THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Supreme Court San Fernando)

Claim No. CV 2006 - 04023

BETWEEN

DOOLIN MOHAMMED

(Legal Personal Representative of the Estate of Samuel Mohammed)

Claimant

AND

ASHTON KAWAL

First Defendant

BANKERS INSURANCE COMPANY LIMITED

First Co-Defendant

AZIZ HOSEIN

Second Defendant

MARITIME GENERAL INSURANCE COMPANY LIMITED

Second Co-Defendant

JAVED HOSEIN

Third Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. Cindy Bhagwandeen for the Claimant

Mr. Dipnarine Rampersad for the First Defendant

Mr. Asaf Hosein for the First Co-Defendant

Mr. Ronnie V Persad instructed by Ms. Salma Rahaman for the Second and Third Defendants and Second Co-Defendant

Reasons for Decision

Background

1. The claimant seeks to amend her statement of case filed on 12th December 2006 to include a claim for loss of earnings of the deceased, and funeral expenses. The application to amend was filed on January 27th 2012.

2. She claims that the documents - (the receipt for funeral expenses – and a job letter which evidenced the claim for loss of earnings,) "had **now been brought to** her **attention** "and were only brought to the attention of her lawyers on the 17th January 2012.

3. These documents are dated 21st January 2003 - (letter from employer) and 30th December 2002 - (receipt from funeral home) respectively. The former is addressed to former attorney at law for the claimant.

4. The claimant's ability to amend is derived from CPR Part 20 as amended on July 1st 2011. It provides as follows –

> ***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 shall not give permission to change a statement of case* ***after the first case management conference*** *unless it is satisfied that –*

(a) there is a good explanation for the change not having been made prior to that case management conference; and

*(b) the application to make the change was made **promptly**.*

(3A) In considering whether to give permission, the court shall have regard to –

(a) the interests of the administration of justice;
(b) whether the change has become necessary because of a failure of the party or his attorney;
(c) whether the change is factually inconsistent with what is already certified to be the truth;
(d) whether the change is necessary because of some circumstances which became known after the date of the first case management conference;
(e) whether the trial date or any likely trial date can still be met if permission is given; and
(f) whether any prejudice may be caused to the parties if permission is given or refused.

5. At issue is whether the first case management conference has passed. This matter is related to another which is pending before the Court of Appeal. The parties agreed to be bound by the outcome of that appeal as to liability. All that would have remained in issue in relation to the instant mater would be quantum.

Procedural history

6. On December 7th 2011 the Court had ordered that the claimant file and exchange written submissions on quantum on or before 29th February 2012 and leave was granted to the defendants to file and exchange written submission on or before the same date. The Claimants submissions were filed on 14th February 2012 and the Second and Third Defendants and Co-Defendant's written submissions were filed on the 28th February 2012.

7. It is clear

a. that significant time elapsed between the date of filing the claim and statement of case i.e. 12th December 2006 ,and the date of the application to amend, i.e. 27th January 2012.

b. that minimal directions were given in the expectation and on the representation that the outcome of the appeal in the related matter would effectively determine the issue of liability in the instant matter.

c. that the main outstanding issue was that of quantum.

d. that it was directed that pre-trial written submissions on quantum be filed so as to ascertain what, if anything, separated the parties, and to explore whether an agreement in principle on quantum could be also arrived at, similar to that already arrived at on liability, which would obviate the necessity for a trial.

8. In fact this appeared to stimulate the application to amend as it would then have become clear to the claimant that an amendment to her pleadings was necessary if she wished to claim loss of earnings for the lost years.

9. On 27th January 2012 the claimant filed her application to amend. The effect of the proposed amendment was to convert the claim as it then stood, from one purely for loss of

expectation of life, (a conventional sum of $20,000), to one for the lost years – with pre trial loss of earnings being claimed over a period of 9 years 1 month from 15th December 2002 to 19th January 2012, together with future loss of earnings.

10. This was 9 years after the date of the first alleged document, and 8 years after the second alleged document, addressed to the claimant's former attorney, were allegedly *"brought to her attention"* and thence allegedly to the attention of her attorneys at law.

Whether first case management conference had been concluded

Must the first case management conference be concluded at one hearing?

