BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV 1746 of 2018

BETWEEN:

TARA-MAHALIA SMITH INTENDED CLAIMANT/APPLICANT

AND

GRAND CASS MANAGEMENT (BARBADOS) LIMITED t/a SANDALS BARBADOS RESORT & SPA INTENDED DEFENDANT/RESPONDENT

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 4th January 2019

Ms. Faye Finisterre in association with Ms. Sophia Billingy for the Intended Claimant/Applicant

Ms. Alicia Archer for the Intended Defendant/Respondent

DECISION

INTRODUCTION

[1] Before me is an application filed on 24 December 2018 by the applicant, Ms. Tara-Mahalia Smith (Ms. Smith) for an order that the respondent (Sandals) pays her the sum of $35,000.00 by way of an interim payment.

[2] On its face, the application is expressed to be made pursuant to ***Rule 17.2 (1)*** of the ***Supreme Court (Civil Procedure) Rules, 2008***. That rule provides that an order for an interim remedy may be made at any time including before a claim is made. Evidently, it was invoked by Ms. Smith since at the time of making the application she had not filed a claim form against Sandals.

[3] At the hearing of the application, the question arose as to whether the application was doomed to fail for any of two reasons, namely whether (i) ***CPR 17.5(1)*** precluded the making of the application at this time; and (ii) any of a number of preconditions for the grant of an interim payment set out in ***CPR 17.6(1)*** had been met.

[4] I have read Ms. Smith's affidavit which she filed in support of her application. I have also considered the submissions which were advanced by Ms. Faye Finisterre who appeared in association with Ms. Sophia Billingy for Ms. Smith and those of Ms. Alicia Archer who appeared for Sandals. Having done so, I have determined that the application must be refused. The reasons that impelled this conclusion are set out below.

THE RULES

I will set out ***CPR 17.2(1)***, ***17.5(1)***, and ***17.6(1)***. ***CPR 17.2(1)*** reads:

> 17.2 (1) An order for an interim remedy may be made at any time, including
>
> (a) before a claim has been made; and

(b) after judgment has been given.

(2) However

(a) sub-rule (1) is subject to any rule which provides otherwise; and

(b) the court may grant an interim remedy before a claim has been made only if

(i) the matter is urgent; or

(ii) it is otherwise necessary to do so in the interests of justice; and

(c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1(1) before filing an acknowledgement of service under Part 9.

(3) Where the court grants an interim remedy before a claim has been commenced, it must require an undertaking to issue and serve a claim form by a specified date.

[5] ***CPR 17.5(1)*** provides:

> The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgement of service applicable to the defendant against whom the application is made.

[6] ***CPR 17.6 (1)*** is in these terms:

> **17.6** (1) The court may make an order for an interim payment only if
>
> (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant.
>
> (b) the claimant has obtained an order for an account to be taken as between himself and the defendant and judgment for any amount certified due on taking the account;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money, including costs, to be assessed;

(d) except where sub-rule (3) applies, it is satisfied 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 costs; or

(e) the following conditions are satisfied

(i) the claimant is seeking an order for possession of land, whether or not any other order is also being sought; and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable, even if the claim for possession should fail, to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

[7] Reference is made to sub-rule 3 in ***CPR 17.6 (1) (d)***. It relates only to claims for damages for personal injuries involving two or more defendants. It is not relevant here.

THE EVIDENCE

[8] I turn now to Ms. Smith's evidence. At paragraph 3 of her affidavit, she deposed as follows:

> My intended action is one for personal injury to my left knee, loss and damage as a result of a fall at the premises of Sandals Hotel, the Intendant Defendant's hotel premises. I was carrying a shoulder tray of dirty dishes when I slipped on a wet floor and fell, injuring my knee. I have been in pain and have been coping with disability ever since.

