

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2018/0030

BETWEEN:

DOLCIE CHRISTIAN

(In her capacity as Executor of the Estate of Sydney Christian, Q.C.)

Appellant

and

KING'S CASINO LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

Appearances:

Mr. Jason A. Martin for the Appellant.

Ms. Kivine M.J. Knight-Edwards for the Respondent.

2020: January 17;
March 26.

Civil Appeal – Personal injury – Assessment of Damages – Loss of earnings – Nominal damages - Whether learned master erred in concluding that practice was mainly a trademarks practice - Appeal against master's findings of fact – Approach of appellate court to findings of fact – Whether learned master erred in exercise of her discretion in awarding 20% of annual income as loss of earnings – Basis on which appellate court would interfere with exercise of master's discretion

REASONS FOR DECISION

- [1] **THOM JA:** At the conclusion of the hearing of this appeal, we dismissed the appeal and indicated that we would give written reasons for our decision. We do so now.

- [2] This is an appeal against the decision of the learned master in which she awarded the appellant \$157,000 for loss of earnings.

Background

- [3] Mr. Sydney Christian now deceased, was one of Her Majesty's Counsel ("Mr. Christian, QC"). He was a sole practitioner. In or about 2005, he underwent knee replacement surgery. Some time later he continued to experience difficulties with the same knee and in January 2011 he underwent further surgery on the knee. This resulted in him using a walking aid. He became unable to climb the steps to his office and consequently he worked from his home.
- [4] On or about 6th August 2011, Mr. Christian, QC was entering the premises of King's Casino Limited ("the respondent") using a walking aid, when the automatic doors to the premises closed, causing injury to him. He was 74 years old at the date of the incident. Mr. Christian, QC became bedridden as a result of the accident and remained in this state until his death on 22nd December 2016.
- [5] In 2014 Mr. Christian, QC instituted these proceedings against the respondent, for damages for the injuries suffered, including \$845,351.58 for loss of earnings. After his death Mrs. Dolcie Christian, the executrix of Mr. Christian's estate was substituted as claimant ("the appellant").
- [6] At mediation, the respondent admitted liability and the parties agreed to damages being awarded under several heads. However, the parties were not able to agree on the quantum of damages to be awarded for loss of earnings. This issue was referred to the learned master for determination.

The proceedings in the lower court

- [7] In support of the claim for loss of income, the appellant filed a witness statement to which several documents were attached, including a report contained in a letter dated 4th June 2016 from Accounting Solutions¹ which estimated Mr. Christian's income between the period 2008 – 2010 (the period immediately prior to the accident) to be

¹ An accounting firm tasked with quantifying the loss of earnings experienced by Mr. Christian QC.

\$157,000 per annum. The appellant also gave sworn testimony. The relevant evidence is outlined at paragraph 22 of her witness statement, which states as follows:

“My husband enjoyed his law practice and was still very much involved in his law practice at the date that he was injured even though he had slowed down a bit due to the mobility issues caused by his knee surgeries. As I indicated his mobility issues (sic) did affect his ability to climb the steps to his office but he liaised with his staff and worked from home more. The accident severely diminished his ability to practice as an attorney due to the constant pain and obvious loss of focus. We commissioned an accountant to review his financial records and she estimated his annual loss of income at \$157,000. She prepared a report which we have available for the court. This estimate is in my view extremely low and does not take into account the loss of opportunity that flowed from him being effectively excluded from being able to practice. His experience, expertise and associations had the ability to attract high profile clients and extremely lucrative work. The injury made this an impossibility.”

- [8] During her oral testimony, the appellant was cross-examined about the nature of Mr. Christian's practice. It must be noted that on this appeal, learned counsel for the appellant, Mr. Martin, took issue with the manner in which the learned master interpreted this evidence. The transcript reference to this is not very lengthy. Therefore, for the sake of convenience, I will outline it in its entirety. The transcript reads as follows:

“Samantha May Francis: Did the practice remain open until what date?

Dolcie Christian: It remained open all the time because we had two girls who had trademark work which they did all the time.

Samantha May Francis: There was some level of income generated after the deceased was injured true?

Dolcie Christian: Yes.

Samantha May Francis: The accounting did not take into account 2011 to 2013 true? Did you provide any documentation?

Master: Counsel the report indicates what period of time was assessed.

