 1998.
[7] See Part 1.1 (2) (e), CPR, 1998.
[8] The new 'mixed system' that has been introduced together with the docket system has resulted in an immediate 'backlog' and has contributed somewhat to the undermining of the objectives and expectations of the CPR, 1998.

Defendant, and that it then be adjourned to Monday the 16th July in San Fernando, Trinidad for the cross-examination of the Defendant .[9]

THE APPLICATION TO AMEND: PARTS 10.6 (3) AND 20.1 (3), CPR, 1998.

By a Notice filed on the 10th July, 2007 the Defendant sought leave of the Court on the first day of the trial (12th July, 2007) to amend his defence to 'plead a point of law'. The point of law was disclosed as being the immunity from liability for negligence in respect of the conduct of litigation provided for by section 22 of the Legal Profession Act, 1986.

This application was refused for the following reasons, which are to be understood in the context of the background facts, and in particular because since the 24th November, 2006 it had been indicated by both sides that the pleadings were closed and the final case management conference was completed on the 27th April, 2006.

First, neither the requirements of Part 20.1 (3) nor of Part 10.6 (3) of the CPR, 1998, upon which the Defendant relied, have been satisfied. That is, in neither instance has there been sufficient evidence to satisfy the Court "that the change (to the Defence) is necessary because if some change in circumstances which became known after that (the first) case management conference",[10] or "that there has been a significant change in the circumstances which became known after the date of the case management conference".[11]

It is to be noted that whereas Part 20.1 (3) of the CPR applies to a defence because of the definition of "statement of case" in Part 2.3, Part 10.6 (3) of the CPR is a specific provision dealing with the granting of permission to rely on an allegation not mentioned in a defence after a case management conference. Further, whereas in Part 10.6 an "allegation" may narrowly be construed as referring to matters of fact, clearly Part 20.1 covers any changes to a statement of case.

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[9] This date was fixed after consultation with the attorneys and bearing in mind that the Defendant lives in San Fernando, and after having indicated that if necessary the Court would hear further from the Defendant's physician and would be prepared to have the cross-examination done at the Defendant's home.

[10] Part 20.1 (3), CPR, 1998.

[11] Part 10.6 (3), CPR, 1998.

In this application the only reason given in support of it was that Counsel "only received the brief of this matter on the 2nd July, 2007" and upon reviewing same "it was discovered that a point of law pursuant to section 22 (2) and (3) of the Legal Profession Act, 1986 should have been included and pleaded in the defendant's defence dated the 29th September, 2006".

In my opinion this reason does not constitute "a change in circumstances which became known" as contemplated by Part 20.1 (3), and certainly do not constitute "a significant change in circumstances which became known" as contemplated by Part 10.6 (3) of the CPR, 1998.[12] In my opinion points of law that are not new or that have not arisen after the relevant case management conference, but that were always available to be raised, do not constitute "a change in circumstances" for the purpose of either Part 10.6 (3) or 20.1 (3), even if these were only 'discovered' after the case management conference.

Second, no draft of the proposed amendment was annexed to the application or to the draft order and none had been formulated by counsel up to the making of the application. In my opinion every application for a change to a statement of case and/ or to a defence pursuant to Parts 20.1 (3) and/or 10.6 (3) must be accompanied by a draft of the proposed change in the statement of case or defence.

Third and in any event, what the Defendant proposed to introduce as an amendment to his defence was a matter of pure law. While it is clearly desirable to set out in a defence all answers to a claim, both factual and legal, once adequate notice of matters of law is given and subject to the considerations in the Overriding Objective, some latitude may be permitted to allow such defences to be raised. In this case counsel for the Claimant had no objection to the issue of law raised by section 22 of the Legal Profession Act being argued by the Defendant.

[12] In my opinion Part 10.6 (3) creates a higher threshold to be crossed than that in Part 20.1 (3) of the CPR, 1998. See in this regard **Mallalieu v WASA,** CV 2006-00386, a decision of Stollmeyer J dated the 15th March, 2007.

COSTS

Counsel for the Claimant did not seek any costs on either of these two applications and so no order as to costs was made with respect to them.

CONCLUSION

As already indicated both the application to adjourn the entire trial and to amend the defence were refused. No order for costs was made. It is hoped that attorneys will pay more attention to the provisions and requirements of the CPR, 1998 when making applications of this nature. In this context both attorneys and the courts should have regard to the provisions of Part 66.8, CPR, 1998 dealing with wasted costs.

Dated this 16th day of July, 2007.

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P. Jamadar

Judge

Judicial Research Assistant: Ms. Sumintra Singh.