[2010] UKPC 15
Privy Council Appeal No 0033 of 2009

JUDGMENT

Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) (Appellant) *v* Ramesh Seebalack (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Brown
Lord Kerr
Sir John Dyson SCJ
Sir Stephen Sedley

JUDGMENT DELIVERED BY

SIR JOHN DYSON SCJ

ON

21 July 2010

Heard on 16 June 2010

Appellant
Sir Fenton Ramsahoye QC
David di Mambro

(Instructed by Bankside Law)

Respondent
Jonathan Crystal
Amina Hasnain

(Instructed by Sebastians Solicitors)

SIR JOHN DYSON SCJ:

1. This is an appeal from the decision of the Court of Appeal of Trinidad and Tobago (Warner, Kangaloo and John JJA) reversing the decision of Bereaux J to give the claimant permission to re-amend her statement of case. The appeal raises questions as to the proper interpretation of the Civil Proceedings Rules ("CPR") of Trinidad and Tobago.

2. Reagan Nicky Bernard ("the deceased") was killed when he was struck by a truck at Barrackpore on the island of Trinidad on 25 October 2002. The claimant is his legal personal representative. By a claim form and statement of case filed on 23 February 2006, she commenced proceedings against Khemchan Ramcharan (the truck driver), Ramesh Seebalack (the truck owner) and Capital Insurance Company Limited (the insurer of the truck). She alleged that the deceased's death was caused by the negligence of the driver and claimed damages against the driver and the owner and a declaration that the insurer was liable to indemnify the driver and owner. The claim form and statement of case gave particulars of the driver's negligence and alleged that by reason of this negligence the deceased had suffered injuries as a result of which he died. Neither the claim form nor the statement of case gave any details of the claim for damages.

3. A defence was filed on behalf of the owner on 8 May 2006 and a separate defence on behalf of the insurer on 1 December 2006. At the first case management conference which was held on 30 June 2006, the claimant was given permission to amend the claim form and statement of case to allege that the driver was at all material times the servant and/or agent of the owner. Further case management conferences were held on 21 April and 26 May 2008. The pre-trial review was held on 11 November 2008.

4. Meanwhile, on 17 July 2008 the claimant's list of documents was filed. It included a receipt for funeral expenses from Dass Funeral Home and pay sheets relating to the deceased's wages. The claimant filed a witness statement on 17 July 2008. She stated that the funeral had been conducted by Dass Funeral Home and that the cost was $8,625.00. She attached a copy of the receipt to the statement. She also gave details of the deceased's employment and his monthly income between 19 May 2000 and 25 October 2002 and attached copies of his pay sheets for that period. On 15 August, she filed a bundle of documents which included the receipt for the funeral expenses and the pay sheets for the period between 19 May 2000 and 25 October 2002.

5. On 27 November 2008, she applied by notice supported by affidavit for permission to re-amend the statement of case to include particulars of special and general damages. The owner of the truck objected relying on CPR Part 20.1(3).

6. It is necessary at this stage to refer to the provisions of the Trinidad and Tobago Civil Proceedings Rules ("the CPR") which are material to this appeal.

> "1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> (2) Dealing justly with the case includes –
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with cases in ways which are proportionate to –
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> 1.2 The court must seek to give effect to the overriding objective when it –

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

…

8.6 (1) 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.

…

8.10 (1) This rule sets out additional requirements with which a claimant in a claim for personal injuries must comply.

…

(4) The claimant must include in, or attach to, his claim form or statement of case a schedule of any special damages claimed.

…

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 may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.

(4) A statement of case may not be changed without permission under this rule if the change is one to which rule 19.2 (change of parties) applies.

(5) Any amended statement of case must be filed promptly at the court office.

(6) Where a statement of case is amended, the amendments must be verified by a certificate of truth unless the court orders otherwise."

7. Paragraph 6 of the proposed re-amended statement of case was in these terms:

"By reason and (sic) the matters aforesaid the deceased died as a result of injuries sustained from the collision.

