BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1638 of 2009

BETWEEN:

KENDALL INCE **CLAIMANT**

AND

ASPHALT PROCESSORS INC **DEFENDANTS**
GLENROY CADOGAN

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2014 July 9, 15
Date of Decision: 2018 November 21

Appearances:

Mr. Satcha Kissoon Attorney-at-Law for the Claimant.

Ms. Jessica Ashby Attorney-at-Law for the First and Second Defendants.

DECISION

Introduction

[1] This is an application filed pursuant to **Part 17** of the **Civil Procedure Rules (CPR)** for an interim payment in a personal injury matter.

[2] The issue does not appear to be whether a payment should be made, but rather, the quantum of such a payment. The Claimant/Applicant is seeking a payment of $50,000 which is being challenged by counsel for the Defendants.

Relevant History and Background

[3] This matter was commenced by Writ of Summons filed August 21st, 2009. The background circumstances relate to a motor vehicle accident occurring 9 August 2006. The Claimant/Applicant was the driver/owner of a vehicle which was run into from behind by the Second Defendant, who was the servant/agent of the First Defendant.

[4] A Default Judgment was entered against the Defendants in or about March 2013. At time of writing, no application has been made to set aside this judgment.

[5] The Claimant/Applicant made his Application in April 2014 under **Part 17.5** of the **CPR**. This Application in accordance with the requirements of **Part 17** made three important statements as follows: (1) that liability was not in dispute in the face of an unchallenged judgment for damages to be assessed;

(2) that the First Defendant is insured; and (3) the amount of damages to be awarded is likely to be substantial.

[6] The Claimant/Applicant filed two affidavits in support dated April 16th and July 11th respectively. Both outlined the injury sustained and exhibited medical reports from doctors and physiotherapists.

The Injury

[7] The Claimant/Applicant's vehicle was stationary at the stoplights when the First Defendant's vehicle ran into the back. The first affidavit chronicles the immediate onset of pain and several medical interventions (Dr. Alert, Dr. Sangye Anderson and Dr. Gill; Physiotherapists Ms. Cheryl Moe and Ms. Sandra Vaughn).

[8] The Claimant/Applicant has evidently sustained an injury of undetermined severity to his back resulting in episodic back and leg pain, subsequently diagnosed by Dr. Gill as a L5/S1 disc herniation. This injury has allegedly occasioned him much pain and medical intervention, inclusive of physiotherapy and surgery, detailed in reports dated 2008 to 2012. The word 'allegedly' is being used in recognition of the Defendant's submissions summarized below.

[9] Invoices totaling $22,679.13 were submitted with the affidavit of April 16th 2014. The Applicant deposes that these are not the only invoices issued to

him, but it is the pressure to pay these particular invoices that has prompted this application for an interim payment.

[10] It is evident from the documentation submitted that the Claimant/Applicant had two surgical interventions for his disc herniation by 2010 (2008 and 2010 respectively). The Medical Report of neurosurgeon Dr. John Gill dated 1 June 2012 indicates that since the second operation "the leg pain has resolved as has the back pain. There is no residual numbness, Mr. Ince has returned to a full activity without discomfort. His prognosis is good and requires no future medical input for this injury." In the opinion of Dr. Gill, the situation has now resolved.

[11] Significantly, and regrettably the Claimant/Applicant's affidavits do not contain a quantification of his claim, beyond a general reference to cases of some similarity in order to establish a range. It appeared at the time of the hearing of this application that there had been no quantification or submission of a quantified claim to the Defendants' insurers, although Dr. Gill's Report indicates that the matter has been largely resolved since 2012.

The Submissions

[12] The Claimant/Applicant filed Written Submissions on July 15th, 2014. In summary, he submits that he has met the requirements for an interim payment

as stipulated by **Part 17.6**; specifically **Part 17.6 (c)** "that the claimant has obtained judgment against that defendant for damages to be assessed."

[13] He emphasizes that the Court need not concern itself with what the Claimant does with his money on the authority of **Kenrick Hoyte v Electrical Sales and Services Ltd, Stringman v McArdle [1994] 1 WLR 1653** and **Tinsley v Sarkar [2004] EWCA Civ 1098** and **Campbell v Mylchreest [1999] P.I.Q.R.Q17.**

[14] Counsel submits generally, on the authority of **Turner v Owens Corning Fibreglass UK Ltd. (unreported) Kemp & Kemp November 1997, Re Hibberd (unreported) Kemp & Kemp March 1997**, that the average award in these cases is £11,750, which when converted to Barbados currency with the relevant multipliers, is $65,388.75 for general damages alone. In conclusion, it is his submission that an interim payment of $50,000.00 is not unreasonable given these circumstances.

[15] The Claimant also seeks an Order for costs in the sum of $5000.00 which represents the normal ten percent which is applied to legal fees for personal injury matters.

