

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

Claim No. CV2016-04056

BETWEEN

DEBRA JAMES

Claimant

AND

NEIL PEREZ

First Defendant

SEAN GRANT

Second Defendant

LA VAUGHN WIGGINS

Third Defendant

GUARDIAN GENERAL INSURANCE LIMITED

Fourth Defendant

Before Master Sherlanne Pierre

Date of Delivery: 31st July, 2020

Appearances:

Claimant: Mr. Stanley Marcus S.C. instructed by Ms. Jacqueline Bowen

Defendant: Mr. Ravindra Nanga instructed by Ms. Alana Bissessar

DECISION

I INTRODUCTION

1. The issue before this court was whether it should grant the defendants' application and make an order for specific disclosure directing that the claimant produce her income tax returns at the assessment of damages¹.

¹ The claimant obtained judgment on liability before Aboud J and the matter was put before this court for the assessment of damages

2. The Court refused the defendants' application because it was not persuaded that the income tax returns were directly relevant to a matter in issue in the proceedings nor that an order for specific disclosure of the returns was necessary to dispose fairly of the claim.
3. By her amended statement of case, the claimant made a claim for loss of income for the following periods:
 - i. December, 2011 to March, 2012 in the sum of \$120,000.00, and
 - ii. August to October, 2015 in the sum of \$90,000.00.
4. The claimant pleaded that she was unable to work during these periods because of injuries she sustained from a collision occasioned by the defendants' negligence. As a result, she claimed she suffered loss of income. In support of her loss of income claim, the claimant intended to rely on her witness statement, the witness statement of an accountant, numerous receipts and a statement of income attached to the statements. There was no reference to income tax returns nor tax receipts in her pleadings or witness statements. The level of income which the claimant claimed she could have earned for the relevant period, would, however, ordinarily attract tax under the Income Tax Act Chapter 75:01.
5. The defendants applied for the following orders pursuant to Part 28 of the Civil Proceedings Rules 1998 (as amended) (CPR) and/or under the inherent jurisdiction of the court:
 - i. that the claimant disclose her income tax returns for the years 2009 to 2016 inclusive within 14 days of the date of the application;
 - ii. the assessment of damages fixed for hearing be rescheduled to a date after the claimant has complied with any order for specific disclosure; and
 - iii. the claimant do pay the defendants' costs of the application as assessed.
6. The defendants' application was supported by the affidavit of Kevina Ramsook, attorney-at-law.

II SUBMISSIONS

7. The defendants submitted that an order for specific disclosure of the claimant's income tax returns should be made for the following reasons:
- i. the level of income claimed by the claimant in her particulars of loss was such that it would attract tax and therefore she would have been obligated to pay income tax for the relevant period;
 - ii. the claimant's income tax returns were the only credible document capable of proving the claimant's earnings;
 - iii. the evidence upon which the claimant intended to rely did not provide a picture of the trend of the claimant's earnings to support her claim that she could have earned approximately \$2,000.00 per day, because,
 - i. she failed to annex receipts to her witness statement for fees earned for the years 2010, 2011, 2014 and 2015, and
 - ii. the claimant's accountant-witness failed to exhibit statements for any year other than 2013;
 - iv. the period for which the income tax returns had been requested, that is, two years prior to the first period for which loss of income was claimed and one year after the second such period was reasonable in order to give an accurate reflection of the true earning capacity of the claimant;²
 - v. the claimant failed to produce the income tax returns or in default receipts evidencing payment of taxes or to go on affidavit that she had paid taxes, despite the defendants' request that she produce the tax returns; and
 - vi. the claimant's income tax returns were directly relevant to the loss of earnings issue and were therefore necessary to fairly dispose of the assessment and would serve the overriding objective.
8. The defendants relied on the authorities of Proman Holdings (Barbados) Lt et. anor. v CL Financial Ltd et. ors.³, Deposit Insurance Corporation v Trotman et ors.⁴ and Real Time Systems Limited v Renraw Investments Limited et. ors.⁵

² See lines 7 to 11 of para 7 of defendants' submissions filed 16 June, 2020

³ 91 WIR 568

⁴ CV2010-01442

⁵ 84 WIR 439

9. The claimant filed no affidavit in opposition but resisted the application on the following grounds:

- i. the income tax returns were not directly relevant to the issues in the proceedings and therefore the defendant's application was merely a fishing expedition;
- ii. the claimant had already advised the defendants that the requested documents did not exist for the stipulated periods;
- iii. income tax returns for a period of eight years in relation to a claim for seven months' loss of income violated the principle that the documents must be directly relevant; and
- iv. the claimant had provided what documentary evidence she possessed which was therefore the best evidence available to her.