Particulars of Special Damages

1. Funeral expenses - $8,625.00 (see Annex 1).

2. Clothing for the deceased for the funeral - $1,200.00

Particulars of General Damages on behalf of the Estate of the deceased:

1. The deceased was born on the 12th July, 1982 and died on the 25 October, 2002 at the age of 20 yrs;

2. The deceased at the time of his death was a part owner of Rick's Lumbar Yard;

3. On average he earned $1,134.89 per wk;

4. At the date of his death he was unmarried with no children, lived at home with his parents and was in excellent health;

5. Statement of the deceased's average monthly expenditure:

- Transport to and from school $300
- Spending money for school - $400
- Helped his brother repair his maxi taxi - $300
- Helped contribute to family's food purchase - $500
- Clothing - $300
- Liming - $500
- Cell phone - $200

Total expenditure - $2,500

Total savings - $2,039.56

6. Calculations:

- Multiplier – 16
- Multiplicand - $2,039.56 x 12 = $24,474.72
- Total - $24,474.72 x 16 = $391,595.52"

8. In her affidavit in support of the application for permission to amend the claimant stated that, when the statement of case was amended on 3 July 2006, her then attorney-at-law did not have copies of any bills or receipts in support of her claim. The original receipt had been misplaced or destroyed and she could not quantify the exact sum that had been expended on her brother's funeral. In about July 2008, she had obtained a duplicate copy of the original receipt for the funeral expenses. She also said that after the death of her brother, she and the family were emotionally distraught for several years. In consequence, she was unable to provide the necessary documents relating to her brother's earnings until about July 2008. She said that she believed that "for the proper determination of the question of just compensation and/or quantum in this matter it is necessary for me to re-amend my Statement of Case to include particulars of special and general damages and I hereby respectfully make an application for leave to re-amend same."

9. Bereaux J acceded to the application. He said that the word "*change*" in Part 20.1(3) should be construed in accordance with the overriding objective of dealing with cases justly. He said:

> "11. I note as well that Part 20, is unlike the English CPR which speaks of '*amend'* (as opposed to '*change*'). In my judgment, that difference is significant. Use of the word '*amend'* in Part 20 rule (3) would have permitted the inflexible interpretation sought to be put on the rule by Mr Persad.
>
> *'Change'* on the other hand connotes an alteration of the tenor and character of the statement of case or defence. As such an amendment which clarifies but keeps intact the basic character of the statement of case or defence does not '*change'* it. Indeed it permits both claimant and defendant to advance the matter more quickly to trial by clarifying the issues sought.
>
> 12. The re-amendment sought by the claimant in no way changed her case or the substance of the statement of case. It simply provided particulars of special damages and general damages…."

10. A further point made by the judge was that this approach was consistent with section 20 of the Supreme Court of Judicature Act Chap 4.01 ("the SCJ Act") which provides:

> "The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act and the Constitution shall in every cause or matter pending before the Court grant, either absolutely or on such terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by him in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

11. The judge therefore concluded that the proposed amendment did not come within the scope of Part 20.1(3). He said at para 14:

> "I do not accept that this construction of Part 20 of the CPR will in any way undermine the intention behind the rules which remains intact. Parties cannot expect to make wholesale and substantive changes to their statements of case and defences after the first case management hearing. It will always be a matter of judicial discretion whether to permit the amendment or not, having regard to the facts and circumstances of any given case. Consistent with the overriding objective it allows for flexibility where a deserving case arises and places the decision to amend squarely and appropriately in the hands of the judge, where it belongs."

12. The Court of Appeal took a different view. Warner JA said that section 20 of the SCJ Act did not help the claimant since her claim was not "properly brought forward" having regard to contemporary principles and practice. She then said:

> "24. The philosophy underlying the radical change of the procedural rules is to counter delay and reduce costs. Even if I were minded to adopt a more liberal construction to the expression 'some change of circumstances,' this is not a case which would qualify. The respondent's affidavit is vague and it does suggest that key aspects of the case have not been brought forward.
>
> 25. The English rule (see Part 17 of the Civil Procedure Rules) is considerably more flexible, in that it allows amendment to a statement of case after service, with consent of all other parties, or with permission of the court. The rigidity with which the local rule is drafted, does indicate that much stricter standards have been set. As has been the Jamaican experience, it may well be that the potential factors for and against amendment must now be considered, without rolling back the clock to more lax times. As the English rule demonstrates, the ultimate responsibility for the efficiency of the system rests with the court."

13. Kangaloo JA said that the re-amendment was a "fundamental change" since it introduced a claim for "lost years" and a claim for special damages for the first time; the words "*change*" and "*amendment*" were used interchangeably in Part 20; and in any event Part 20.1(3) applied to any changes and not merely "fundamental" changes.

