

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Civil Appeal No. 8 of 2011

BETWEEN:

ELECTRIC SALES AND SERVICES LIMITED *Appellant*

AND

KENRICK HOYTE *Respondent*

BEFORE: The Hon. Peter D.H. Williams, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2011: December 2 and 8;

2012: January 31

Mr. Bryan Weekes of Weekes Kissoon Deane for the Appellant

Mr. Dale Marshall Q.C. and Mrs. Susan Sealy of George Walton Payne & Co. for the Respondent

JUDGMENT

PETER WILLIAMS JA

I. INTRODUCTION

- [1] The power of a judge to order an interim payment on account of damages is an important weapon in the armoury of the court in granting interlocutory relief. This power is especially important and widely used in some jurisdictions in personal injury claims in order to ameliorate the suffering of claimants who have lost earnings, incurred expenses and need funds to meet further expenses.
- [2] Mr. Kenrick Hoyte, the plaintiff in the High Court action and the respondent in these proceedings, was employed as a driver/porter with Electric Sales and Services Ltd. ("Essco"), the defendant in the High Court action and the applicant/appellant in these proceedings. In the interest of accuracy, the correct name of the company as certified by the Registrar of Companies is Electric Sales & Service Limited and not the name perpetuated in the proceedings.
- [3] On 4 August 2000, the plaintiff was working for the defendant carrying out repairs at a house known as "Bellerive" (not "Belle Reef" as stated in the proceedings), in Speightstown, St. Peter, when he fell from a ladder onto concrete flooring. He sustained a fracture of the radius and ulna on the left forearm. As a result he is now disabled and has not resumed employment.

II. THE PROCEEDINGS

- [4] The record of proceedings does not disclose what transpired between Mr. Hoyte and Essco from the date of the accident to the commencement of proceedings on 3 June 2002 when the plaintiff filed a writ against the defendant. On 27 August 2002, the statement of claim was filed. It was pleaded in paragraph 4 that:

“While engaged in his work at the said premises the plaintiff was standing on a stepladder and lifting heavy materials when he slipped and fell from the said ladder and onto the concrete flooring, causing him to suffer severe injuries to his left forearm.”

Paragraph 5 of the claim alleged negligence against the defendant and set out the particulars of negligence: failing to provide a proper lifting device, failing to secure properly the ladder, failing to inspect the ladder, failing to warn the plaintiff and failing to institute a safe system of work.

[5] On 2 September 2002, the defence was filed. It was in the form of a general denial: it was not admitted that the plaintiff was working on the premises, that there was any negligence on the defendant’s part, or that the plaintiff was injured. The defendant pleaded that it provided a safe system of work and that any injuries suffered by the plaintiff were due entirely to his own negligence.

[6] No action was taken by the plaintiff for another year until 16 October 2003 when he filed a summons for directions. An order was made in terms of the summons; the parties were ordered to exchange a list of documents and the case was to be set down for hearing. Curiously, a second summons for directions was filed a year later on 19 November 2004 in the same terms as the first summons. A second order was made in the same terms as the second summons. No further proceedings were filed for almost another three years.

[7] We hasten to add that the plaintiff was not represented by his present attorneys-at-law who did not come onto the record until 6 September 2007. However, another year elapsed before they filed the plaintiff’s List of Documents on 4 November 2008. The defendant appears not to have filed its List of Documents as none appeared on the court file. On 7 January 2009, the plaintiff filed an application for particulars of the defence, namely, of the safe system of work and of the negligence of the plaintiff. On 30 January 2009, the defendant was ordered to provide the particulars within 14 days of the order. The particulars filed on 11 January 2009 were in very general terms: that the ladder used by the plaintiff was “well maintained and checked on a periodic basis”, that the defendant provided “adequate” supervision and that the plaintiff failed to look where he was stepping and “to walk with proper care”. Not surprisingly, the plaintiff requested yet further and better particulars, which on 22 April 2009 were ordered to be given. The further particulars were not given and the plaintiff applied to strike out the defence. On 1 February 2010, the further particulars were eventually filed. These were also in very general terms and were in part a mere repetition of the particulars filed previously; they did not deal in any meaningful way with the specific circumstances of the accident.

[8] On 9 March 2010, the plaintiff amended his statement of claim. Paragraph 4 of the original statement of claim (quoted at paragraph [4] above) was recast as follows:

“While engage (*sic*) in his work at the said premises the Plaintiff was climbing up on a stepladder when said stepladder collapsed under him causing him to fall forward onto the said ladder.

A section of the said ladder punctured his left arm breaking his radius and ulna.”