III DISCUSSION

10. I first set out the relevant rules of Part 28, namely rules 28.1 (4), 28.5 and 28.6:

28.1(4) For the purposes of this Part a document is "directly relevant" if-

- (a) the party with control of the document intends to rely on it;*
- (b) it tends to adversely affect that party's case; or*
- (c) it tends to support another party's case,*

but the rule of law known as "the rule in Peruvian Guano" does not apply.

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-

- (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.

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.

Were the income tax returns directly relevant, within the meaning of rule 28.1(4), to the issue before the Court?

11. Under rule 28.5 (5) the defendants were required to show that the income tax returns were directly relevant to a matter in issue in the proceedings and that the claimant intended to rely on them or that the income tax returns tended to either adversely affect the claimant's case or support the defendants' case.
12. The claimant's claim for loss of income had been put before this court for assessment. The issues for determination at the assessment would therefore be whether the claimant had established the fact of the loss as a result of the defendants' negligence and whether the claimant had proven the quantum of such loss.
13. At an assessment of damages, the evidential burden to prove her damages fell squarely on a claimant's shoulders. This claimant elected to rely on her witness statement and that of the accountant and the receipts and statement of income

attached thereto. The claimant did not elect to rely on income tax returns nor tax receipts and no specific reference was made to the filing of tax returns nor to the payment of taxes in her pleadings or in the witness statements.

14. The defendants submitted, however, that the very level of income claimed by the claimant in and of itself would require compliance with the Income Tax Act Chapter 75:01 and the Proceeds of Crime Act Chapter 11:27. A court was always concerned with upholding the law but nothing had been raised directly in the pleadings on the issue of taxes which the defendants were required to answer. Whether the claimant filed income tax returns or paid taxes were not issues of fact on the assessment. What was in issue was whether the claimant suffered the loss of income which she claimed and if so, what was the quantum of such loss. It was open to her to rely on the evidence she considered would best assist her in discharging her evidential burden. Further, a court could, in the usual way, discount any award for loss of income to take into account statutory deductions including P.A.Y.E.,⁶ so express evidence as to taxes was not directly relevant.
15. Notwithstanding, the defendants submitted that the income tax returns must be relevant to the loss of earnings issue because, to put it plainly, the documents and witness statements upon which the claimant intended to rely to prove her loss of earnings were inadequate. The defendants' application, supporting affidavit and submissions were all framed in this way.
16. In setting out the grounds of the application, the defendants asserted that the claimant had not annexed receipts and income statements for certain years:

[3] Whilst the claimant has annexed receipts to her witness statement for fees earned for the years 2014 and 2015 she has not annexed any such receipts for the years 2010 nor 2011 and has annexed 23 receipts for the months January 2015 to August 2015.

[4] Mr. Rampersad has exhibited to his witness statement filed on the 15th January, 2020 a statement of income for the year 2013 but has failed to exhibit

⁶ See CV2007-04748 Wayne Wills v Unilver Caribbean Limited

any for any other years. He has opined that she could have earned between \$1,850.00 and \$2,350.00 during the period 2007 to 2013.

[5] The defendants by letter dated 14 February 2020 wrote to the claimant's attorney-at-law requesting these documents but by email dated the 21 February 2020 the claimant has failed and/or refused to provide same.

[6] The disclosure of the requested documents will provide a picture of the trend of the claimant's earnings over the period immediately prior during and immediately after the periods claimed so as to assist this Honourable court in assessing the damages as such they are directly relevant to the issue of loss of earnings, is necessary to fairly dispose of the assessment of damages and would serve the overriding objective by allowing the Honourable Court to have all the information to assist in assessing the claimant's damages.'

