REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-4660

BETWEEN

MANO SAKAL

Claimant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. Sasha Singh for the claimant

Mr. David Alexander instructed by Ms. Neebar for the defendant

Oral decision

1. The claimants sought to contend that the actions of Petrotrin caused loss to him of his crops. In his evidence however, he accepted that dredging issues existed on the Nagassar channel, (which is a channel that he said had been blocked by the actions of Petrotrin), **before** the actions of Petrotrin.

2. He had cause to complain to the Ombudsman, via his son, about the failure of the Ministry of Works to dredge that channel. At one point in his evidence he accepted that the failure of the Ministry of Works actually caused him to lose crops.

(Proof of Loss)

3. He further testified that the area of land that he planted varied according to whether or not he was able to secure labour. It is clear therefore, that labour cost was a factor in assessing his loss of profit. Yet his calculations of his alleged loss were simply based on a number of plants per acre, their yield, and the price per pound of that alleged yield. There is no deduction for **expenses**, and there is no attempt to support the amounts claimed by any documentation whatsoever.

4. The reason offered was that the claimant had operated almost exclusively on a cash basis. He says he grew his own seedlings, he fertilized them with manure from his own cows, and he sold the crops at the market on a cash basis, but that does not explain why

i. he does not have receipts from the labourers who would have worked for him,
ii. he has no receipts or evidence from anyone from whom he must have purchased the seeds to allegedly grow the seedlings,
iii. there is no statement in evidence from even one person at the market who would have purchased produce from the claimant,
iv. there is no evidence from anyone as to the alleged price of the crops that he says he grew, at the time that he says he grew them,
v. he has not produced even a basic accounting to determine whether he makes any profit whatsoever,
vi. he has no evidence of bank statements to show deposits of the fairly substantial sums that he contends were received from the alleged crops,
vii. he has no tax returns from previous years to substantiate the alleged income from his farming activities - three hundred and sixty thousand dollars **($368,000) per year** - from the land allegedly affected.

5. I am unable to accept that the alleged substantial losses have been proved on a balance of probabilities. The court is therefore left with grave doubts as to whether, even if the defendant's activities had the alleged or any impact on the claimant's land, whether he ever sustained the alleged or any loss.

Liability

6. On the question liability itself I find as follows (re) the several witnesses in this matter:

(i) The defendant's witness Roopchand Balliram was extremely unsure about everything in his witness statement. I don't accept any of his evidence. It cannot be relied upon. It is not accepted as he was not definite on any aspect of his witness statement.

(ii) The evidence of Sieunarine Sirjoo- I accept his evidence. His demeanor was candid and straightforward. He was clear on what he knew and what he did not know.

(iii) The evidence of Mr. Sennon. He gave evidence of the placing of 14 booms across the Nagassar channel to contain and trap oil. His evidence was rather vague, though from his responses it appeared that he knew what he had done, but he had difficulty communicating it verbally. Certainly he was not as fluent with his language skills as his witness statement would have suggested.

7. His explanation of the booms and the fact that they would not impede the flow of water is accepted. His evidence with respect to the dog legs and their manner of operation is less clear. Paragraphs 10 and 11 of his witness statement do not satisfactorily explain the mode of operation of a "dog leg".

8. The effect of his witness statement and his testimony is that an excavation is made in the channel bed and an embankment is made in front of it. Prima facie the defendant has admitted that he in fact carried out some work that had the potential to impede, to some extent, the flow of water in the Nagassar channel.

9. The court's attempt to have the witness explain to the court, as the finder of fact, the precise operation of the dog leg, and the extent of the embankment that had been made by the defendant, was objected to. So even though the witness was willing to draw a diagram and explain

what he meant at paragraph 10 and 11 of his witness statement, the court was deprived of that opportunity.

10. Prima facie therefore, there is evidence that the defendant did carry out some activity that had the potential to impede the flow of water in the Nagassar channel:

(a) By reason of the construction of embankments, the extent of which is unknown; and

(b) By the placing of dog legs in the channel, the mode of operation of which is left uncertain by his evidence,

and therefore his assertions that these do not impede the flow of water in that channel remains unsupported and cannot be accepted by this court.