Samantha May Francis: Yes

Samantha May Francis: Was it a mainly trademark practice?

Dolcie Christian: Yes it was mainly a trademark practice.

Samantha May Francis: Did u (sic) take any hands on approach in relation to the administration of the office?

Dolcie Christian: Yes

Samantha May Francis: what happened to the active files when Mr. Wason was there?

Dolcie Christian: He took care of all the active files during the 9 months – the few that was there.

...”

[9] The next bit of evidence in relation to Mr. Christian's loss was the letter from Accounting Solutions which was purportedly signed by a Ms. Cassandra P. Simon, ("Ms. Simon") a Chartered Accountant. There seems to be no order for expert witnesses. Ms. Simon did not give a witness statement and was not called as a witness, so she could not be cross-examined. The letter was simply attached to the appellant's witness statement. While Ms. Simon was not deemed an expert, she did conclude her report with the following words, "We confirm that we have no personal nor professional relationship with either party in this matter and conducted our review and rendered our report with complete independence".

[10] In her report, Ms. Simon noted that based on her enquiries of the staff at Mr. Christian's office, there were no Antigua and Barbuda Sales Tax (ABST) or Personal Income Tax (PIT) returns. The data Ms. Simon examined was from a spreadsheet showing deposits to three bank accounts. Ms. Simon also took into account that the staff had indicated that some clients paid in cash and that those sums were used to pay office expenses. Having explained the process adopted, including sums deducted that were not related to the practice of law, Ms. Simon concluded:

"As mentioned previously we were unable to eliminate elements of funds deposited for ABST and expenses. We calculated the average annual earnings based on the adjusted deposits for 2008-2010 and adjusted for 15% ABST. We believe this adjustment of 15% on the total deposit as well as consideration (sic) the cash fees not deposited should provide a reasonable approximation of earnings pre-accident time.

Although the schedule included earnings from the integrity commission, there (sic) were also excluded as Mr. Christian continued to be paid up to 2014 signifying that his incapacity had no effect on those earnings.

Our calculation of annual earnings is \$157,000."

[11] In arriving at her decision, the learned master made the following findings:

"Mrs. Christian under cross examination admitted that the mainstay of the practice was that of trademarks. Further Mrs. Christian admitted that although the deceased was unable to physically attend his chambers that this work was routinely done by the two secretaries on staff who then attended the house to deal with any issues concerning the same. The other legal matters in the chambers were eventually passed onto a senior attorney with whom a fee sharing arrangement of 30% of the profits of those matters would be paid to the claimant. Mrs. Christian admitted that these matters [were] few in number and did not generate much profit. Further this arrangement with the attorney

after a period of only nine months came to an end when that attorney terminated the agreement.”

- [12] The learned master having noted that the report from Accounting Solutions did not assess Mr. Christian’s income for the period in issue, found that the evidence established that work relating to trademarks, which was the “bread and butter” of Mr. Christian’s practice before the incident, continued after the incident and until his death. The learned master further noted, that the income generated from the trademarks aspect of the practice was apparently discounted in the claim for loss of earnings and therefore a determination could not be made whether there was a shortfall in the trademarks business. The learned master accepted that prior to the incident, Mr. Christian, QC also had a litigation practice but it would have been circumscribed by his immobility. Having taken these factors into consideration, she awarded 20% of the sum assessed (\$157,000) in the report by Accounting Solutions being a sum of \$31, 400 annually for a period of 5 years totaling \$157,000.

The Appeal

- [13] The appellant, being dissatisfied with the quantum of the award, appealed on two grounds. Those grounds being that:

- (1) The learned master misdirected herself in finding that the deceased claimant’s law practice was admittedly essentially a trademark practice prior to his incapacitation as the appellant made no such admission nor were any question on the issue of the extent of the deceased’s law practice prior to his injury put to the appellant in examination in chief or cross-examination; and
- (2) The learned master misdirected herself in the exercise of her discretion in awarding the appellant only 20% of the amount claimed, because the exercise of discretion in this manner was based on an incorrect and/or unjustified interpretation of the evidence.

Ground 1

- [14] This ground challenges the learned master’s finding of fact. The law is well settled as it relates to an appellate court’s interference with the findings of fact by a lower court.