17. At paragraph 7 of her affidavit⁷⁷ Ms. Ramsook, deposed that unless the tax returns were disclosed, there would not be sufficient evidence before the court for the court to glean the trend of the claimant's earnings:

'I am advised by Counsel and verily believe that the disclosure of the requested documents will provide a picture of the trend of the claimant's earnings over the period immediately prior, during and immediately after the periods claimed so as to assist this Honourable court in assessing the damages as such they are directly relevant to the issue of loss of earnings, is necessary to fairly dispose of the assessment of damages and would serve the overriding objective by allowing the Honourable Master to have all the information to assist in assessing the claimant's damages.'

18. At paragraph 6 of their written submissions⁸, the defendants argued that income tax returns were the only credible document capable of proving the claimant's loss of income:

'Accordingly, when we examine the Amended Statement of Case, we observe that there is a claim for loss of earnings, and the quantum claimed would have

⁷⁷ Affidavit of Kevina Ramsook filed on 26 February, 2020

⁸ Defendants' submissions filed on the 16th June, 2020

obligated the claimant to have paid tax on the level of income she claims to have lost. Accordingly, we submit that the Claimant cannot seriously argue that her income tax returns are not directly relevant to a matter in issue in the proceedings. This much is clear from an analysis of the pleadings. If the Claimant earned the level of income that she is now claiming, she ought to produce her income tax returns in order to support her claim. That is the only credible document capable of proving the claimant's earnings'.

19. Further, at paragraph 7 thereof, the defendants submitted that the period for which they had requested income tax returns would give an accurate reflection of the claimant's earning capacity:

'...the income tax returns for the period 2009-2016 are more than reasonable, as it is two years prior to the first period being claimed and one year after the second period claimed, and in respect of which the Claimant's 2015 income would have been declared. This period would give an accurate reflection of the true earning capacity of the Claimant, and thus is directly relevant and will determine an issue in the assessment, namely, the loss of the claimant's earnings.'

20. A prudent claimant would rely on the best evidence available in order to effectively discharge her evidential burden (I do not say whether this had been done, one way or the other), however, it was the claimant's burden to discharge. It was not for this court nor for these defendants to 'assist' the claimant in the discharge of her evidential burden.

21. Where a party was of the view that any evidence on which the other side intended to rely was wanting, they could test such evidence at trial. These defendants might test the claimant's evidence by way of cross-examination at trial to highlight what they perceived as weaknesses in the claimant's case. Further, if at the end of trial, the defendants were of the view that the claimant had not led sufficient or cogent evidence to prove her loss of income claim, they could make submissions as to the weight which the court ought to attach to the receipts and the claimant's and

accountant's evidence and invite the court to make certain findings. Specific disclosure was also therefore not necessary to fairly dispose of the claim.

22. The defendants asserted that the best evidence to support the claimant's claim was the income tax returns, but I think that was a matter for the claimant. As was stated by Boodoosingh J in Clico supra '[u]ltimately, however, the applicant bears the burden of proving what has been alleged against the respondents. If their evidence, including documents in support do not come up to proof, the Liquidator will not be entitled to the orders sought against the respondents.'⁹
23. There was also an issue as to whether the requested documents existed. The claimant had expressly indicated in writing to the defendants that the documents which they had first requested by letter, did not exist; that there were no income tax returns for the period requested. A document which did not exist could not be the subject of an order for specific disclosure.¹⁰ The defendants had invited the court to take note of the fact that the claimant did not go on oath to confirm what had already been indicated by her attorneys but there was nothing contrary before the court to cast doubt on the claimant's position as indicated.
24. I concluded that the defendants did not satisfy rule 28.5(5). They did not show that the claimant intended to rely on the income tax returns nor that the returns tended to either adversely affect the claimant's case or support the defendants' case. I agreed with the submissions of the claimant that the income tax returns were not directly relevant to a matter in issue on the assessment. I was also of the view that the court might fairly dispose of the case as it stood, without making an order for specific disclosure. In the circumstances, I dismissed the defendants' application with costs.

Sherlanne Pierre

Master

⁹ Para 6

¹⁰ See para 9 of *Clico supra*