REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S 525 of 2001

BETWEEN

GAITRI KALICHARAN

Plaintiff

AND

KASRAJ PREERANGEE

First Defendant

AND

RAVI LAL

Second Defendant

Before: Master Margaret Y Mohammed

Appearances:

Ms Cindy Bhagwandeen for the Plaintiff
Mr Reshad Khan instructed by Mr Ravi Pherangee for the Defendants.

REASONS

1. On March 20, 2012 I dismissed the plaintiff's application to amend her statement of claim pursuant to Order 20 rule 5 (1) of the Rules of the Supreme Court 1975 ("the RSC") and ordered the plaintiff to pay the defendants costs of the application to be taxed

in default of agreement. The issue to be determined was whether the defendants can be compensated with an order for costs for any prejudice caused to them by the proposed amendment. I was of the view that they could not for the reasons set out hereafter.

2. There was agreement by the parties on the relevant law applicable to the plaintiff's application. Order 20 rule 5(1) of the RSC states that:

" Subject to Order 15, rules 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

3. There has been a plethora of local decisions which have examined the aforesaid provision the most notable being the Court of Appeal judgment of Mendonca JA in **Aron Torres v Point Lisas Industrial Port Development Corporation Ltd**[1] in which at paragraph 13 he stated:

" 13 Counsel however accepted that an amendment may be made at any stage of the proceedings, even during or after the closing addresses, and therefore without more, the application could not be said to be too late. Under Order 20 r 5 (1) an amendment may be granted at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner (if any) as the court may direct. The Judge in the exercise of his discretion to amend therefore should be guided by his assessment of where justice lies. In a case such as this, where the amendment sought is not within O 20 r 5 (3) - (5), then subject to the consideration of the impact of the amendment on the administration of justice, it is, generally speaking, an appropriate exercise of the Judge's discretion to grant an amendment no matter how late it is made if the prejudice to the parties may be compensated by an order as to costs. After all, the purpose of an amendment is to formulate the real issues between the parties. Of course, in determining whether a party can be adequately compensated by order as to costs the Court should consider all the

[1] Civ Appeal 84 of 2005 at para 13

circumstances and may take into account such matters as the strain litigation imposes on the litigants, particularly if they are personal litigants rather than corporate entities; the anxiety occasioned by facing new issues; the raising of false hopes; and the legitimate expectation that a trial will determine the issues one way or the other (see **Ketteman v Hansel Properties Limited [1987] 2 WLR 312**. The Court should also take into account the impact on the administration of justice if an amendment were to be granted."

4. Similar sentiments were echoed by Jamadar J in **Ramdaye Lalla v The North West Regional Health Authority[2].**

5. The general rule is amendments ought to be allowed at any stage of the proceedings for determining the real issues in the proceedings or to correct any defect or error in the proceedings. A clear distinction is drawn between amendments to clarify issues in dispute and those which provide for a distinct claim to be raised for the first time. It is undisputed that an amendment should not be granted if it is unfair, prejudicial, or creates an injustice to the other party for which he could not be compensated with costs or otherwise. In determining whether costs would be an adequate remedy the following factors are to be considered:

   (a) Would a strain be imposed on the defendant in particular if he was a personal litigant and not a company?
   (b) Would any anxiety be caused to defendant?
   (c) Did the amendment cause the defendant to suffer any false hope?
   (d) Was there a legitimate expectation that the trial would determine the issues one way or the other?
   (e) Does the amendment impact on the administration of justice?

6. Having considered the nature of the proposed amendment and the principles which the court must take into account in exercising its discretion I refused the application for the following reasons :

[2] HCA 2580 of 2001

(a) It would have been prejudicial to the defendants to allow the amendment for which costs could not compensate them.

(i) The plaintiff's pleaded injuries were lacerations to the face and injury to the eye. The proposed amendment included additional injuries to the back, legs, head, shoulder and post-traumatic stress disorder. The effect of the proposed amendment undoubtedly would have had a significant increase in the award of general damages to the plaintiff and in my opinion an order for costs could not compensate the defendants for this increase.

(ii) The plaintiff pleaded in the statement of claim loss of earnings at $250.00 per week for 14 weeks, a total sum of $3,500.00. There was no pleading to indicate that this loss was continuing some 4 years after the accident. I appreciated that an assessment of damages is a one-off event to determine the plaintiff's loss but in my opinion it was highly prejudicial to the defendants for the plaintiff to be allowed to amend her statement of claim 10 years after to include a claim for loss of reduced earnings for a total period of 12 years for an additional sum of $104,000.00. In my view an order for costs could not compensate the defendants for this prejudice.

(iii) These defendants were individuals who had limited resources to allocate to meet their liability in this matter. A proposed doubling of the claim for damages would have been a strain on the defendants and created great anxiety to them for which costs could not compensate them. If they were aware that their exposure was as high as that in the proposed amendment they would have assessed and conducted their case differently. In my opinion the defendants would then have to find witnesses to address and rebut the plaintiff's proposed claims. They could no longer conduct independent investigations into the amended claims to ascertain their veracity.