The approach to be taken by an appellate court when requested to review facts found in the court below has been outlined in several cases including the case of **Fage UK Limited and Another v Chobani UK Limited**² where Lewison LJ stated the principle as follows:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.”

[15] Lord Neuberger in the case of **Re B (a child)**³ had this to say:

“[W]here a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it...”

[16] In **Henderson v Foxworth Investments Ltd and another**⁴ Lord Reed said at para 67:

“[I]n the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

[17] Mr. Martin contended that this is a case which warrants appellate interference. He argued that the learned master misinterpreted the evidence in finding that trademarks were the “bread and butter” of Mr. Christian’s practice before and after the injury. He further argued that the appellant did not describe Mr. Christian’s law practice as a trademarks practice in her witness statement or examination-in-chief. The issue arose in cross-examination where the focus was not on the period prior to the injury but instead on the period after. He relied on the holding of the House of Lords in **Whitehouse v Jordan and another**:⁵

“Although the view of the trial judge (who had seen and heard the witnesses) as to the weight to be given to their evidence was always entitled to great respect, where his decision on an issue of fact was an inference drawn from

² [2014] EWCA Civ 5 at para 114.

³ **Re B (a child)** (care order: proportionality: criterion for review) [2013] 3 All ER 929 at para 53.

⁴ [2014] 1 WLR 2600.

⁵ [1981] 1 All ER 267.

the primary facts and depended on the evidentiary value he gave to the witnesses' evidence and not on their credibility and demeanour, an appellate court was just as well placed as the trial judge to determine the proper inference to be drawn and was entitled to form its own opinion thereon..."

- [18] Ms. Knight-Edwards, learned counsel for the respondent, submitted that based on the evidence of the appellant under cross-examination and there being no re-examination to clarify if the statement referred to the period before or after the accident, it was reasonable for the learned master to find that Mr. Christian's practice was mainly a trademarks practice which continued after the injury. She further argued that the finding of the learned master ought not to be set aside in view of the following evidence. Firstly, in the report of Accounting Solutions, the staff incorrectly attributed two large deposits to trademarks fees; this, she argued, shows that the vast majority of Mr. Christian's practice was trademarks. Secondly, learned counsel submitted, that the appellant testified that on account of the knee injury Mr. Christian, QC had slowed down his practice since he could not climb the stairs. Thirdly, she contended that no evidence was led to show that Mr. Christian, QC was engaged in litigation at the time of the incident or during the three year period prior to the accident. Finally, she argued that Mr. Christian, QC was semi-retired at the date of the accident. Having regard to the above facts, Ms. Knight-Edwards submitted that the inference drawn by the learned master that Mr. Christian's practice was mainly a trademarks practice is a finding of fact by the lower court and should not be interfered with by this Court.

Analysis and discussion

- [19] Having reviewed the evidence of the appellant, while I agree that the question posed to her was ambiguous, the answer offered by her was equally ambiguous. The appellant took an active part in the administration of Mr. Christian's office. She was therefore well positioned to give specific evidence on the nature and extent of the practice at the time of the accident and more particularly, the non-trademarks practice. The appellant also gave a witness statement and oral testimony. At the hearing, the nature and extent of Mr. Christian's practice arose during cross-examination. It was open to the appellant to clarify on re-examination, the nature and extent of Mr. Christian's practice at the time of the accident. It was also open

to her to shed light on whether the practice was not mainly a trademarks practice. This was not done.

- [20] Mr. Christian, QC was a 74 years old sole practitioner at the time of the accident. His health was declining. He was unable to go to the office. His practice had scaled down. When all of the circumstances are taken into account, I agree with Ms. Knight-Edwards that it was open to the learned master to draw the inference that trademarks was the mainstay of Mr. Christian's practice at the time of the accident and after. The learned master cannot be faulted for drawing the inference which she did. There is no basis for appellate interference with that finding of fact by the learned master.