11. I find however

i. that there is evidence the flow of water in the Nagassar channel was impeded by activities other than that of the defendant,

ii. that that channel required regular maintenance by the Ministry of Works, as revealed in the Statement of Case of the claimant, and a letter by the claimant's son to the Ombudsman.

12. I find that pre-existing state of occasional impeded flow of the Nagassar channel had resulted in complaints by the claimant and his son of loss of crops. This appears to support the defendant's contention that its activities had no additional impact on the flow in that channel.

Burden of proof

13. The burden of proof is on the claimant to establish that the activity of the defendant, and not the pre existing propensity of that channel to become blocked with sediment, is what caused blockage of that channel. He has failed to do so by any, or any sufficient, evidence of probative value.

14. The evidence is that as a result of non maintenance by the Ministry of Works, the drainage of the Nagassar channel has been impeded in the past, and it was the claimant's pleaded case that it was the responsibility of that Ministry to maintain that channel to prevent such an impediment.

15. The specific manner in which the defendant's activities allegedly caused blockage, additional to the pre existing propensity of that channel on its own to be blocked, has not been proved by the generalized nature of the self serving evidence of the claimant.

16. I find therefore he has failed to establish a causative nexus between the activities of the defendant and the loss that he claims.

17. In view of that finding there is no basis to make any award of nominal damages in lieu of the specific damages that he has claimed, which I find that he has not proved.

18. I therefore find that as far as liability is concerned the claimant has not succeeded.

Further as far as the issue of quantum is concerned, he does not succeed.

19. The claimant's claim against the defendant is dismissed, with the claimant to pay the defendant's costs on the basis prescribed by the Civil Proceeding Rules in the amount of $14,000.00.

Dated this 17th day of July 2012.

Peter A. Rajkumar
Judge.

Supplemental reasons

Law - Proof of special damages

1. Pretrial loss is an item of special damage. It has to be pleaded, particularized and strictly proved. See **Charmaine Bernard (Legal Representative of the Estate of Regan Nicky Bernard) v Ramesh Seebalack [2010] UKPC 15** at paragraph 16 Sir John Dyson SCJ (citing ***Perestrello) infra:***

In *Bonham Carter v Hyde Park Hotel* *[1948] 64 TLR* **Lord Goddard CJ** stated that parties *"must understand that if they bring actions for damages, it is for them to* ***prove their damage****; It is not enough to write down the particulars, so to speak, throw them at the head of the court saying 'this is what I have lost; I ask you to give me these damages'.* ***They have to prove it."***

2. **The degree of strictness of proof that is required depends on the particular circumstances of each case**.

(a) As Bowen L.J. stated in **Ratcliffe v Evans** (1892) 2 Q B 524, 532 - 533: (all emphasis added)

"In all actions accordingly on the case where the damage actually done is the gist of the action, ***the character of the acts themselves*** *which produce the damage and* ***the circumstances*** *under which these acts are done****, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved****. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done.*** *To insist upon less would be to relax old and intelligible principles to insist upon more would be the vainest pedantry."*

(b) In Civil Appeal 41 of 1980 **Gunness and Another v Lalbeharry**, the appellant was injured in a vehicular collision. In an action for damages for negligence the Judge allowed certain claims and disallowed others. Among the claims disallowed was a claim for special damages relating to the loss of various items of jewelry, handbag, cosmetics and $75.00 in cash. On Appeal the Court held that the Judge erred in disallowing the claim.

Braithwaite J.A with whom the other members of the Court of Appeal agreed stated (at page 2):

"In disallowing the appellant's claim for these items, the judge merely stated:

'From the evidence which she gave and which was unsupported, I find that you failed to prove such loss.'

There is no evidence to contradict the evidence of the appellant nor had she been shown not to be a credible witness. There is therefore no justification for the judge's finding in this respect. The fact that her evidence is unsupported is clearly not sufficient to deny her claim for a loss which must be taken, in the absence of evidence to the contrary, ***in the circumstances of her loss of consciousness*** *to be at least strong* ***prima facie evidence*** *of the fact which she alleged."* (all emphasis added)

(c) That a measure of flexibility exists in the degree of proof required for special damages was confirmed by the Court of Appeal in Civil Appeal 162 of 1985 **Uris Grant v Motilal Moonan Ltd.** and **Frank Rampersad**, where **Ratcliffe v Evans** was applied.