[9] For much of the remainder of her affidavit, Ms. Smith detailed the medical history of the treatment to her stated injury; and the various diagnoses and recommendations obtained from the physicians she ttended. She exhibited with her affidavit a report issued by Dr. J Okella Ward setting out the findings of an MRI examination of her left knee; and reports from Dr. Paul Adams and Dr. Jerry Thorne, two orthopaedic surgeons.

[10] The medical reports suggest that Ms. Smith has suffered an injury to her left knee which has resulted in an unstable patella; and that she requires an arthroscopic examination of the injured knee; an arthroscopic removal of a loose bone fragment; and a reconstruction of the medial patella femoral ligament. The evidence discloses the fees proposed by Dr. Thorne and Dr. Adams for surgical and related services.

[11] At paragraph 20 of the affidavit, Ms. Smith deposed as follows:

> I am also advised by my Attorney-at-Law, Ms. Finisterre, that if this action proceeds to trial, I am likely to be awarded a substantial sum of money in damages. She has advised that on the medical evidence thus far, she estimates the award for pain and suffering to be in excess of $150,000.00 and the $35,000.00 is a reasonable proportion of that or any likely award of damages.

SUBMISSIONS AND DISCUSSION

[12] This brings me to Counsel's submissions. It makes good sense to start with those relating to ***CPR 17.2(1)*** and ***17.5(1)*** since the related issue goes to

whether there is a competent application before the Court. The competing submissions were predictable.

[13] Ms. Archer submitted that ***CPR 17.2(1)*** expresses a general rule in relation to interim remedies which is trumped by the procedure set out in ***CPR 17.5***. She urged that the latter rule was specific to interim payments and that it is implicit in ***CPR 17.5(1)*** that an application cannot be made for an interim payment before a claim form is filed. In defence of the application, Ms. Finisterre urged that ***CPR 17.5(1)*** provides a general rule in respect of interim payments, but ***CPR 17.2(1)*** applies in the exceptional circumstance of urgency.

[14] I am in no doubt that Ms. Archer is correct. ***The CPR*** does not contemplate the making of an application for an interim payment before the commencement of proceedings. A contextual examination makes this obvious. ***CPR 17.1 (1)*** provides generally for the grant of interim remedies. It goes on at ***paragraphs (a)*** to ***(l)*** to list a number of types of remedies that are included within that concept. Orders for interim payments are identified in ***paragraph (h***) in this way:

> an order, referred to as an "order for interim payment", under rule 17.5 for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay;

[15] The reader who wants to ascertain what is an order for an interim payment must therefore turn to ***CPR 17.5*** and when he does so, he encounters the edict

in ***sub-rule (1)*** that a claimant may not apply for such an order "before the end of the period for entering an acknowledgement of service applicable to the defendant against whom the application is made". Clearly, this requires that a claim form must have been filed and that the specified post-service time has expired.

[16] The idea that ***CPR 17.5(1)*** is a general rule which gives way in circumstances of urgency to ***CPR 17.2(1)*** is not supported by a reading of the latter provision. Undoubtedly, ***CPR 17.2(1)(a)*** allows for the grant of an interim remedy before a claim has been made. However, the generality of that rule is subject to the dual limitation imposed by ***CPR 17.2(2)***. The critical one in this case is that set out at sub-paragraph (a) which provides that sub-rule (1) is "subject to any rule which provides otherwise". ***CPR 17.5(1)*** provides otherwise. The second limitation is that in ***CPR 17.5(2)(b)*** which proscribes that an interim remedy may only be made if the matter is urgent; and it is necessary to do so in the interest of justice. However, it is clear from the structure and language of ***CPR 17.5(2)*** that the ***17.5(2)(b)*** requirement is inoperable where the ***17.5(2)(a)*** limitation applies.

[17] There is a presumption that a general rule yields to a specific one which covers the same situation. Citing ***Vinos v Marks & Spencer plc [2001] 3 All ER 784***

at [27], ***Francis Bennion*** explains it succinctly in ***Bennion on Statutory Interpretation 5th ed.*** at ***page 1164*** in this way:

> Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision.