Discussion

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:

> "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…
>
> 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 Board was informed that a conventional award of $20,000 is made in the courts of Trinidad and Tobago in claims for damages in respect of a person's death. It may be that the rules do not require such a claim to be pleaded in the statement of case, since a conventional award is inevitable in such cases.

Should the re-amendment of the statement of case have been permitted?

20. It should be stated at the outset that it is common ground that there was no "change of circumstances" within the meaning of Part 20.1(3) after the first case management conference. The focus of the argument has been on whether the re-amendment sought by the claimant was a change to the statement of case.

21. The Board rejects the submission made on behalf of the claimant that the approach of Bereaux J was correct. First, section 20 of the SCJ Act cannot be used as an aid to the proper interpretation of the CPR. The CPR are a detailed code of civil procedure rules made pursuant to section 78 of the SCJ Act for "regulating and prescribing the procedure, including the method of pleading, and practice to be followed…in all causes and matters whatsoever…". It is (rightly) not submitted that rule 20.1(3) is *ultra vires* section 20, since section 20 is not concerned with procedural matters and the manner in which litigation is conducted. Section 20 is concerned with the substantive granting of remedies in respect of claims "properly brought forward". The section is in all material respects in identical terms to, and was clearly based, on section 43 of the Supreme Court of Judicature (Consolidation) Act 1925 ("the 1925 Act"). The 1925 Act was in turn derived from section 24(7) of the Supreme Court of Judicature Act 1873 ("the 1873 Act"), the statute which fused the courts of equity and the common law. The purpose of section 24(7) of the 1873 Act and section 43 of the 1925 Act was to make clear that the High Court and the Court of Appeal had the power to grant all legal and equitable remedies to which a claimant may appear to be entitled. In this way, different actions in law and equity in different courts (the "multiplicity of legal proceedings") were avoided.

22. Secondly, although it is clearly correct that, when interpreting Part 20.1(3), the court must give effect to the overriding objective of enabling it to deal with cases justly, that does not assist the claimant. It is submitted on behalf of the claimant that, since the amendment could have been made without causing any prejudice to the defendants, justice required that it be allowed. No doubt in the pre-CPR era that submission would have been accepted. It is also reflected in the decision of the High Court of Australia in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 at paras 29 and 57 where (in the context of an application for

permission to amend) approval was given to the following statement of principle made in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at p 154:

> "…nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

23. But under the CPR (and the England and Wales CPR) it is no longer right to say that the court's function is to do substantive justice on the merits and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources. Thus, interpreting Part 20.1(3) so as to enable the court to give effect to the overriding objective does not require a strained interpretation of the word "*change*" so as to limit it to "an alteration of the tenor and character of the statement of case" (Bereaux J's formulation) or a "fundamental" change (the epithet used by Kangaloo JA in the present case).

24. Thirdly, the language of Part 20.1(3) is plain. It refers to a change to the statement of case (the pleading), not a change to the nature of the case being advanced. It directs attention to the text of the statement of case. On a literal reading of the rule, *any* change to the text (however minor) is caught by it. But such an unreasonable interpretation cannot have been intended and is not necessary to give effect to the overriding objective. Thus, for example, the rule should be interpreted in such a way as to exclude from the meaning of "*change*" the correction of a typographical error. But the Board is of the view that the inclusion of particularised heads of loss where no heads of loss are to be found in the unamended statement of case is plainly a "change" within the meaning of Part 20.1(3).

25. Fourthly, the Court of Appeal was right to say that the words "*change"* and "*amend"* are used interchangeably in Part 20.1. There is no warrant for holding, as the judge did, that the use of the word *"amend"* admits of a more inflexible meaning than the word "*change*".

26. Fifthly, Mr di Mambro relies on a passage in the judgment of Barrow JA in *East Caribbean Flour Mills Ltd v Boyea* (St Vincent and The Grenadines, Civil Appeal No 12 of 2006). Barrow JA said in relation to a rule which is in the same terms as Part 20.1(3) of the CPR:

> "45. However, I am firmly of the view that additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case.
>
> 46. If a party alleges misconduct of a certain nature, say misappropriating funds by making false entries in an accounting record, and gives 5 instances of false entries, and a closer look at documents reveals a 6th false entry I see no reason why the party should be prevented from giving particulars of it in his witness statement, provided the requirements of fairness have been satisfied and there has been no abuse of process or other disentitling conduct. I emphasise the distinction between changing a statement of case and supplying particulars to say I expect the courts will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case by case basis."