[9] The particulars of negligence in paragraph 5 were also recast as follows:

- “1. Failing to inspect the said stepladder for safety at all times, whether regularly or not.
2. Failing to take any or any adequate precautions for the safety of the Plaintiff while he was engaged upon his work.
3. Exposing the Plaintiff to a risk of damage or injury of which they knew or ought to have known.
4. Causing or permitting the Plaintiff to use the said stepladder which was in a dangerous and defective condition.
5. Failing to maintain or repair the said stepladder.
6. Causing or permitting the said stepladder to be and/or to remain in a dangerous and/or defective condition.
7. Failing to [take] all reasonable and effective [means] whether by inspection, examination or otherwise, to ensure that there was or would be no risk arising from the use by the Plaintiff of the stepladder.
8. Failing to provide proper and safe equipment to the Plaintiff for the performance of his duties.”

The defendant did not file an amended defence in response to the amended statement of claim.

III. THE INTERIM PAYMENT APPLICATION

[10] On 10 May 2010, the plaintiff applied by summons for an interim payment on damages pursuant to the *Rules of the Supreme Court, 1982 (“RSC”)*,

Order 29, Rule 11. We digress to state that new Rules came into effect on 1 October 2009: *The Supreme Court (Civil Procedure) Rules, 2008* (“*CPR*”). Under the *CPR, Rule 73.3(4)*, where a summons for directions has been taken out the parties may agree to have the case referred to a case management conference and the new Rules apply. There was no case management conference and the application was heard under the old Rules.

[11] We also digress to state that the Rules providing for interim payments do not appear to have a statutory basis. The only reference in the *Supreme Court of Judicature Act, Cap.117A* to interim payments is to be found in *section 82(1)(a)(iv)* which empowers the Rules Committee to make rules with respect to interim payments. In contrast, the equivalent English Rules on interim payments are based on a statutory power contained in *section 31* of the *Supreme Court of Judicature Act 1981*, which it is helpful to quote, as follows:

“**32 Orders for interim payment**

(1) As regards proceedings pending in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, with provision for the payment to be made to such other party to the proceedings as may be so specified or, if the order so provides, by paying it into court.

(2) Any rules of court which make provision in accordance with subsection (1) may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules.

(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.

(4) Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs.

(5) In this section “interim payment”, in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.”

[12] The summons did not state the grounds on which the application was made but it was supported by an affidavit of the plaintiff. The plaintiff swore as to the circumstances of the accident, as follows:

“3. While I was engaged in my work at the premises, I climbed on to a stepladder and started to ascend the same when suddenly and without any warning, it collapsed under me and caused me to fall forward onto the ladder. As a result, a section of the said ladder punctured my left arm causing a severe fracture to my radius and ulna.

4. [...] the said accident was caused by the failure and/or breach of duty of care of the Defendant owed to me as an employee to maintain a safe system of work, and to maintain safe and adequate plant and equipment.

5. Notwithstanding that the Defendant has filed its defence, I am advised and verily believe that I have a good cause of action for damages for personal injuries...”

The defendant did not swear an affidavit in response to the plaintiff’s affidavit. It was in the context of the above facts and circumstances that the judge had to determine whether to order the defendant to make an interim payment.

IV. THE JUDGE’S DECISION

[13] *Cornelius J* heard the application on 5 July 2010 and gave her decision on 28 May 2011. She set out in her judgment the background and nature of the application and the law. The *RSC, Order 29, Rule 10* provides for an application for an interim payment as follows:

“10. In an action for personal injuries the plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.”

Rule 11 states that the manner in which the application must be made is by summons stating the grounds of the application and supported by an affidavit verifying the damages suffered by the plaintiff. *Rule 12* in so far as it is relevant to this application, states that “the Court may, if it thinks fit” order the respondent to make an interim payment if it “is satisfied” -

“(1)(c) that, if the action proceeded to trial, the plaintiff would succeed in the action on the question of liability without any substantial reduction of the damages for fault on his part...and would obtain judgement for damages against the respondent”.

Rule 12 also provides that -

“(2) No order shall be made if it appears that the defendant is not...

(c) a person whose means and resources are such as to enable him to make the interim payment.”

[14] Two conditions, therefore, must be fulfilled before the court can order an interim payment. First, the court should be satisfied on the evidence currently before it that the plaintiff would on the balance of probabilities succeed at trial on liability. Secondly, the defendant should be financially able to make the interim payment. Thereafter, it would be in the discretion of the court based on the facts and circumstances of the case whether to make the interim payment.

[15] The judge in relation to the first condition gave the following reasons for her decision:

“[8] Whether or not an order is made is a matter of the judge’s discretion...Firstly, before granting the order the judge should be satisfied that the plaintiff will succeed in his claim against the defendant...

