THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 10 of 2011

Between

SUNIL CHANKERSINGH

MARITIME GENERAL INSURANCE COMPANY LIMITED

Appellants/Defendants

And

CRYSTAL MORTON GITTENS

(Administratrix Ad Litem of the Estate of GARTH LA MOTTE, deceased)

Respondent/Claimant

PANEL: **A. Mendonça J.A.**
N. Bereaux J.A.
G. Smith J.A.

APPEARANCES:
Mr. R. Persad instructed by Mr. S. Parsad for the Appellants
Mr. R. Ramoutar instructed by Mr. T. Dassyne for the Respondent

DATE DELIVERED: **1st June, 2011**

Delivered By G. Smith J.A.

I agree with the Judgment of Smith J.A. and have nothing to add.

A. Mendonca
Justice of Appeal

I also agree.

N. Bereaux
Justice of Appeal

JUDGMENT

1. In this procedural appeal, the Appellants challenge the decision of Dean-Armorer J. to allow the Respondent to file fresh evidence in support of an Assessment of Damages. For the reasons that appear hereunder I allow the Respondent to file fresh evidence; however, I vary the order of Dean-Armorer J. to the extent that I will limit the fresh evidence to be filed to the matters as stated at paragraph 8 of the affidavit of Lawrence Ollivierra filed on the 23rd November 2009.

Brief History of the matter

2. One Garth La Motte died in a collision on 17th September 2005. His Administratrix (the Respondent in this appeal) commenced an action against the Appellants to recover damages.

3. This action progressed to trial and was adjourned for varying reasons. Several attempts were made to settle this matter. These attempts all failed and the matter was again set for trial on the 25th September 2008. On that date, the Appellant made several objections to certain evidence and the Court made directions to facilitate the proper reception of evidence.

4. On the 15th July 2009 the parties entered a consent order in this action. This order was made simultaneously with an (apparently oral) application to adduce fresh evidence, which formed part of the consent order.[1]

The consent order that was made on the 15th July 2009 is important to this appeal, and I will set out its main terms.

The order recites in part that "Upon this matter being listed for a Pre Trial Review … It is Ordered that:

(1) By consent Judgment for the Claimant against the Defendant(s) as to 75% of liability.

(2) Damages to be assessed in default of Agreement.

(3) Mr. Roopnarine (Counsel for the Respondent) to make a formal application for amplification…"

5. There has been no appeal against this order.

6. On further "management" of this action an issue arose as to the fresh evidence on the assessment of damages. As a result, the Respondent filed a formal Application for leave to amplify the evidence in her original witness statements.

7. On the 12th January 2011 Dean-Armorer J. ruled that the Respondent was entitled to file fresh witness statements. The Appellants have appealed this decision.

8. The written orders that Dean-Armorer J. made on 12th January 2011 have not been produced on this appeal. The Appellant contends that the orders were:

(i) That the trial of this Action had been split having regard to the consent order made on 15th July 2009 (see paragraph 4 above).

(ii) That the Respondent may now adduce further and/or fresh evidence

(iii) That witness statements and/or summaries are to be filed

[1] See paragraph 16 of the ruling of Dean Armorer J. dated 3rd February 2011

(iv) Pre Trial review scheduled for 6th April 2011.

9. I mention the orders of the 12th January 2011 at this stage because Counsel for the Respondent did not expressly agree that these were the orders made. In argument on this appeal, he grudgingly conceded that these orders seem to have been made.[2]

Further, Dean-Armorer J. states at paragraph 17 of her Ruling that the consent order of the 15th July 2009 did not constitute a splitting of the trial. This is contrary to what Counsel for the Appellant states was the first order made by Dean-Armorer J. on the 12th January, 2011.[3]

10. In spite of this divergence of opinion as to the orders made on the 12th January 2011, I will demonstrate later in this judgment that whatever the actual order that was made with respect to the "splitting" of the trial, the outcome of this appeal would be the same (see paragraphs 16 and 17 below).

ANALYSIS

11. The case for the Appellants is that the decision of Dean-Armorer J. to split the trial and/or to make the ensuing orders for the Respondent to file further witness statements was wrong. The case for the Appellants is based on their interpretation of Part 27.7 of the Civil Proceedings Rules 1998 (the C.P.R.).

12. The Respondent argues that Part 16.4 of the CPR expressly authorized Dean-Armorer J. to make the orders for the separate hearing of the assessment of damages and for the filing of fresh witness statements.