The appellant's furniture and other articles were destroyed when a vehicle ran off the road and crashed into a house in which she lived. She claimed damages in respect of the destroyed chattels. According to the evidence the appellant had made a detailed list of the things destroyed the day following the accident. In the statement of claim the Appellant's special damage claim had been particularized. A default judgment was taken up, and in the assessment before the Master, the appellant produced in evidence the **list** she had prepared which itemized each item and the **price** thereof. She however produced **no receipt** verifying the price she had paid for the items. She admitted that she did not have such receipts, nor did the appellant retain the services of a valuator to value the damage.

The Master held that the appellant had failed to prove the value of the items and awarded an "ex gratia" payment. The Court of Appeal held that the Master erred. The Court at page 16 noted that the appellant's evidence as to her loss represented strong prima facie evidence and was unchallenged. With respect to the lack of receipts to support her claim, it stated: - *By the production in evidence of the list of chattels destroyed together with the costs of their replacement, the appellant had established* ***a prima facie*** *case both of the*

fact of loss *of those articles and of the* ***costs of their replacement*** *at the time. Her special damage had to be established on a balance of probabilities. The respondent called no evidence in rebuttal. In the event, the Master, in my view, either had to accept the appellant's claim in full or,* ***if for whatever reason she had reservations*** *she should have approached the matter along the lines in Ratcliffe's Case by* ***applying her mind judiciously to each item and the cost thereof*** *in the list. This she did not do. Instead she merely, as stated earlier, made an ex gratia award. She did so on the premise, wrongly in my view, that the appellant had called no evidence of any kind in support of her claim.*

In my view, the Master erred. The appellant did call ***prima facie evidence*** *of her replacement costs the fact of which, as I said was* ***unchallenged****. At this stage I must pose the question whether in this country it is* ***unreasonabl****e, in a case of this kind, for a person to be unable to produce bills for* ***clothing, groceries, watches, kitchen utensils, furniture and/or other electrical appliances*** *and/or for that matter to remember the time of the purchase. To my mind, this is clearly in the negative and to expect or insist upon this is to resort to the "vainest pedantry."*

With regard to proof of special damage the authors of McGregor on Damages citing the dictum of Bowen, L.J. in Radcliffe's Case supra and quoted earlier in this judgment state that in proof as with pleading, "the courts are realistic and accept that the particularity must be tailored to the facts." (all emphasis added)

d. In a more recent decision of the Court of Appeal, **David Sookoo, Auchin Sookoo v Ramnarace Ramdath Cv. App No. 43 of 1998** per M.A de la Bastide, C.J, delivered 12th January 2001, it was confirmed that that degree of flexibility had limits, depending on inter alia:-

(i) The circumstances,

(ii) The nature of the claim,

(iii) The difficulty or ease with which proper evidence of value might be obtained, and

(iv) The value of the item involved.

"It is common experience that items of special damage are sometimes not proved to the hilt and yet the Court may make an award in respect of them. ***It is a matter which depends on***

the circumstances and evidence in each case. *The Court has to decide whether on the material before it, it can arrive at some acceptable conclusion as to the amount which it should award."* (At page 4)

".....These are the cases on which counsel for the Respondent relies. ***The sort of evidence*** *which a Court should insist on having before venturing to quantify damages* ***will vary*** *according to the* ***nature of the item in respect of which the claim is made*** *and* ***the difficulty or ease with which proper evidence of value might be obtained****. It would also,* ***depend in part on the value of the individual item****. It may not be reasonable to require expert evidence of the value of used household items but where one is dealing with a motor-vehicle which usually has considerable value, and* ***in respect of which there should be no difficulty in securing proper evidence of value****, then the* ***Court is entitled to adopt a more stringent approach****.*