[9] Secondly, the standard of proof that is required by the plaintiff, to prove that his case will succeed, is the usual civil standard, on a balance of probabilities, but to a high standard...Thus, the Court must be satisfied that the claimant will succeed, not that he is likely to succeed.

...

[13] Another consideration is that the interim payment procedure is not suitable where factual issues are complicated or where difficult points of law arise...

...

[15] Mr. Nicholls has argued that there is a good case for Mr. Hoyte. He says that he was acting within the course of his employment, and using equipment (the ladder) provided by Essco, the faultiness of which caused the accident and the injury. Mr. Weekes has rebutted this, arguing, quite correctly, that the standard of proof is a very high one, higher than the ordinary civil standard. He does not go on to show how Mr. Hoyte has failed to meet that standard. The facts alleged are quite simple.

...

[17] These are circumstances, where a worker during the course of his employment uses a piece of equipment provided by the employer, piece of equipment that is purchased by and kept in the custody of the employer, and this piece of equipment is alleged to be faulty, and thereby has allegedly caused an accident...In this case, I consider that the facts as alleged are highly probable, and a likely occurrence, and that Mr. Hoyte has satisfied the high standard of proof necessary.”

[16] With regard to the second condition the judge stated:

“[20] I am also satisfied that the defendant is a person who has the means and resources to make the interim payment. Mr. Nicholls argued that the defendant is a company which has the means to pay, and that it is a company of 60 years standing in Barbados. He goes no further than this, but the Court considers that a company is unlikely to be in business for such a substantial period if it had not met with some measure of success.”

[17] The judge noted that the plaintiff’s affidavit did not set out any specific amount claimed for the interim payment and she concluded:

“[22] Taking all these factors into consideration, I am satisfied that this is a proper case in which to exercise my discretion. [I] therefore order an interim payment of \$20,000.00 to be paid within one month. I also order a speedy trial, and costs in the cause.”

V. THE APPEAL

[18] On 8 June 2011, Essco filed a Notice of Application for leave to appeal the interlocutory order for the interim payment, leave being necessary by **section 54(1)(g)** of the **Supreme Court of Judicature Act, Cap. 117 A**. The ground of the application relied on was that “the judge erred in law in her judgment and wrongly exercised her discretion in holding that the Intended Appellant should pay the sum of \$20,000.00 as an interim payment pursuant to the **RSC, Order 29 Rule (1)(c)** in circumstances where the Intended Appellant is contesting liability in the matter there being insufficient evidence before the court to justify a finding that the Respondent would succeed at the trial of the matter and or that a court would not reduce any quantum of damages found due to him as a result of his own fault”. The Notice was supported by an affidavit sworn to by Mr. Weekes.

[19] Counsel for the parties agreed to the suggestion of the court that in the circumstances of this case the application for leave to appeal could conveniently be heard with the appeal. This form of procedure is particularly appropriate where the circumstances are such that, in order to decide whether to grant leave to appeal, it is necessary to cover in depth virtually the whole of the ground comprised in the proposed appeal: **5 Atkin’s Court Forms, Second Edition, 1992 Issue at page 55.2**. Mr. Marshall Q.C. properly agreed to this course though it might have been slightly to the respondent’s disadvantage by depriving him of the opportunity to resist the leave application and if leave was granted, then to resist the appeal. However, it is the obligation of the court and the parties in all cases whether filed before or after 1 October 2009 to further the overriding objective of the **CPR** to deal with cases justly which includes saving time and expense. The court therefore granted the applicant leave to appeal as the matter of interim payments on damages involves a question of importance.

[20] Mr. Weekes’ substantial submission was that based on the facts and circumstances of this case the judge could not be satisfied that the plaintiff would succeed in the action if it proceeded to trial. The first condition, therefore, for the award of an interim payment was not fulfilled.

[21] Counsel in his skeleton argument stated that there was an error in the exercise of the discretion because interim payment applications “necessitate a qualitative analysis by the judge of the cause of action pleaded by the plaintiff and the defence pleaded by the defendant [and that] the judge failed to analyse the defence properly or at all”. He stated that an analysis of the pleadings indicated that the plaintiff’s claim was based on an alleged breach of the defendant’s common law duty to provide him with a safe system of work and that the defendant defended the claim on the basis that it provided a safe system of work and that the injury suffered by the plaintiff occurred as a result of his own negligence. It was also contended that the judge failed to analyse the applicable law. He stated that at common law the duty owed by the employer to his employee was to provide a safe system of work and to provide adequate equipment. He submitted that the defendant had discharged its duty.