11. The statement by the Honourable Justice Rampersad in the case of **Premnath Bowlah v The Attorney General of Trinidad and Tobago H.C. 4924/2008** at paragraph 19 is relevant:

> *"To my mind the first Case management Conference is an event, a fact, not a name. The ritualistic administrative function of giving a date does not impose the judicial connotations of case management until there has been an actual exposition of the matters intended to be dealt with as referred to at Part 25. If those matters are not dealt with on the 1st court appointed date I see it necessary to consider at what point a judge has dealt with the matters. It is important to note that Part 25.1 is not a check list but a guide to the matters which a court ought to consider".*

12. It is also the case however that, rather than splitting the first case management conference into several parts, each being an extended version of the first case management conference, a court can, and sometimes does, hold more than one case management conference, **after** the first one – a second, or more, depending on the circumstances, as contemplated by CPR Part 27.8 (1). This is a matter for a court's discretion in actively managing each matter.

13. What transpired at the Case Management Conference on the 7th of December 2011 needed to be considered. It is clear that on that date the only directions that were given were directions that would have directed the parties' minds to the quantum in dispute. Other directions which would normally have taken place at the first Case Management Conference were specifically deferred. For example, no order was made for the filing of witness statements at that stage or for the exchange of documents.

14. It is clear therefore that all matters which could have been dealt with at the Case Management Conference, at the first Case Management Conference, and which would have been dealt with by the court at a full hearing of the Case Management Conference, were not, precisely because the matter was awaiting the outcome of an appeal in a related matter.

15. It is not recorded in the court's fly sheet at any point that it was the first case management conference that was being adjourned. While the first case management conference may be held in parts over more than one sitting it has become the practice to record this expressly when this is intended.

16. Further, although no direction for witness statements had been made, a direction had been given for a significant step in the management of the matter, on the main issue that remained – quantum. This was not merely a ritualistic administrative function. It was a step directed specifically to the main issue in the matter.

17. In those circumstances it would be difficult to contend that the matter, 5 years after its filing, was still at the stage of the **first** case management conference. I consider that the first Case Management Conference had been concluded as at the date of the notice of application, and that the **first** Case Management Conference had not been adjourned. If it had, this court's practice is to specifically record this, as there are consequences attendant upon that stage being

passed. No such record was made in this case. It is clear that the further directions that would have been necessary for a full trial were to be given if the attempt to quantify the amount in dispute did not, as it sometimes does, produce a resolution.

18. It should have been obvious that a claim for the lost years should have been included in the statement of case, if that had been intended. See **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) *v* Ramesh Seebalack [2010] UKPC 15** at paragraphs 14 -18 as set out below

> ***Was the amendment necessary?***
>
> *14.* ***It was common ground in the courts below that an amendment of the statement of case was required in order to permit the claimant to advance the "lost years" claim and the claim for funeral expenses. It is now submitted on behalf of the claimant that the amendment was not required.*** *It is said that the statement of case included a claim for damages and that information about it could have been provided by the claimant pursuant to Part 35 of the CPR either of her own initiative or in response to a request by the defendants or pursuant to a court order. Alternatively, it is submitted that the details of the claim for damages could have been provided by the claimant in a witness statement (as in part they were).*
>
> *15.* ***In the view of the Board, an amendment of the statement of case was required.*** *Part 8.6, which is headed "Claimant's duty to set out his case", provides that 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. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that "Particulars of claim must include— (a) a concise statement of the facts on which the claimant relies". In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at p 792J, Lord Woolf MR. said:*
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> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken*

by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required."

16. But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. ***Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed.*** *Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the material facts and by r 12(1) that "every pleading must contain the necessary particulars of any claim". In Perestrello v United Paint Co Ltd [1969] 3 All ER 479, Lord Donovan, giving the judgment of the Court of Appeal, said at p 485I:*

"Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet…Page 8

The same principle gives rise to a plaintiff's ***undoubted obligation to plead and particularise any item of damage which represents out-of -pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation.*** *Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded….*

The claim which the present plaintiffs now seek to prove is one for ***unliquidated damages****, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial* ***it requires to be pleaded*** *so that the nature of that claim is*

disclosed… …a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning."