[18] ***The White Book Service 2002, Civil Procedure Vol 1*** invokes this presumption in explaining the relationship between rules in the ***Civil Procedure Rules 1998*** of England and Wales of much similarity to those under consideration. It states at ***paragraph 25.2.1***

> In terms, rr. 25.2 and 25.3 would apply to an application for an interim payment order. However, particular rules for such an application are found in rr. 25.6 to 25.9 and, presumably, those provisions would prevail in the event of any inconsistency between them and rr. 25.2 and 25.3.

[19] ***The White Book Service*** returns to the subject at ***paragraph 25.6.3*** under the caption "**Time of application**", where it states:

> The general rule is that, subject to any limiting provisions, an application for an interim remedy may be made at any time r.25.2(1) and r. 25.6(1) states that the claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgement of service applicable to the defendant against whom the application is made.

[20] ***CPR 17*** deals generally with interim applications. ***CPR 17.2 (1)*** provides generally for the making of such applications and, in so doing, states that they may be made at any time, including before the filing of a claim (***CPR***

17.2(1)(a)). ***CPR 17.2(2)(a)*** expressly makes that general rule subject to any rule that provides otherwise. ***CPR 17.5*** sets out particular rules in respect of interim payments and these include the regulation at ***CPR 17.5(1)*** as to when an application for an order may be made. I can conceive of no reason why the draftsman would have included this latter rule, were it not intended to disapply the general rule in ***CPR 17.2(1)***. It follows that there can be no competent application for an interim payment before this Court.

[21] That is the end of the matter. However, out of deference to Counsel, I will comment briefly on the other ground raised by Ms. Archer. I agree with her that given what was before the Court when the application was heard, it could not be said that any of the pre-conditions stipulated in ***CPR 17.6(1)*** for the making of the order had been met.

[22] It is common ground that the only condition of relevance in the circumstances of this case is that set out at ***CPR 17.6 (1)(d)***. It requires that the Court be satisfied that "if the claim went to trial, the claimant would obtain judgment against the defendant from whom he is seeking the payment for a substantial sum of money or for costs". Ms. Finisterre submitted that paragraph 3 of Ms. Smith's affidavit is enough to satisfy the Court that the defendant would be held liable at trial. She referred to the evidence of the nature of Ms. Smith's injury; and her related advice in respect of damages.

[23] At the hearing, Ms. Finisterre referred glibly to the common law, ***section 4*** of the ***Occupiers Liability Act Cap 208*** and ***sections 6***, ***8*** and ***9*** of the ***Safety and Health at Work Act Cap 356*** as the bases for causes of action that Ms. Smith might successfully pursue. Additionally, she cited ***Conner v Bradman and Company Ltd [2007] All ER (D) 495 (Nov)*** and the ***Judicial Studies Board Guidelines***, ***14th edition***, ***Chapter 7 Orthopaedic Injuries*** in an effort to demonstrate that Ms. Smith would be entitled to a substantial award.

[24] Ms. Archer submitted that what is before the Court is insufficient to satisfy it that Ms. Smith would obtain judgment against Sandals for a substantial award. She commented that the affidavit was lacking in detail as to what cause of action Ms. Smith intended to pursue; or a sufficiency of alleged facts to support any cause of action.

[25] The obvious starting point of this discussion must be what is the applicable standard in determining whether a claimant "would obtain judgement". In this respect, Ms. Finisterre referred me to ***Kemp Commentary, Chapter 24, paragraph 24-003*** where the following appears:

> … in Scott Kem Ltd v Bentley [1990] All ER 850 CA … Neill L.J. considered that the words "would obtain judgment" meant:
>
> *"something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden."*

[26] The correct name of that case is ***Schott Kem Ltd v Bentley & Ors***. It is referred to in ***JSC BTA Bank v Ablyazov [2012] EWHC 783 (Comm)***. Having cited Neill LJ's statement in respect of the burden of proof at ***paragraph 36***, Hamblen J went on in the following paragraph:

> That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the Interim Payment application under paragraph (c) has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?