[22] He further stated:

“In the case at bar the plaintiff’s allegation is that the ladder provided to him collapsed under his weight and caused him to fall thereby causing his injuries. The defendant has denied that the ladder collapsed. This is a dispute of fact, which has to be resolved by the trial judge after hearing the evidence presented by both parties. It is the appellant’s contention that the accident could have happened due to causes outside of the negligence of the defendant. The defendant has alleged that the plaintiff fell due to his own lack of care. It is possible that the plaintiff’s fall could even have occurred simply by the fact that he lost his balance.”

[23] In summary, Mr. Weekes submitted that this is a matter that could be resolved only upon a full trial where witnesses can be cross-examined and the extent of liability, if any, established. We acknowledge that this is a substantial submission which requires a detailed response.

[24] Mr. Marshall Q.C. submitted in respect of the pleadings that the defence consisted largely of “non-admissions” and “denials” and a claim that the plaintiff’s injuries were caused by his own negligence but that no particulars of negligence were provided in the defence and that the further and better particulars given “do not address the issue of a ladder which collapsed under the plaintiff”. Counsel also stated that the plaintiff would rely on the doctrine of *res ipsa loquitur*, citing in support the English Court of Appeal decision of ***Bennett v. Chemical Construction (G.B.) Ltd. [1971] 1 W.L.R. 1571***, the applicability of which the defendant denies and on which it is not necessary for us to comment. Finally, counsel submitted that there was sufficient evidence before the court to entitle the judge to have ruled in favour of the plaintiff.

[25] In respect of the evidence, Mr. Marshall relied on the plaintiff’s affidavit in which he swore that “he was ascending a stepladder which suddenly and without warning collapsed under him”. The defendant did not file an affidavit in response to the plaintiff’s affidavit or any evidence in opposition to the application. Mr. Marshall submitted that the plaintiff’s affidavit was not controverted by the defendant; the judge therefore had on behalf of the defendant only the defendant’s pleadings, which were not evidence in the case.

[26] In our opinion, the judge was required to determine whether the first precondition of making an order for an interim payment had been met, namely, whether she was satisfied that the plaintiff would succeed in the action on liability. She had to make a judgment based on the available evidence at the time as to the predicted liability of the defendant; she had to assess the facts and to weigh and balance them. This was an exercise in judgment, which involves judicial assessment of a fact-based situation and not an exercise in discretion, which involves judicial selection from a range of two or more available options. The distinction between the exercise of judgment and discretion as different types of judicial decision-making is admirably explained in the writings of Francis Bennion: see “***Bennion on Statutory Interpretation***”, ***Fifth Edition (2008)*** at **page 127** and the references.

[27] The judge took into account the standard of proof required of the plaintiff, namely, on a balance of probabilities but to a high standard and that the interim payment procedure was not suitable where the factual issues require what has been described in recent cases as “a fact-sensitive inquiry”. She held that the facts alleged were “quite simple” and that the defendant did not show in what way the plaintiff failed to meet the standard of proof required. This is a case in which the judge could reasonably have expected that the employer would have provided a witness statement or expert report or inspector’s report in support of its position that it was not liable to its employee for the injury he sustained on the job. The employer produced no factual account of the accident or evidence as to the condition of the ladder after the accident but instead relied solely on its pleaded case which in very general terms alleged that the plaintiff was himself responsible for his misfortune. In these circumstances, we cannot hold that the judge was wrong to find that the first precondition for the making of the order had been met and that she was satisfied on the available evidence that there was a very strong possibility that the plaintiff would succeed on liability. It follows that we cannot accept the appellant’s main ground of appeal. The position taken by the judge on the evidence was permissible and not one with which this court should interfere.

[28] The judge should take into account the plaintiff’s possible contributory negligence both in determining liability and in fixing the amount for the interim payment. However, even if the judge was of the view that the plaintiff was contributorily negligent for the accident or substantially so, she would still have been entitled to have made the order that she did. We should also state that where the facts in a case are simple but disputed, the judge should not necessarily be precluded from making an order. Too conservative an approach to the making of an order will merely frustrate the purpose of the valuable power to grant interim relief especially in personal injury cases.

[29] The second precondition to the granting of relief is the requirement that the defendant has the means and resources to make the interim payment. The judge so found and her finding is not challenged on appeal.

[30] The preconditions having been satisfied, the judge still had the discretion to grant or refuse the relief. In most cases there will be no good reason for refusing to make the order. In some cases where there is doubt on the merits or significant delay or the plaintiff is suffering hardship it may be appropriate to stay the hearing of the application and give directions in accordance with ***RSC, Order 29, Rule 13*** as to the further conduct of the action. In this case it was appropriate for the judge to make the order that she did. Although the basis is not stated on which the amount of the interim payment was determined, no complaint is made with regard to the same as it represents only a modest sum compared to the plaintiff’s loss.