13. I find that the arguments of the Appellants are without merit. Dean-Armorer J. was entitled to make orders to have a separate hearing of the assessment of Damages and the order to file further, but limited witness statements..

[2] See pages 18 and 19 of the transcript of proceedings in the Court of Appeal.
[3] See paragraph 8(i) above.

Re Part 27.7 of the C.P.R.

14. Part 27 of the CPR deals with "Case Management Conference - Procedure" Part 27.7 provides that the court may direct a separate trial of the issues of liability and quantum where two situations exist. In this case no one contends that any of the two situations exist.

The Appellants argue that Part 27.7 makes specific provision for the splitting of a trial at a Case Management Conference (C.M.C.). That being the case the Appellants state that "Part 27.7 circumscribes the Court's discretion in splitting the trial of the issues of liability and quantum: it establishes the parameters of that discretion as being restricted to only where either of the 2 circumstances therein cited pertain….".[4] The Appellants argue that since the C.M.C. had long passed before the consent order of the 15th July 2009 and the impugned order of the 12th January 2011, Dean- Armorer J. should not have split the trial and the matter ought to have proceeded only upon the witness statements that had already been filed.

This argument is without merit for the reasons which follow.

15. Part 27.7 is merely permissive in terms. It allows for the giving of directions for a separate hearing of liability and quantum at a C.M.C. Part 27.7 does not purport to provide exclusively for the splitting of a trial only at a C.M.C.. There are other provisions which allow the separation of issues of liability and quantum at other stages of an action.

So, for instance, Part 39.3 of the C.P.R. makes provisions for the rules relating to a C.M.C. to apply to a Pre-Trial Review (P.T.R.). It states that Parts 25 and 26 of the C.P.R. apply to a P.T.R. as they do to a C.M.C..

Under Part 26.1 of the C.P.R. a Court can give a myriad of directions, including the separate trial of issues (26.1(h)); the order in which to try issues 26.1(g)); separation of parts of proceedings 26.1(j)); any other direction for managing the case 26.1(w). Any of these provisions would authorize a court to direct that a trial of the issue of liability be separated or split from the trial of the issue on quantum.

Further Part 26.1(5) expressly states that the list of powers given in Part 26.1 applies <u>in addition to</u> any other powers given to the court by any other rule etc. The power to separate the issue of quantum from liability by virtue of Part 26.1 is in addition to any such power given in

[4] See the Appellants' written submissions filed on the 3rd February 2011 at paragraph 10.

Part 27.7. This reinforces the conclusion that Part 27.7 is permissive and not exhaustive or exclusive with respect to the separation of the issue of liability from the issue of quantum.

16. When Part 39.3 and 26 (1) are applied to this case it becomes clear that Dean-Armorer J. did have the jurisdiction to separate the issue of liability from the issue of quantum either on the 15th July 2009 (the date of the consent order) or the 12th January 2011 (the date of the order under appeal). This is because the matter was then at the stage of a P.T.R. Indeed, Counsel for the Appellants argue that the matter "had been demoted from trial" to a P.T.R. from since September 2008.[5] That being the case, Dean-Armorer J. had the jurisdiction to separate the issue of quantum from that of liability otherwise than at a C.M.C. under Part 27.7, and that jurisdiction was not circumscribed by the provisions of Part 27.7.

17. At this stage I elaborate on a point which I mentioned earlier in this judgment (see paragraphs 8 and 9 above). This relates to the consent order before Dean-Armorer J. on the 15th July 2009. Dean-Armorer J. stated at paragraph 17 of her decision that she did not split the trial on 15th July 2009.

I note that the expression "splitting a trial" is not a term of art. It does not appear in the CPR. The CPR refers to a "separation" of issues at or the giving of "directions"[6] on the hearing of issues. Whether or not the trial was "split" on the 15th July 2009, Dean-Armorer J. did direct the separate hearing of the assessment of damages by the consent of all parties. The effect of this direction was to separate the issue of quantum from that of liability.

As I stated above, Dean-Armorer J. had the jurisdiction to make this order pursuant to Parts 39.3 and 26.1 of the C.P.R. There was no appeal from this order of the 15th July 2009, and it is difficult to see how the Appellants can challenge her jurisdiction to make the later orders of the 12th January 2011 which gave effect to the earlier order of the 15th July 2009. A fortiori, the earlier order was made by consent of all the parties. The attempt to query the jurisdiction of Dean-Armorer J. to make the later order of the 12th January 2011 is an indirect attack on the previous order of the 15th July 2009, the validity of which is not in question.

