

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. **CV2018-02098**

BETWEEN

**MALISSA MOHAMMED**

Claimant

AND

**PRICESMART CLUBS (TT) LIMITED**

Defendant

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Monday 17 June 2019.**

**Appearances:**

**Ms. Mellissa Boodhai instructed by Ms. Krystal Lewis, Attorneys at Law for the Claimant.**

**Mr. Keston McQuilkin instructed by Ms. Summer Abigail Sandy, Attorneys at Law for the Defendant.**

---

**REASONS**

---

1. The Claimant instituted this claim in negligence seeking damages against the Defendant for personal injuries she suffered while shopping on the Defendant's premises in La Romaine on August 2017. On 10<sup>th</sup> May 2019, the Court ordered the parties to give standard disclosure by filing and serving their list of documents on or be 24<sup>th</sup> May, 2019 and for the Defendant to provide the Claimant with a copy of the recording of the CCTV footage of the incident.<sup>1</sup> At the

---

<sup>1</sup> Order dated 10<sup>th</sup> May, 2019 states:

**"IT IS HEREBY ORDERED** that:

1. Parties to give Standard Disclosure by filing and serving their list of documents and copies on or before 24<sup>th</sup> May, 2019.
2. Defendant to provide to the Claimant a copy of the recording of the CCTV footage of the incident which is the subject of this claim on or before 24<sup>th</sup> May, 2019.
3. Parties to convene an all parties conference on or before 10<sup>th</sup> June, 2019 to explore a settlement of this claim.
4. 3<sup>rd</sup> Case Management Conference is adjourned to 17<sup>th</sup> June, 2019 at 10:15am in Courtroom SF08."

3<sup>rd</sup> Case Management Conference (CMC) on 17<sup>th</sup> June 2019, paragraph 8 of the Defendant's Defence<sup>2</sup> and paragraph 1 of the Defendant's List of Documents<sup>3</sup> which made reference to the CCTV footage was struck out due to the Defendant's failure to comply with the Court's order of 10<sup>th</sup> May, 2019<sup>4</sup>.

### **Specific Disclosure**

2. Rules 28.5 and 28.6 of the CPR provides:

#### **"Specific disclosure**

**28.5** (1) An order for specific disclosure is an order that a party must do one or more of the following things:

(a) disclose documents or classes of documents specified in the order; or

(b) carry out a search for documents to the extent stated in the order; and

(c) disclose any document located as a result of that search.

(2) An order for specific disclosure may be made on or without an application.

(3) An application for specific disclosure may be made without notice at a case management conference.

(4) An application for specific disclosure may identify documents—

---

<sup>2</sup> Paragraph 8 of the Defence stated:

"When the black loading cart made contact (minimal) with the Claimant she want not propelled forward nor did she fall. Instead the Claimant turned around and moved the loading cart backwards and walked away touching her upper back. The entire aforementioned sequence of events was recorded by the Defendant CCTV system and the Defendant will at trial rely on the video recording for it true meaning and effect."

<sup>3</sup> Paragraph 1 of the Defendant's List of Documents states:

"CCTV Footage of incident occurring on the 5<sup>th</sup> August 2017 at the Defendant's La Romain Premises."

<sup>4</sup> Court's order dated 17<sup>th</sup> June 2019 states:

**"IT IS HEREBY ORDERED** that:

1. The last sentence in Paragraph 8 of the Defendant's Defence is struck out.
2. Paragraph 1 of the Defendant's List of Documents is struck out.
3. By consent, the time is extended for the service of the Defendant's List of Documents to 17<sup>th</sup> June, 2019.
4. Parties to exchange proposals to settle this claim.
5. Parties agree to mediate this claim and to make arrangements for the mediation of this claim before the next Case Management Conference.
6. Case Management Conference is adjourned to 19<sup>th</sup> July, 2019 at 1:30pm in Courtroom SF07."

(a) by describing the class to which they belong; or

(b) in any other manner.

(5) An order for specific disclosure may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings.

**Criteria for ordering specific disclosure**

**28.6** (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) It must have regard to—

(a) the likely benefits of specific disclosure;

(b) the likely cost of specific disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure it may however make such an order on terms that the party seeking that order shall pay the other party's costs of such disclosure.