VI. **GENERAL COMMENTS**

[31] The facts and circumstances of the interim payment application require this court to make some general comments on the matter.

(a) Failure to obey court orders

[32] Apart from failing to obey the court’s order to file its List of Documents, the appellant also disobeyed the court’s order to make the interim payment. The respondent has not made an issue of the non-compliance but the court’s orders should be obeyed unless some arrangement is made with the beneficiary of the order. The general rule is that the court can refuse to hear an application by a person who is in contempt of a court order (***Hadkinson v. Hadkinson [1952] 2 All E.R. 567 CA***). However, the court does have the discretion to hear the matter in spite of the contempt (***ASM Shipping Ltd of India v. TTMI Ltd of England [2007] 2 Lloyd’s Rep 155***). There is an established exception to the general rule where, as in this case, there is an appeal against the order which was disobeyed (***The Messiniaki Tolmi [1981] 2 Lloyd’s Rep 595 CA***). Nevertheless, the proper practice is to apply for a stay of execution of the order.

(b) CPR, Part 17

- [33] **CPR, Part 17** provides for interim payments. **Rule 17.6 to 17.9** is in similar terms to **RSC, Order 29, Rules 9 to 17** except that the **CPR** do not limit the ordering of an interim payment to personal injury claims but “on account of any damages, debt or other sum which the court may find the defendant liable to pay” (**Rule 17.1(h)**).

(c) Non-disclosure of order for interim payment

-] **RSC, Order 29, Rule 14** provides that no communication shall be made to the court at the trial of the fact that an interim order has been made (a similar provision is to be found in **CPR, Rule 17.9**). In this case there has been full disclosure of the order on the court file and in the judgments. It used to be the practice, to our knowledge, that the Registration Office of the Supreme Court prepared a separate court file with the interim payment application, which at the trial of the action would not be disclosed to the judge. In this case no separate file has been prepared and the interim payment documents have been filed with the other court documents in a single file. The parties have not raised the matter and we therefore leave it to them to take such action as they deem appropriate in the circumstances. However, we would make two comments. From the non-disclosure provision, it is clear that the judge who hears the interim payment application should not generally hear the trial of the substantive action. Secondly, it is the duty of those responsible for the practice and procedure to be followed in the Supreme Court to give appropriate directions and to ensure that there is compliance with the Rules.

(d) The overriding objective

- [35] The accident occurred on 4 August 2000. The trial of the action has been set for hearing on 15 and 16 May 2012, nearly twelve years later. On 28 May 2011, the judge ordered a speedy trial; on 16 June 2011, Mr. Marshall wrote the Registrar requesting that the matter be set down for a case management conference pursuant to **CPR, Part 73.3(3)**. However, in spite of the judge’s order for a speedy trial, the case management conference was not heard until 10 November 2011, when an order was made by the Acting Master for a hearing a year after the judge’s order.
- [36] By **CPR, Rule 2.3**, “court” means the High Court and the Court of Appeal and by **Rule 2.4** the functions of the High Court (except provided otherwise) may be exercised by any judge, master or registrar of that court. **Rule 1** states that the overriding objective of the Rules is to enable the court to deal with cases justly, which includes ensuring that a case “is dealt with expeditiously and fairly”. Dealing with a case justly also includes ensuring that “the parties are on an equal footing”. The overriding objective applies to all pending cases whether commenced before or after the introduction of the **CPR** on 1 October 2009: see **Rule 73.4**. We are of the view that the judge’s order conformed with the spirit of the new civil procedure rules.

VII. DISPOSAL

- [37] Accordingly, though giving leave for the appeal to be heard, we dismiss the appeal and affirm the order of **Cornelius J.** The appellant is ordered to pay \$20,000.00 to the respondent; the said sum was ordered by the judge to be paid within one month of 28 May 2011. It should therefore have been paid within a calendar month, by 28 June 2011: see **RSC, Order 3, Rule 1** and **The Supreme Court Practice 1999, Order 3, Rule 1** at 3/1/2. As the order was not complied with, we order that the appellant pay interest on the said sum of \$20,000.00 at the rate of 6% per annum from the said 28 June 2011 until payment. The judge ordered the costs below to be costs in the cause; we are of the view that the costs of the appeal should also be costs in the cause, subject to any written submissions as to costs that the parties may wish to make within 14 days of the date of this judgment.

Justice of Appeal

Justice of Appeal

Justice of Appeal