[5] See page 5 of the transcript of proceedings in the Court of Appeal
[6] See Parts 16.4, 26.1 and 27.7 of the C.P.R.

Re Part 16.4 of the C.P.R..

18. There is much force in the Respondent's argument that Part 16.4 of the C.P.R. is the provision that governs this present situation. This rule validates the jurisdiction of Dean-Armorer J. to make her orders on both the 15th July 2009 and 12th January 2011.

19. Part 16.4(1) provides that "This rule applies where the court makes a direction as to the trial of an issue of quantum."

As framed, the rule is of direct application to the present matter since there is no argument that Dean-Armorer J. gave directions for the trial of the issue of quantum on both the 15th July 2009 and the 12th January, 2011.

20. Part 16.4(2) provides that "The direction may be given at:

(a) A C.M.C.

(b) The hearing of an application for summary judgment.

(c) The trial of the claim or of an issue, including the issue of liability."

Once again this rule is permissive. It does not state that the direction "may only" be given in the three situations mentioned above. In any event, there is no reason why the rule would apply at a C.M.C. (16.4(2)(a) and at a trial 16.4.(2)(c) and not at a P.T.R.

21. Part 16.4.3 provides (inter alia) that when the court makes such directions (viz with respect to the trial of the issue of quantum) it must exercise C.M.C. powers and in particular must give directions about (inter alia) the service of witness statements.

22. The clear intent of this rule is to ensure that proper directions are given when an issue of quantum is being dealt with separately from any other issue, including liability.

23. I find that Dean-Armorer J. also had an independent jurisdiction under Part 16.4 to separate the hearing of the issues of liability and quantum at the P.T.R. on either or both the 15th

July 2009 and 12th January 2011. Further, this jurisdiction was not circumscribed by the provisions of Part 27.7.

24. I only wish to make three further observations here.

Firstly, Dean-Armorer J. stated at paragraph 15 of her reasons that the court was engaged in the trial of the claim on the date of the consent order, namely, the 15th July 2009. If this is correct, then Part 16.4.(2) (c) would have directly applied to this matter. If, on the other hand the matter was not really at trial stage but at the stage of a P.T.R. (as the order itself says) Part 16.4 would still apply generally and her orders would be valid (see paragraph 20 above).

Secondly, and in any event, it should be noted that Part 16.4 (2) (c) specifically provides for the giving of directions on the trial of quantum at the trial of any issue. It makes provision for the giving of directions upon the splitting of a trial other than at a C.M.C. This reinforces my earlier conclusion at paragraph 15 that Part 27.7 is merely permissive and not exhaustive of the jurisdiction to split a trial.

Thirdly, there appears to be some overlap between Part 16.4(a) and Part 27.7, in that, if the 'splitting of the trial occurs at a C.M.C. then the express provisions of Part 27.7 are applicable. If this splitting occurs at other times then the jurisdiction of a Court is not circumscribed by Part 27.7.

The exercise of discretion

25. Having decided that Dean-Armorer J. did have the jurisdiction under Part 26.1 and/or Part 16.4 to "split" the trial and to give further directions, the question arises as to how is that discretion to give further directions to be exercised in respect of the filing of further witness statements.

I wish to refer to certain matters that may be relevant to the exercise of such a discretion.

By virtue of Part 1.2 of the C.P.R., the Court must give effect to the overriding objective to deal with cases justly under Part 1.1 of the C.P.R.. Further, with respect to supplemental witness statements, the provisions of Part 29.8 may have some bearing on the discretion. The court should also have regard to the nature of the evidence the party wishes to adduce and to the

prejudice that may be caused to other parties by admitting that evidence. Also, a court may very well need to be satisfied that there is some reason why any fresh evidence was not adduced in previous witness statements.

26. Having made these general observations, I now examine Justice Dean-Armorer's exercise of discretion to allow fresh evidence on the issue of quantum.