(b) It was not in the interest of the administration of justice.

In **National Lotteries Control Board v Michael Deosaran** [3] the full court of the Court of Appeal in dealing with an application for an extension of time for the filing of a summons to settle a record of appeal filed under the RSC commented on the impact on the administration of justice of such applications which although are different in nature from the instant application which was before me was still instructive since the information which the attorneys were seeking to rely on was available before this action was instituted. Jamadar JA stated:

" 58….To permit this application would be to set a precedent where delay is excessively inordinate and inexcusable, and even when there is some degree of prejudice caused to the respondent, as long as there is a good prospect of success on the merits of the appeal an extension of time should be granted (all other considerations being equal).

59. In my opinion, at this time, such a precedent would seriously undermine all the efforts that are being made to bring about a change in exactly this unacceptable culture of non-compliance with rules and orders that are plaguing the civil litigation system in Trinidad and Tobago. It is for this reason that for the last decade or so the Court of Appeal in Trinidad and Tobago has more or less consistently insisted that inordinate delay coupled with unacceptable explanations will be specially weighted among the factors that a court must consider in applications for extensions of time in cases such as this one.

60. Moreover, in this case and in all cases, the administration of justice is strengthened by compliance with the rules of procedure which are there to be observed, though not imposed in an inflexible or oppressive manner. In this case there can be no complaint about inflexibility or oppression. In this case no question of a miscarriage of justice arises[4]. No court readily moves to dispose of a matter before a

[3] Civ Appeal 132 of 2007
[4] See Kangaloo JA in I.M.H Investments at pages 6 to 9

trial or appeal, but there are times when this must be done in the interest of justice. In my opinion this is such a case."

The history of this matter was typical of matters instituted under the RSC. This case meandered through the civil justice system for at least 10 years with little attention being paid to the substance of the action until it was on the brink of the trial of the assessment of damages. It was instituted in April 24, 2001 for an accident which took place in July 1997. On November 12, 2002 permission was granted to the plaintiff to proceed with her action pursuant to Order 3 rule 6 of the RSC and Judgment in default of defence was entered on the same date. During the period May 21, 2003 to July 7, 2009 the assessment of damages came up for hearing before the Master and on the latter date directions were given for the plaintiff to file and serve her list of documents, bundle of documents and witness statements on or before February 26, 2010 and the trial was fixed for January 5, 2011. The plaintiff filed her list and bundle of documents on August 27, 2009 and her witness statement on February 26, 2010 some 2 years and 1 year respectively before the application. The instant application was filed on the date the trial was set to proceed.

For a period of 10 years that is between April 2001 and January 2011 this matter occupied the court's time and resources. To allow this application more than 10 years after the action was instituted and in particular when most of the information which the plaintiff sought to introduce was available long before the application was made would have been to condone a wastage of the court's resources not only causing undue delay to the defendants in this action but to other litigants in the civil justice system queue awaiting a timely conclusion of their matter.

(c) The information on which the proposed amendment was premised was previously available.

The information which the plaintiff was seeking to include in her statement of claim was available before her claim was filed on April 24, 2001. As stated previously the proposed amendment sought for the first time to introduce new claims (as opposed to clarify the issues) to divers parts of the body namely back, legs, head, shoulder and post-traumatic stress disorder. The proposed injuries were significant and were documented in the medical reports of the plaintiff which all predated the institution of the plaintiff's claim namely the report of Dr Roy Tilluckdharry dated September 4, 1997, Dr Victor Blackburn dated April 16, 1998, Dr Hari D Maharaj dated June 22, 1999 and Dr Shevanand Gopeesingh dated July 9, 1999. These reports detailed the injuries which the plaintiff was seeking to introduce some 10 years after the action was instituted, 13 years after receipt of the last report and 9 years after liability was entered.

(d) Reason given by the plaintiff for the delay was not excusable.

The plaintiff's reasons for the proposed amendment were her treatment and expenses as a result of her injuries have been on-going since the accident and her statement of claim only itemized certain aspects of her loss and injury and that the information which she sought to introduce was made available to the defendant in attempting to negotiate a settlement of this matter. I found this explanation to be unacceptable and inconsistent with the medical information which was clearly available to the plaintiff many years ago. In my opinion given the delay by the plaintiff in making this application with the information which she had in her possession for a substantial period of time it was fair to presume that the defendants would have suffered anxiety and distress in having such amendments sprung on them.

(e) The proposed claim for future medical care was new

The plaintiff's action was instituted in 2001 some 4 years after the accident. At that time there was no claim for future medical care yet 10 years after the plaintiff proposed to plead a claim for future medical care without any particulars. In my view this was a new claim which did not seek to clarify any of the already crystallized issues.

Dated this 26 April, 2012

Margaret Y Mohammed
Master (Ag)