17. These observations are applicable to Part 8.6 of the CPR as well as to Part 16.4(1) of the England and Wales CPR. ***In the present case, there was nothing in the original statement of case to indicate the heads of general damages that were being claimed. In order to satisfy Part 8.6, it was necessary to amend the statement of case to make good that omission.***

18. ***It was also necessary to amend the statement of case to include the claim for special damages****, although for a different reason. Part 2.3 of the CPR defines "claim for personal injuries" as including a claim for damages "in respect of a person's death".* ***The claim for funeral expenses was a claim for special damages****. Since a schedule of special damages was not included in or attached to the claim form or statement of case, in order to comply with Part 8.10(4), the claimant was required to obtain permission to amend the statement of case in order to include the schedule of special damages in it.*

19. The absence of the letter from the employer might have explained the inability to plead a specific figure, or the need to amend a figure so pleaded, but it cannot explain a complete failure to plead this head of damage at all.

20. The prejudice to the defendants in having a claim converted, by amendment, to one for almost $700,000.00, which from inception, was on its face one for loss of expectation of life ($20,000), cannot be underestimated.

21. They would need to find rebuttal or confirmatory evidence in relation to the alleged earnings of the deceased in 2003 – 9 years ago, in respect of evidence which stems from a letter which was, on its face, addressed to attorney at law for the claimant.

22. The Civil Proceedings Rules Part 20 provides that the court's discretion in relation to circumstances like this must be exercised within specific parameters.

1. There must be a good explanation for the change not having been made prior to that case management conference.

2. The application to make the change must have been made promptly.

23. The explanation provided for the change not having been made prior to that case management conference is lacking in specificity, and credibility. The application was made in 2012, several years after the statement of case was filed, and years after the documents which purportedly gave rise to it, were issued. The reason for those documents having recently been brought to the attention of the claimant, and by whom they were so brought, remains unexplained and unclear. The affidavit evidence in this regard is insufficient to move the court to exercise any discretion in her favour to allow the requested amendment.

24. *(3A) In considering whether to give permission, the court shall have regard to –*

(a) the interests of the administration of justice;

(b) whether the change has become necessary because of a failure of the party or his attorney;

(c) whether the change is factually inconsistent with what is already certified to be the truth;

(d) whether the change is necessary because of some circumstances which became known after the date of the first case management conference;

(e) whether the trial date or any likely trial date can still be met if permission is given; and

(f) whether any prejudice may be caused to the parties if permission is given or refused.

The interests of the administration of justice

25. An amendment 5 years after the filing of a matter to increase a claim from one which on its face is valued at approximately $20,000.00, to one which is now valued at almost $700,000.00, based on evidence which was clearly available since 2004, which was addressed to attorneys at law for the claimant, and in respect of which attorneys for the defendant have to seek rebuttal evidence more than 9 years later, cannot conceivably be in the interests of the administration of justice.

Whether the change has become necessary because of a failure of the party or his attorney

26. According to the affidavit it was the failure of the claimant. It is difficult to accept this at face value. There remains a real possibility that it was the failure of the claimant's attorney. In the circumstances of this case it makes little difference. The defendants should not be made to suffer the prejudice attendant upon allowing such an amendment.

Whether the change is factually inconsistent with what is already certified to be the truth

27. I do not ascribe significance to this factor in the circumstances of this case.

Whether the change is necessary because of some circumstances which became known after the date of the first case management conference

28. I entertain significant reservations about the veracity of the reason given for the proposed amendment. The most important document on which it was purportedly based was addressed to attorney at law for the claimant. The statement in her affidavit to the effect that she drew that document to the attention of her attorneys at law on January 17th 2012 is therefore not credible.

Whether the trial date or any likely trial date can still be met if permission is given

29. This is of little relevance in the circumstances of this case. No trial date was set, as the outcome of the appeal on liability in the related matter was awaited.

Whether any prejudice may be caused to the parties if permission is given or refused

30. The amendment if granted would significantly and substantially increase the quantum in issue as demonstrated by the submissions on quantum filed.

31. In the premises I find:

a. the matter has progressed beyond the stage of the first case management conference.

b. the claimant has not demonstrated circumstances that give rise to the exercise of this court's discretion to permit an amendment to her pleaded case at this stage.

32. In those circumstances:

a. The application was dismissed.

b. It was ordered that the claimant do pay the costs thereof to be assessed by this court at the trial of this action.

Dated this 21st day of June 2012

Peter A. Rajkumar
Judge.