27. The Board finds nothing in this passage which is inconsistent with what it considers to be the correct interpretation of Part 20.1(3). If a statement of case contains allegations which are "sufficiently made" (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement. But for the reasons stated earlier, in the present case the statement of case should have included a short statement of the heads of loss that were being claimed. This could have been amplified by further information and/or in the witness statement(s).

28. Finally, the Board attaches importance to the "litigation culture" in Trinidad and Tobago and the response of the local courts to it. In *Trincan Oil Ltd v Schnake* (Civil Appeal No 91 of 2009), a question arose as to whether the appellant should be given permission to amend its notice of appeal out of time or be granted relief under Part 26.7 from sanctions arising out of the failure to appeal within time. In giving the judgment of the Court of Appeal of Trinidad and Tobago, Jamadar JA said at para 38 that the time limits stated in the CPR were fair and should be strictly complied with. He continued:

> "The failure to do so without good reason and/or to act promptly to remedy any default can have serious consequences, especially at this time in Trinidad and Tobago when the civil litigation system is suffering the consequences of a *laissez-faire* approach to the conduct of civil litigation which is undermining public trust and confidence in the administration of justice."

29. Having decided not to allow the amendment (the need for which was mainly attributable to fault on the part of the appellant's legal representatives), he acknowledged at para 54:

> "On the face of it this decision may appear somewhat harsh in its effect and based upon an overly strict interpretation and application of the CPR 1998. It is therefore worth repeating, though it has already been stated by the Court of Appeal, that at this time in the evolution of the new CPR 1998 in Trinidad and Tobago this approach is considered necessary if a meaningful shift is to occur in the way civil litigation is practised here."

30. At para 56, he continued:

> "This case is, sadly, not an exceptional one, but is rather only too typical of what the culture of civil litigation in Trinidad and Tobago is and has been for far too long. It is hoped that with a sufficiently sustained insistence on 'strict' compliance with the rules for conducting litigation an overall change in the existing culture will be established. When this change is evident the Rules Committee may consider reviewing the strictures of Part 26.7 given the current approach, but until such time this is the manner in which Part 26.7 CPR 1998 will be applied. Though the core interpretation of the text, faithful to legislative intent, its language, structure and context is likely to remain unchanged, its application over time can change as circumstances change. The interpretation of the law is also historically and culturally contextual and as such is an unfolding process. In this way the law is responsive to changes in society."

31. In interpreting Part 20.1(3), the Board has had regard to the litigation context in which the Rules Committee drafted the CPR. On any view, as Warner JA pointed out in the present case, Part 20.1 provides for a more inflexible regime for amendment than the corresponding Part 17.1 of the England and Wales CPR. Part 17.1(2) provides that, if the statement of case has been served, a party may amend it only (a) with the written consent of all the other parties or (b) with the permission of the court. The power of the court in England and Wales to give permission to amend is circumscribed only to the extent that it must be exercised so as to give effect to the overriding objective. But it is clear from remarks such as those of Jamadar JA that rules such as that in Part 20.1(3) were drafted in an attempt to introduce more discipline into the conduct of civil litigation and defeat the endemic *laissez-faire* attitude to it. The Board considers that it would be wrong for it to adopt an interpretation to the rules which would undermine the attempts made by the Rules

Committee (supported by the Court of Appeal) to improve the efficiency of civil litigation in Trinidad and Tobago.

Conclusion

32. It follows that this appeal must be dismissed.

33. The Board agrees with the observations of Warner JA at para 25 of her judgment (cited at para 12 above). If the local courts can be relied on to exercise their case management powers so as to give effect to the overriding objective, then it ought to be possible to relax the rules themselves to some extent. There is a place for inflexible rules in any system of justice. Sometimes the need for certainty is paramount. But inflexible rules can also lead to injustice as injustice is ordinarily understood. The Board recommends that the Rules Committee of Trinidad and Tobago consider whether and if so to what extent it feels able to change Part 20.1 so as to move closer to Part 17 of the England and Wales CPR.