[27] More recently, in ***Triuva Kapitalverwaltungsgesellschaft v Galliford Try Construction Ltd [2017] EWHC 275 (TCC)*** O'Farrell J stated at paragraphs 12 to 14:

> 12. The court must be satisfied on the balance of probabilities that if the claim went to trial on the basis of the evidence currently before the court, the claimant would obtain judgment for a substantial amount of money; it is not sufficient for the **claimant merely to show that it is likely that it will do so:** *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] EWCA Civ 57 per Aikens LJ at Paras. 36 & 38.
>
> 13. Whether the amount of money is substantial or negligible must be determined in the context of the total claim made: *Test Claimants v Inland Revenue* (above) per Aikens LJ at Para. 39.

> 14. The court should not conduct a mini trial, and an application for interim payment is not appropriate where the issues of fact and/or law are complex, but the application may be entertained if the claimant can establish that it would succeed on an "irreducible minimum part" of the claim: *Schott Kem Ltd v Bentley* [1991] QB 61 per Neill LJ at pp.71-73; *Trebor Bassett Holdings Limited v ADT Fire and Security plc* [2012] EWHC 3365 per Coulson J at Paras.8 – 10.

[28] An indication of the exacting nature of the required standard and its underlying rationale has been articulated by May LJ in ***Gibbons v Wall [1988] CA Transcript 111 (February 24, 1998)***. He stated:

> … the civil burden of proof … is a flexible test … and it depends on the nature of that which has to be proved where on the flexible scale of the balance of probabilities one has to pitch the burden … [In] the context of an application for an interim payment … the burden is a high one within that standard if only because litigation of its nature involves no certainties. A plaintiff with what may appear to be a strong case may find it fail [sic] at trial. If he does then he will have to repay the whole or, to the extent that he fails, part of the interim payment. But … the plaintiff may spend it … If he does it may be difficult … to recover … Clearly the burden resting on an applicant in those circumstances is towards the top of the flexible scale.

[29] These authorities out of England and Wales have been considered by the Court since they express principles that have been developed in respect of a pre-condition identical to that in ***CPR 17.6(1)(d)***. The general standard they espouse is not foreign to regional jurisprudence. ***Schott Kem Ltd*** has been applied by in Jamaica (see ***Anderson v Rankine Claim No. 2006 HCV05105, date of decision 10 December 2008***) and in the Eastern Caribbean (see, for

example, ***Pinder v Wettherill Civ App No 41 of 2011, Court of Appeal of Antigua and Barbuda, date of decision 5 June 2012***).

[30] The test for the making of an award on the predicted liability condition set out in ***CPR 17.6(1)(d)*** is a stringent one. The burden on an applicant is a high one, though he need not meet the criminal standard of proof beyond reasonable doubt. He must demonstrate more than a prima facie case. The Court must be satisfied on the balance of probabilities as to the defendant's liability and the likelihood of substantial damages being awarded against him. A mere tilting of the balance will not suffice. Only proof at the upper end of that flexible civil standard is acceptable.

[31] The material before me falls woefully short of this high standard. There are no pleadings that disclose the cause of action or causes of action on which Ms. Smith relies. No expert evidence has been offered as an attempt to fill this lacuna. Even if one could discern exactly where in law Ms. Smith intended to locate liability, there is nothing in her affidavit that could lead to the conclusion that she will establish a case. All she discloses is that she was carrying a tray and fell on a wet floor. No one has demonstrated how those bald assertions could possibly establish liability even under any of the areas of law suggested by her Counsel to be relevant.

DISPOSAL

[32] However, all that is moot. I have determined that the intended claimant's application is premature and for that reason I must dismiss it. I will hear the parties in respect of costs.

OLSON DEC. ALLEYNE

JUDGE OF THE HIGH COURT