(4) Where the court makes an order under paragraph (3) it must assess the costs to be paid in accordance with rule 67.11

(5) The party in whose favour such an order for costs was made may apply to vary the amount of costs so assessed."

3. In this case, the Court ordered specific disclosure of the CCTV footage for the following reasons:

a) At the first CMC the Defendant revealed that it had in its possession this footage which would show that the incident complained of by the Claimant is a minor one. Such a material document should have been disclosed at the pre-action stage. There was no

explanation offered for failing to comply with the pre-action protocols.

- b) The Court requested of the Defendant's attorney to disclose the document to facilitate negotiations at an All Parties Conference.<sup>5</sup>
- c) At the second CMC the Defendant again failed to disclose the document. The Court made the order for specific disclosure emphasising to the Defendant's attorney the importance of sharing this relevant document to further the overriding objective.

### **Striking Out a Statement of Case**

4. Rule 26.2 (1) (a) of the Civil Proceeding Rules 1998 (CPR) states:

“**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... ”

5. The rule confers a discretion on the Court to strike out a Statement of Case/Defence if there has been a failure to comply with an order or direction given by the Court. It is a draconian remedy and one of last resort. See **Zuckerman on Civil Procedure, Third Edition**, paragraph 9.36<sup>6</sup>.

6. In **Kadir Mohammed v The Attorney General of Trinidad and Tobago** CV2013-04647 it was noted:

“17. The Court must be careful therefore to only resort to striking out a claim if it is satisfied that such a response is economical, fair and proportionate. Would it be a more economical use of the Court's and parties' resources and time? Would it be fair to the Defendant if it is called upon to answer the claim balanced against the right of the

---

<sup>5</sup> Parties are requested to assist the Court in furthering the overriding objective.

<sup>6</sup> “The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence, or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion. Nor is it appropriate to do so where a litigant effectively refuses to engage in a legal process by setting out to abuse or subvert it. In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay.”

Claimant to pursue his claim? Would it be proportionate to the nature of the allegations made and the nature of the matter, in this case essentially one of calling on the prosecutor in the criminal justice system to account for the use of prosecutorial powers. Such a decision calls for a broad judgment after considering the available possibilities and concentrating on the intrinsic justice of the case in light of the overriding objective and against the backdrop that this is a draconian remedy to be used sparingly.”

7. At the third CMC, against this backdrop of continued failure to provide the said footage and failure to comply with the Court’s order, the question of striking out that portion of the Defence which relied on the footage legitimately arose for consideration. The Court must be mindful of the principles of proportionality, equality and economy in the exercise of its discretion to strike out a Statement of Case/Defence.
8. In this case, it was the second time that the Defendant was asked for the CCTV footage to be shown to the Claimant since it is a material part of the Defence and important for the resolution of the claim. The CCTV footage should have been revealed even before the 1<sup>st</sup> CMC at the pre-action stage but the Defendant failed to reveal same to the Claimant. At the 3<sup>rd</sup> CMC on 17<sup>th</sup> June, 2019, when questioned by the Court why the CCTV footage was not shared after being asked twice to share same, Counsel for the Defendant indicated that she thought it would have been shared at the All Parties Conference which was to be held on or before 10<sup>th</sup> June, 2019. In any event, this was after the deadline for the disclosure of the CCTV footage on 24<sup>th</sup> May, 2019 and the Claimant did not file an application for relief from sanctions upon its failure to comply with the Court’s order.
9. In these circumstances, the Court was of the view that it was proportionate to strike out part of the Defendant’s Defence in failing to comply with the Court’s order and in failing to cooperate with the Court. Paragraph 1 of the Defendant’s List of Documents which concerned the CCTV footage was also struck out as being irrelevant to the claim since paragraph 8 of the Defence which concerned same was struck out. This kept the parties on equal footing in furthering the overriding objective and instilling discipline in litigation.
10. For these reasons, the Court struck out paragraph 8 of the Defendant’s Defence and

Paragraph 1 of the Defendant's List of Documents.

**Vasheist Kokaram**  
**Judge**