[16] Counsel for the Defendants orally resisted the application. She submits, inter alia, that the Claimant has failed to satisfy **Rule 17.6(1) (d)**. She argued that the Court must not run the risk of infringing the proportionality principle, in

that the Court would not wish to make a payment which amounts to an overpayment. Counsel further contends that there are discrepancies in the medical evidence, namely, that the medical reports do not establish a link between the Claimant's injuries as assessed in 2006 and the subsequent surgeries. There is nothing, in her submission, to assist her in understanding what occurred between 2006 and 2008 in order to establish the causal link leading up to the surgeries. Counsel further, is unhappy with what, in her opinion, is a lack of a causal link between the two surgeries. Counsel expressed the concern that these issues and others are still unclear and should be properly resolved through the testing of the medical evidence at trial. Her best offer of an interim payment is the sum of $10,000 until final assessment.

[17] In support of her submissions counsel relied on the following authorities: **Hoyte v Electric Sales and Service**; **Commonwealth Holdings PLC v Quadrex Holdings Inc [1989] QB 842**.

Discussion

[18] **Part 17** of the **CPR** provides for the granting of interim remedies, inclusive of interim payments in personal injury claims (**Rule17.1 (1) (h)**.

[19] The time that such application can be made and an order made by the Court is provided for in **Rule 17.2 (1)** and **17.5(1)**.

[20] **Rule 17.6 (1)** is of central importance because it sets out the conditions which must be satisfied before the court makes an order for interim payment. The two most significant conditions in the context of this matter are (1) that the Claimant has obtained judgment against the Defendant for damages to be assessed; and (ii) that the Court must satisfy itself that if the claim went to trial, the Claimant would obtain judgment against the Defendant from whom he is seeking an order for interim payment for a substantial amount of money or for costs.

[21] **Rule 17.6 (2)** is also of fundamental importance in the determination of whether to make an interim order as it provides as follows:

> "In addition, in a claim for personal injuries, the court may make an order for the interim payment of damages only if the defendant is
>
> (a) Insured in respect of the claim;
>
> (b) A public authority; or
>
> (c) A person whose means and resources are such as to enable that person to make the interim payment."

[22] **Rules 17.6 (4)** and **(5)** are also of significant relevance as they provide respectively, that " the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment" and that the Court must take into account "(a) contributory negligence, where applicable; and (b) any relevant set-off or counterclaim".

[23] The underlying philosophy behind this provision in the Rules is explained by **Nicoll LJ** in **Shearson Lehman Brothers Inc v Maclaine, Watson & Co [1987] 2 All ER 181** at **page 190** as follows:

> "The underlying purpose of the two (interim payment) rules is the same: to mitigate hardship or prejudice to a defendant which may exist during the period from the commencement of the action to the trial. Further the underlying task of the court under each rule is the same: ordering an interim payment of such amount as is just, having regard to all the circumstances."

[24] See also **Williams JA** in **Electrical Sales and Services Limited v Hoyte Civil Appeal No. 8 of 2011** and **Commonwealth Caribbean Civil Procedure, 3rd Ed. 2009 at page 166**.

Disposal

[25] In making the final determination in this matter I am mindful of two matters: First, that the determination of whether or not to make an order for an interim payment in the circumstances of the case before it, is a matter of the judge's discretion: See **British & Commonwealth Holdings plc v Quadrex Holdings Inc. [1989] QB 842; Shanning International Ltd v George Wimpey International Ltd. [1988] 3 AllER 475**.

[26] Second, and in the particular circumstances of this matter, that this Court should err on the side of caution in avoiding the risk of overpayment where the Claimant may be unable to repay the excess: see **Cornelius J** in **Hoyte v Electrical Sales and Services Ltd. BB 2011 HC 16** and **Andrew v Moorjani**

Caribbean Limited Suit No. ANUH CV 0232 of 1999. This is a consideration of Rule 17.6(4) and (5) above that in making this determination this Court should not order a payment of more than a reasonable portion of the likely judgment taking into account any possible contributory negligence or set off.

[27] There is some concern as to the paucity of medical evidence in the face of the matters raised by the Defendants and the absence of a quantified claim in this matter. This creates a challenge in this Court's assessment of what constitutes "a reasonable proportion of the likely amount of the final judgment." (**Part 17.6 (4)**).

[28] In light of the above, despite a finding that the conditions for the granting of an interim payment have been met, this Court is minded to err on the side of caution and make an order for the payment of $23,000 being the amount of the outstanding medical expenses.

[29] It is further ordered that this matter be given an early date for case management to facilitate the early trial of this matter, as it appears unlikely that the parties after this significant time period will reach agreement on the quantum of damages.

[30] No order is made as to costs at this time.

MARGARET A. REIFER
Judge of the High Court