27. In her written ruling, Dean-Armorer J. focused mainly on the issue of jurisdiction to 'split' the trial and to give further directions under Part 16.4 of the C.P.R.. No doubt this was because of the arguments before her. Only one paragraph is devoted to the reason for the exercise of her discretion and I quote it here:

> "16. Learned Counsel Mr. Persad had argued that it would be unfair to the Defendant who may have compromised on the basis that there would be no new evidence. In my view however, Mr. Persad's argument could not be accepted in the particular context of this matter, where the application to adduce fresh evidence was simultaneous with and in fact formed part of the consent order. In these circumstances it would have been open to the defendant to insist that a condition of the compromise would be that no new evidence be adduced. The consent order was entered however without any such condition."

28. I summarise this as follows: In arriving at her decision to allow fresh witness statements, Dean-Armorer J. considered the procedural history of the matter and she also made an assessment that the Appellants would suffer no real prejudice as a result of this decision.

I agree with her reasoning in so far as it deals with the general discretion to allow fresh evidence. It produces a result that is just and fair in the circumstances of this case. However, the open-ended nature of the order is not appropriate here. The order to allow fresh evidence should have been limited to the particular request that was made. It should not have been a carte blanche permission to allow the Respondent to introduce any new material she saw fit.

29. The written application that was before Dean-Armorer J. was an application to "amplify" the evidence contained in the Respondent's original witness statement filed on the 24th January

2007. That application was allegedly made pursuant to Part 29.10 of the C.P.R., which really deals with amplifying upon a written witness statement/summary while "giving oral evidence." Technically, this was not the correct rule for this application since no one was "giving oral evidence." This application should properly have been made pursuant to Part 29.8 of the C.P.R., namely, this should have been an application to serve a supplemental witness statement. However, nothing really turns on this since this is a procedural error which can be set right by this court pursuant to Part 26.8, and I so do.

30. The true nature of the application was to serve a supplemental witness statement to amplify or expand upon certain statements made in the original witness statement of the Respondent.

To remove all mystery surrounding what was, in my view a simple, and I daresay, benign application, I cite the material part of the application:

"Amplification is sought for the following pieces of evidence-:

a. The evidence of the Claimant is that the deceased provided for her and her children financially. The amplification sought is to clarify whether the deceased was the sole breadwinner of the family and therefore if the family lived by his working his taxi.

b. The evidence before the court is that the deceased worked his taxi everyday from Monday to Saturday. Thus, the amplification sought is to define what were his hours of work during said days worked.

c. The evidence stated in the witness statement is that the deceased gave to the Claimant the sum of $300.00 for running the household, the amplification sought is to clarify the regularity of the provision of this sum whether daily, weekly or monthly.

d. The evidence before the court is that the deceased worked as a taxi driver, the amplification sought is to clarify what was the route worked and what was the fare per passenger.

e. Finally, the evidence of the Claimant is that the taxi owned and operated by the deceased was a B13, the amplification sought is to clarify the seating capacity of said vehicle."

31. The "amplification" which the Respondent requested was very limited in nature. It is even arguable that most, if not all of the items of "fresh evidence" were really particulars of matters already referred to and not fresh evidence, and would have been allowed in evidence at the hearing of the assessment of damages without any formal application (see Part 29.10). The Appellant cannot complain of any prejudice that would be caused by now admitting that evidence and it would better serve the ends of justice for the Court and the Appellants to know this evidence beforehand.

32. In these circumstances, in keeping with the overriding objective, I find that it is just and fair to allow this evidence to be given by way of supplemental witness statements at this stage of the proceedings. Even if Justice Dean-Armorer's exercise of discretion may be faulted, this is not a case where I would overturn the general exercise of her discretion to allow fresh evidence, but instead, I would limit such evidence to the requests referred to in paragraph 30 above.

CONCLUSION:

33. In the circumstances I vary the order of Dean-Armorer J. made on the 1st January 2011 only to the extent that I allow the Respondent to adduce fresh evidence of the matters referred to in paragraph 8 of the affidavit of Lawrence Ollivierra filed on the 23rd November, 2009.

Gregory Smith
Justice of Appeal

Post Scriptum

The decision in this case upholds the jurisdiction of a judge to split a trial in a proper case. This is not to be taken as an open charter to split a trial. The Court of Appeal has often strongly expressed a preference that the splitting of issues of liability and quantum should be the exception rather than the rule.[7] This still holds true.

G. Smith
Justice of Appeal

[7] See e.g. **Philbert Ross v Omatee Chattergoon** Civil Appeal of 1998 and **Nisha Ramroop v Ramjitsingh** Appeal 23 of 2002 Per Kangaloo J.A. at paragraphs 18 and 19 and Sharma C.J.