I, accept the correctness of the decision in ***Grant's*** *case but that case is clearly distinguishable on the facts from ours".* (At page 5)

e. See also the discussion on proof of special damages by the Honourable Justice of Appeal Archie as he then was at pages 8 to 11 of the case of *Civ. App. No. 20 of 2002 Anand Rampersad v. Willie's Ice Cream Limited* – applying all of the above cases – as follows:-

At page 8 – *"I wish to emphasise that the fact that a defendant may not challenge the values of destroyed items given by the plaintiff does not automatically entitle the plaintiff to recover whatever is claimed. The rule is that* ***the plaintiff must prove his loss****".*

At page 10 – *"None of the latter three cases should be understood as derogating in any way from the principle that the plaintiff must prove any special damages claimed. In particular, Uris grant, which may appear to bear some similarity to the present case, is merely an example of a case where the degree of particularity accepted by the Court of Appeal was considered to be appropriate in those special circumstances. In this case the Plaintiff/Respondent is a* ***commercial enterprise. It would have been reasonable to expect that some evidence of the value of the larger items could be found in its books and records****."*

At page 10 –*" a lesser degree of strictness would apply to proof of the value of smaller items such as kettles, mops (etc .In accordance with Uris Grant the Master, in the absence of any evidence to the contrary, would have been entitled to accept a reasonable figure".*

At page 10-11 *"the plaintiff cannot simply present a list of prices, it must show the basis on which the figures are established"* (all emphasis added)

3. **The principles summarised**

1. The principles revealed by the cases are that special damages must be particularized and pleaded. (See *Seebalack*)
2. Special damages must be proved by evidence.
3. The degree of proof varies depending on (i) The circumstances, (ii) The nature of the claim, (iii) The difficulty or ease with which proper evidence of value might be obtained, and (iv) The value of the item involved. (See *Sookoo*)
4. Even prima facie evidence may, in some instances suffice if not rebutted or challenged, and common sense must be applied in deciding whether such evidence can reasonably be expected to be available to the claimant. – (*Uris Grant, Guinness v Lallbeharry*)

The nature of the claim/value

4. In this case the quality of the evidence must be considered in the light of **the nature of the claim.** The claim is for substantial loss – hundreds of thousands of dollars per year. The evidence in support as set out in the witness statement of claimant is singularly lacking in specifics.

The difficulty or ease with which proper evidence of value might be obtained

5. The claimant has a duty to support such a substantial claim by reference to material that demonstrates inter alia, that it is likely to have made a profit in the first place.

i. he does not have receipts from the labourers who would have worked for him,

ii. he has no receipts or evidence from anyone from whom he must have purchased the seeds to allegedly grow the seedlings,

iii. there is no statement in evidence from even one person at the market who would have purchased produce from the claimant,

iv. there is no evidence from anyone as to the alleged price of the crops that he says he grew, at the time that he says he grew them,

v. he has not produced even a basic accounting to determine whether he makes any profit whatsoever,

vi. he has no evidence of bank statements to show deposits of the fairly substantial sums that he contends were received from the alleged crops,

vii. he has no tax returns from previous years to substantiate the alleged income from his farming activities - three hundred and sixty thousand dollars **($368,000) per year** - from the land allegedly affected. Evidence from tax records or in fact any substantive documentary material supportive of his claim, would have been more convincing than what was in fact produced.

6. The failure to present such material led to the inference that there was no such material, or that such material as existed did not support the claimant's claim.

7. The rough and ready, back of a napkin approach is not adequate in this case, or compatible with a claim for such a substantial amount.

8. The facts, records, and accounts that would be supportive of such a claim would be expected to be within the custody and control of the claimant, whose records would be critical in determining for example, whether his farming operation is even profitable, the amount of tax he needs to pay, and the accuracy of his pricing. These were not disclosed or produced.

9. I am constrained to find that the evidence of the claimant is unreliable in relation to figures that he purports to give in his witness statement**.**

10. The onus in this matter was on the Claimant to prove his loss of profits strictly.

11. In the circumstances of this case I find that this claim for loss not been proved.

Dated this 17th day of July 2012

Peter A. Rajkumar

Judge.