Ground 2

- [21] Mr. Martin submitted that the learned master fell into error in the exercise of her discretion in awarding 20% of Mr. Christian, QC's estimated earnings prior to the accident as loss of income. He contended that she based her assessment on the erroneous fact that Mr. Christian, QC's trademarks practice was the main source of his income prior to the accident and he continued his trademarks practice after the accident. Mr. Martin further submitted that the learned master failed to take certain relevant factors into consideration in exercising her discretion.
- [22] The principles which guide an appellate court when it is requested to interfere with the discretion exercised by a lower court are outlined in **Dufour and Others v Helenair Corporation Ltd and Others**⁶ and are very well known and therefore do not need repeating.
- [23] Having found that the learned master did not err in finding that trademarks was the mainstay of Mr. Christian's practice at the time of the accident and after the accident, I will now focus on Mr. Martin's other arguments in support of his contention that the learned master erred in exercising her discretion in assessing the award for loss of income.

⁶ (1996) 52 WIR 188.

[24] Mr. Martin submitted that this is an appropriate case for appellate interference since the learned master failed to give any or any sufficient weight to the following relevant factors: (a) Mr. Christian, QC being eminent counsel, his practice was not based mainly on trademarks; (b) a senior rather than a junior attorney was required to deal with the work after the incident; and (c) the effect a two year gap in finding a senior attorney would have had on the retention of clientele for the law practice.

[25] As indicated earlier, the learned master in arriving at the sum of \$157,000⁷ being 20% of the estimated annual income for the three years prior to the accident took into account the following:

- (i) the estimated annual income for the three years immediately prior to the accident was \$157,000 per annum;
- (ii) the loss of income claimed was the income from Mr. Christian's practice other than trademarks;
- (iii) no evidence was led in relation to the income generated from trademarks after the accident; and
- (iv) after the accident, the litigation aspect of the practice was not significant. Mr. Christian, QC being immobile, he would not have been able to deal with such matters.

[26] Loss of income being special damages, the onus was on Mr. Christian, QC as claimant to specifically prove the loss. It is not disputed that he suffered loss of income from his non-trademarks practice. As the learned master, in my view, correctly found that while the appellant agreed that Mr. Christian's practice continued to generate income, she adduced no evidence in relation to the quantum generated. The accounting report did not provide any details of income for the period after the accident. Neither did the accounting report provide any details of the income earned from the non-trademarks aspect of the practice during the period prior to the accident. The report simply alluded to a global estimated figure

⁷ That amount being \$31,400 times five giving a total of \$157,000.

of \$157,000 per annum prior to the accident. The appellant adduced no evidence of Mr. Christian's loss of income after the accident and simply requested that the court award loss of income in the sum of \$785,000 (the original sum claimed was \$845,351.58) being five times Mr. Christian's estimated annual income prior to the accident even though he continued to earn income from his trademarks practice.

- [27] It is settled law that where, as is the situation in this case, there is evidence of loss but there is no evidence of the quantum, then the court will award nominal damages. This principle was applied in **Greer v Alstons Engineering Sales & Services Ltd**⁸ where the Judicial Committee of the Privy Council restated the reasoning of the Court of Appeal of Trinidad and Tobago for awarding nominal damages as follows:⁹

“When such evidence is not provided, however, it is open to the trial judge to give consideration to an award of nominal damages. In *McGregor on Damages* (13th Edn) at para 295 it is stated: ‘Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss’. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.”

- [28] There being an absence of evidence of the amount of loss of income, it was the duty of the learned master to make an award that was reasonable in all of the circumstances or in the words of Sir Andrew Leggatt, who delivered the advice of the Board in **Greer v Alston Engineering**, “...an award that is not out of scale”. While I agree with Mr. Martin that Mr. Christian, QC was eminent counsel, this must be considered in context. As stated earlier, at the time of the accident Mr. Christian, QC was 74 years old, experiencing a decline in health to the extent that he was unable to go to his office and therefore his practice was reduced. I also agree with Mr. Martin that after the accident, where for two years there was no counsel in office, with Mr. Christian, QC being a sole practitioner, there would have been some loss in clientele. However, the appellant who was involved in the administration of the office was in a position to provide details of this decline in her witness statement as well as in her oral testimony. None was provided. Having

⁸ (2003) 63 WIR 388.

⁹ Ibid at para 6.

regard to all of the circumstances of this case, I am not of the view that the award made by the learned master was so low, so as to be out of scale or wrong in principle and therefore warranting interference. This ground of appeal also fails.

- [29] On the issue of costs, I can find no reason why the general rule that costs follow the event should not be applied. The respondent, being successful, is entitled to its costs in the sum of two-thirds of the costs awarded in the lower court.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar