BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 20 of 2016

BETWEEN:

ROGER BRATHWAITE **Appellant**

AND

PAULETTE ATKINS **Respondent**

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2017: May 23, June 21
2019: February 27

Appearances:
Mr. Leslie F. Haynes, QC in association with Finisterre Attorneys for the Appellant
Ms. Phedessa Walker in association with Ms. Hazelyn Devonish for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] This is an appeal against the decision of **Chandler J** to grant the application of the respondent, Ms. Paulette Atkins, for an interim payment in the sum of $150,912.44, to be paid by the appellant, Mr. Roger Brathwaite, on or before

15 August 2016. The appeal is also against the judge's order of costs of her application to the respondent and his order of costs in the cause in respect of the appellant's successful application for an order for specific disclosure.

[2] The dispositive issue in the appeal is very narrow but very important. It is this: what is the correct approach to the making of an interim payment order under ***CPR 17*** in a heavy personal injury claim where, in contravention of ***CPR 17.5 (4) (a)***, a claimant does not state in the affidavit in support required under ***CPR 17.3 (b)*** the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded? The disposition of the further appeal against **Chandler J's** costs order is entirely dependent upon the resolution of that narrow issue.

FACTUAL BACKGROUND

[3] Ms. Atkins is a Crown Counsel attached to the Chief Parliamentary Counsel's Office, Office of the Attorney General.

[4] On 18 September 2011, she was driving her motor vehicle, registration number X3397, along Pilgrim Road, Christ Church. She brought her vehicle to a halt and was awaiting clearance to make a right turn into DHL Barbados Ltd., when suddenly her vehicle was struck in the rear by motor vehicle, registration number X7949. The motor vehicle, X7949, was driven by

Mr. Brathwaite and was insured under a policy of insurance with United Insurance Company Limited (United Insurance).

[5] As a result of the collision, Ms. Atkins suffered personal injury, loss and damage.

[6] Ms. Atkins initially presented to the FMH Emergency Medical Clinic for treatment of her injuries.

[7] A medical report dated 18 January 2013 prepared by Dr. Michael E. R. Wharton, MB.BS, M.Sc. assessed Ms. Atkins as having muscular spasms of the neck and back. Dr. Wharton advised Ms. Atkins to continue to take her regular analgesic medication, gave her an intramuscular injection (Voltaren) and placed her on sick leave.

[8] The report indicated that "She had been attending Dr. Harley Moseley (Physiatrist) re: CHRONIC PAIN SYNDROME following a motor vehicle accident in 1997." The report also indicated that, when reviewed on 22 September 2011, there was no improvement in Ms. Atkins' symptoms and signs, and that she was referred for a course of physiotherapy and that her sick leave was extended.

[9] According to the report, at the following review on 24 October 2012, Ms. Atkins' "neck pain was radiating to her right shoulder region and she was also having significant left hip region pain. Examination of her neck and back

remained unchanged." Additional assessments were made of "1. Right Biceps Tendinitis; 2. Left Sacro-Iliac Dysfunction; and 3. Left Trochanteric Bursitis."

[10] Dr. Wharton, in the conclusion of the report, opined that:

> "The initial symptoms experienced by Ms. Atkins were consistent with the mechanism of the accident. It is my opinion that the clinical picture thereafter, represents an exacerbation of a pre-existing condition, although it is extremely difficult to quantify the extent to which this accident contributed to the picture of CHRONIC PAIN."

[11] Ms. Atkins was variously referred to Dr. A Waterman, Anaesthetist/ Pain Specialist, Mr. John Gill, Neurosurgeon and Dr. Mukund I. Gundanna, M.D., Orthopaedic Surgeon, Texas, USA. She was also required by United Insurance to undergo an independent medical examination by Dr. Arthur R. Edghill, C.B.E., M.B.B.S. Honours (Lond.), F.R.C.S (Ed.), F.C.C.S. Dr. Edghill advised United Insurance that they should follow the recommendations of Dr. Waterman in relation to the respondent's pain management.

[12] By letter dated 16 October 2012, Dr. Waterman wrote to United Insurance recommending that the respondent consider surgical intervention by Dr. Mukund Gundanna as an option in relation to her pain management. Ms. Atkins presented to Dr. Mukund Gundanna for a review in keeping with Dr. Waterman's referral. After review, Dr. Mukund Gundanna recommended

that surgical intervention was required to have the respondent's sacroiliac joint stabilised.

[13] By letter dated 16 January 2014, United Insurance wrote to Ms. Phedessa Walker, attorney-at-law for Ms. Atkins, in relation to the two medical practitioners' advice on the need for surgical intervention. United Insurance agreed to fund the performance of the surgical procedure and also agreed to reimburse Ms. Atkins the sum of $11,001.83 for her expenses.

[14] Approximately one week later, on 24 January 2014, United Insurance wrote to Ms. Phedessa Walker cancelling their agreement to fund the surgical procedure.

[15] As a result of this, Ms. Atkins commenced an action in the High Court against the appellant.

THE ACTION IN THE HIGH COURT

The Claim

[16] On 12 February 2014, Ms. Atkins filed a claim form in the High Court. In it, Ms. Atkins sought general damages for pain and suffering, special damages, interest pursuant to **section 35** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)**, costs and further or other relief as the court deemed fit.

[17] In her claim form, also, Ms. Atkins pleaded that the collision was caused or contributed to by the negligence of the defendant, Mr. Roger Brathwaite. She particularised the injuries that she sustained and attached reports from the medical practitioners she had attended. She did not, however, include in, or attach to, the claim form or statement of claim a schedule of special damages claimed. Instead she stated in her statement of claim: "Further particulars of special damages will be provided at Case Management".

The Application for Interim Payment

[18] On 30 May 2014, Ms. Atkins filed a notice of application under a certificate of urgency in the High Court seeking an interim payment to assist her with her recommended surgeries, medical treatment and associated costs. An affidavit in support was also filed. In the application, Ms. Atkins sought an order that the appellant pay to her the sum of $150,912.44, or such other sum as the court may think just, by way of an interim payment on account of the damages claimed by her in her claim form. The respondent also sought an order that the appellant pay the costs of the application.

[19] The grounds of Ms. Atkins' application were (i) that the defendant had admitted liability; (ii) that if the action proceeded to trial the claimant would recover substantial damages against the defendant; and (iii) that the defendant

was insured in respect of the claimant's claim and that the insurer was well able to honour its financial obligations to the claimant.

[20] In her affidavit in support, Ms. Atkins deposed as to the details of the accident, the injuries she sustained, and the treatment she received. She further deposed that by letter dated 24 March 2014, her attorney-at-law wrote to United Insurance's attorney-at-law enquiring why the insurance company relented on its agreement to pay for her surgery without providing reasons. Ms. Atkins indicated that there was no response to that letter.

[21] Ms. Atkins stated that she was at risk of losing her employment as a result of being on sick leave for two years. She was summoned to appear for an examination before the Medical Board of Directors for the Public Service to determine her fitness to continue her employment on two occasions, namely, 18 May 2013 and 16 November 2013. She sought leniency of the Board, and requested an extension of time until the Board makes its decision, since she was still awaiting another surgery.

[22] Ms. Atkins stated that she was trying to meet the demands of her medical treatment and living expenses since she had been reduced to half salary since September 2013.

[23] Ms. Atkins exhibited a letter from Mr. Leslie F. Haynes QC., attorney-at-law for United Insurance, which was addressed to Ms. Walker. The letter was

dated 11 March 2014, approximately one month after the filing of her claim, and invited Ms. Walker to submit Ms. Atkins' quantified claim.

[24] Ms. Walker responded to Mr. Haynes QC's letter, by a letter dated 21 March 2014 as follows:

> "I continue to act on behalf of Ms. Paulette Atkins.
>
> I acknowledge receipt of your letter dated March 11, 2014 inviting the submission of my client's quantified claim on a Without Prejudice basis. Please note, that my client is required to undergo a second surgery to address her sacroiliac joint for which your client had agreed to undertake payment but subsequently by letter dated January 24, 2014 retracted its undertaking without any further word as to its final decision.
>
> In light of these circumstances, I am therefore not in a position to submit my client's quantified claim. In light of the foregoing circumstances, my client awaits your client's final position regarding payment of the said surgery to which they were duly apprised by Dr. Gundanna in his initial correspondence dated November 2012 and reaffirmed after his post surgery review in his report dated September 23, 2013.
>
> I anticipate that this matter could be settled amicably in the interest of both parties. I look forward to receiving your response soonest."

[25] Mr. Haynes QC responded to Ms. Walker's letter of 21 March 2014, but his letter was not exhibited. Ms. Walker, however, referenced Mr. Haynes QC's letter in her subsequent letter to him dated 8 April 2014. That letter reads:

> "I continue to act on behalf of Ms. Paulette Atkins.
>
> Thank you for your letter dated 31st March 2014 in which you indicated that in order for your client to fully consider the request

previously made by me for an interim payment to cover my client's surgery to the Sacroiliac Joint, that I should submit my client's pre-accident medical history.

Do note, that my client was involved in an accident on 3rd December 1997, a matter for which you also have conduct through Consumers' Guarantee Insurance Co. Limited. As a result of the said accident, my client suffered injury to her back namely; the disc as well as injury to her left shoulder.

I refer to you to the medical report from your client's recommended physician Dr. Arthur Edghill dated 28th December 2011 at page 2, where my client declared her previous medical history from this said accident. (Copy enclosed for your ease of reference).

My client reminded me that she had presented to the Medical Board of Directors for the Public Service on two occasions to determine her fitness to return to work. In November 2013 she pleaded with the Board to give her an extension of time to permit her to undergo the second surgery. My client is anxious to return to her employment and the extension which was granted by the said Medical Board expired on October 2014. The delay by your client has significantly prejudiced my client in returning to work.

I look forward to hearing from you as to your client's decision on advancing the interim payment."

[26] Ms. Atkins also exhibited a schedule of expenses as follows:

"**SCHEDULE OF EXPENSES (Paulette Atkins, Claimant)**

OVERSEAS SURGERY

AIRFARE TO TEXAS	2,500.00 BDS
SURGERY	25,708.86 USD x 2 surgeries x 2.0368=104,727.61 BDS

ANAESTIA	1,600.00 USD x 2 surgeries x 2.0368 = 6,517.76 BDS
DR. GUNDANNA'S FEES	5,324.00 USD x 2 surgeries x 2.0368= 21,687.84 BDS
FOOD	600 USD x 3 MONTHS (the forecasted recovery period) x 2.0368= $3,666.24BDS
TOTAL	**$139, 099.45 BDS**
LOCAL EXPENSES	
REIMBURSEMENT OF MEDICAL BILLS	8,459.23 BDS
TOTAL	**147,558.68 BDS**"

[27] It is to be noted that nowhere in her affidavit in support did Ms. Atkins state her assessment of the amount of damages or other monetary judgment she was likely to be awarded as required by ***CPR 17.5 (4) (a)***. It is to be noted also that, in consequence, there was no annexure to the affidavit in support of the application the documentary evidence on which Ms. Atkins relied in support of that assessment as required by ***CPR 17.5 (4) (c)***.

Appellant's Application for Specific Disclosure

[28] In the foregoing circumstances, on 20 June 2014, the appellant filed an application and supporting affidavit for an order that the respondent disclose to the appellant within 7 days of the order a list of documents of which the respondent had or had had control. These included specifically, all medical reports obtained with respect to *High Court Suit No. 2025/1999* between *Paulette Atkins v Restonic Caribbean Limited & Johnathan Sealy*; all claims for sickness benefit, disablement benefit or other disability grants submitted

by the claimant to the Director of National Insurance/the National Insurance Scheme since 1997; and medical record/records of all medical practitioners and physiotherapists and alternative health practitioners seen by the claimant since 1997. The appellant also sought an order that all costs of and occasioned by the application be the appellant's in any event.

[29] The major grounds stated by the appellant for his application related to the respondent's medical history dating back to the 1997 accident and its relevance to the quantum and divisibility of any damages for the 2011 accident. In particular, the application recited as the central ground the fact that in the respondent's pending suit with respect to the accident in 1997 between herself and Restonic Caribbean Ltd. and Johnathan Sealy, the respondent's allegation in that suit was that she sustained personal injury, loss and damage, namely, soft tissue injury to the neck and upper back; myofascial pain on the upper back; injury to the left shoulder; and chronic pain.

Chandler J's Judgment

[30] **Chandler J** delivered his decision on 13 July 2016. In it, the judge made orders based on the consideration of three issues identified by him. These were (i) whether the respondent had complied with ***CPR 17.5***; (ii) whether the respondent had satisfied the conditions of ***CPR 17.6***; and (iii) whether the

appellant's application for specific disclosure of the claimant's medical history should be granted.

[31] On the issue of whether the respondent had complied with the provisions of ***CPR 17.5***, **Chandler J**, at **para [29]** of his decision, held that the respondent had, in compliance with ***CPR 17.5 (4) (b)*** and ***(c)***, supported her application by evidence on affidavit setting out the grounds of the application and exhibiting documentary evidence, which included a schedule of expenses. However, the judge observed that, contrary to ***CPR 17.5 (4) (a)***, the respondent had not stated the likely amount a court might award as damages or other monetary judgment. This notwithstanding, **Chandler J** held at **para [46]** that the respondent had "complied with the general procedure for interim payments under **CPR rule 17.5**" having regard to the fact that "the [respondent's] Attorney-at-Law submitted cases on quantum giving a local equivalent on the sums awarded".

[32] **Chandler J** next considered the issue of whether the respondent had satisfied the conditions in ***CPR 17.6***. Here, the judge found at **para [59]** that the claimant had satisfied the conditions under ***CPR 17.6 (1) (a)*** and ***(d)***, and ***CPR*.6 (2)**.

[33] In relation to the condition in ***CPR 17.6 (1) (a)*** as to whether the appellant's insurers admitted liability, the judge found that the appellant's insurers made

several payments to the respondent, none of which were made subject to an indication that the payment was made without admission of liability. The insurer's only challenge was the quantum of damages to which the claimant would be entitled, and they made no denial that they admitted liability to pay damages.

[34] With respect to the question under ***CPR 17.6 (1) (d)*** of whether the respondent would obtain judgment at trial, **Chandler J** observed at **para [39]** that the medical evidence, of which the insurers were aware, was that the surgical procedure for which the interim payment was sought was "a necessary course of treatment". The judge further observed at **para [41]** that the respondent was "fully liable or responsible for the [respondent's] injuries". Accordingly, the judge concluded at **para [42]**:

> "In all the circumstances, it appears that if the [respondent's] claim went to trial she would obtain judgment against the [appellant] for a substantial amount of money. I am of the view that this condition under **CPR 17.6 (1) (d)** has been satisfied."

[35] Finally, at **para [44]**, the judge found in relation to ***CPR 17.6 (2)***, that the facts show clearly that the appellant was insured by United Insurance in respect of the claim by the respondent. This, according to the judge, was evidence that showed that the appellant was a person whose means and resources would enable him to make an interim payment.

[36] In light of the foregoing, **Chandler J** was of the view that he should exercise his discretion in favour of granting the order for the interim payment. In this regard, he noted that by ***CPR 17.6 (4)***, the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment. The judge reminded himself at **para [46]** that "the total value of the claim has not been quantified". He however felt that he could exercise his discretion in consonance with ***CPR 17.6 (4)*** for the following reason:

> "[47] The interim relief sought represents the amount required to have the sacroiliac joints surgery…which has been quantified, and a figure, given for attendant expenses. It is a species of special damages which the Court might likely award and is recoverable in any event. The reasonableness of, and the necessity for, that specific outlay has not been challenged by the [appellant]."

[37] In relation to the issue of the disclosure of the respondent's medical history, the judge found that the application could not be described as frivolous nor an attempt to delay the respondent from obtaining the relief sought. The judge found that the disclosure of the respondent's medical history is a matter to be taken into account by the court in determining whether it should grant an order for interim payment and whether there is likely to be double recovery or overlap of damages.

[38] **Chandler J** noted that under **section 4** of the **Civil Liability (Contribution) Act Cap. 194B**, the apportionment of liability based upon the extent of the

person's responsibility for the damage in question was relevant to "…whether the medical intervention, which has been suggested has been contributed to, by the tortfeasor in the 1997 case and whether the medical expenses are to be paid by the Defendant in the instant case or shared by the Defendant in the 1997 case." The judge noted that there was medical evidence that the 2011 accident caused or contributed to the claimant's injuries for which the surgery is required.

[39] The judge at **paras [63]** and **[64]** however concluded the following:

> "[63] It has not been alleged that the Claimant is seeking to recover the cost of the surgery from the defendants in the previous case as well as the instant case. There is no issue of overlap or double recovery in relation to the expenses of the surgery. The right of the Defendant to pursue contribution from the Defendants in the previous case is available to the Defendant to pursue if he so desires. In these circumstances the request for specific discovery ought not to defeat the application for the interim payment.
> [64] I am also of the opinion that the Court should grant the Claimant the relief she seeks by making an order for an interim payment."

Chandler J's Orders

[40] In all the foregoing circumstances, **Chandler J** ordered that the appellant pay to the respondent the sum of $150,912.44 on or before 15 August 2016. The judge also ordered the respondent to disclose to the appellant within 21 days of the order, *inter alia*, a list of documents and specifically all medical reports obtained with respect to the previous High Court Suit and all medical

records/records of all medical practitioners and physiotherapists seen by the respondent since 1997, not already in the appellant's possession. Finally, the judge ordered that the respondent should have the costs of her application and that the costs of the appellant's application for specific disclosure be costs in the cause.

THE APPEAL

The Issues in the Appeal

[41] The appellant filed a notice of appeal on 27 July 2016 titled Civil Appeal No. 20/2016 against **Chandler J**'s order granting the respondent an interim payment in circumstances where the respondent had failed to comply with ***CPR 17.5 (4) (a)***. The appeal is also against **Chandler J**'s order that costs in the appellant's successful application for specific disclosure should be costs in the cause.

[42] Two interrelated issues are therefore raised in this appeal. We turn next to our analysis of, and conclusions on, these issues.

COURT'S ANALYSIS AND CONCLUSIONS

The Appellate Function in this Appeal

[43] Both issues before us in this appeal involve challenges against the exercise of discretion by **Chandler J**. First, the application for an interim payment by

the respondent against the appellant was made pursuant to the rule in ***CPR 17.1 (h)***. That rule provides:

> "(1) The court may grant interim remedies including…
> (h) 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."

[44] Based on **section 37** of the **Interpretation Act, Cap. 1**, the use of the word "may" in ***CPR 17.1 (h)*** is to be interpreted as meaning that the court's power to grant an order for interim payment is discretionary. Second, the appeal against **Chandler J**'s costs order is also an appeal against the exercise of a discretion. This is because **section 85** of **Cap. 117A** expressly confers a discretion on this Court and the court below to make costs orders subject to the rules in ***CPR***.

[45] Given the foregoing, in considering whether to interfere with the exercise by **Chandler J** of his ***CPR 17.1 (h)*** discretion or his **section 85** discretion in this case, it is imperative that we begin by reminding ourselves of the appellate function in a case involving the exercise of a discretionary power by a trial judge.

[46] In numerous recent decisions, this Court accepted and applied the statement of law on the appellate function in respect of the exercise of a discretion by a trial judge by Lord Woolf MR in the English Court of Appeal decision of

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1507, 1523-D. There, Lord Woolf MR stated as follows:

> "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[47] Accordingly, in determining whether this Court should interfere with the exercise by **Chandler J** of either his ***CPR 17.1 (h)*** discretion or his **section 85** discretion, the question which we must address is whether the judge acted on a misunderstanding or misapplication of either the law or the evidence in the exercise of his discretion in granting an order for an interim payment to the respondent by the appellant or in making his costs order.

The Appeal against the Interim Payment Order

[48] **Section 82** of **Cap. 117A** empowers the Rules Committee of the Supreme Court (Rules Committee) to make rules in relation to *inter alia*, "the circumstances in which and the terms on which…an interim order may be made, including an order authorising interim payments." The Rules Committee, in exercise of this power, drafted the ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)***. ***Part 17*** of ***CPR*** provides generally for interim remedies. As already seen, ***CPR 17.1 (1) (h)*** provides specifically that

a court may grant an order for interim payment under ***CPR 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. The exercise of the ***CPR 17.1 (1) (h)*** discretion is therefore to be exercised subject to ***CPR 17.5***.

[49] ***CPR 17.5*** sets out the general procedure to be followed and the requirements to be complied with in applying for an order for an interim payment. In this regard, ***CPR 17.5 (3)*** provides that a claimant may file a notice of an application for an order for an interim payment which must be supported by evidence on affidavit. In turn, ***CPR 17.5 (4) (a)*** requires that the affidavit must state, *inter alia*, "the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded".

[50] **Chandler J** acknowledged that the respondent had failed to state the amount of damages or other monetary judgment that was likely to be awarded and thus had failed to strictly comply with ***CPR 17.5 (4) (a)***. Despite that acknowledgement, **Chandler J** held that that failure was not fatal to the respondent's application for two reasons. The first is that, as the judge said at **para [46]** of his judgment, the respondent had "complied with the general procedure for interim payments under **CPR rule 17.5**" having regard to the fact that "the respondent's Attorney-at-Law submitted cases on quantum giving a local equivalent on the sums awarded". The second reason given at

para [47] is that the interim relief sought represented the amount required to have the sacroiliac joints surgery and that that amount had been quantified, and a figure given for attendant expenses. The interim payment claim, according to the judge, was therefore a claim for a species of special damages which the court might likely award and which was recoverable in any event. This, the judge held, satisfied the requirement for a ***CPR 17.5 (4) (a)*** statement.

[51] In our judgment, the logical conclusion of **Chandler J**'s reasoning is that there was no need for strict compliance with ***CPR 17.5 (4) (a)*** in the circumstances of the application before him. Accordingly, the fundamental question for this Court becomes whether or not **Chandler J**'s approach to the rule in ***CPR 17.5 (4) (a)*** was based on a misunderstanding or misapplication of that rule. It is our further judgment that the answer to this question is best determined by an exploration of the objective of the ***CPR 17.5 (4) (a)*** stipulation in the adjudication of an interim payment application.

[52] What therefore is the objective of ***CPR 17.5 (4) (a)***?

[53] In approaching this question, we have in mind that ***CPR 1.2*** mandates in effect that in ascertaining the object of the rule in ***CPR 17.5 (4) (a)***, we must have due regard to the principle that that rule must be interpreted and applied so as to enable the court to deal with cases involving interim payments justly.

Having due regard to this principle, it appears to us that ***CPR 17.5 (4) (a)*** has at least three unmistakable objectives.

[54] In our judgment, the first such objective is to ensure that the parties to an interim payment application are on equal footing within the contemplation of ***CPR 1.2 (a)***. Such an objective is undeniably desirable given the nature of interim payment applications. In **Electric Sales and Services Ltd v Kenrick Hoyte (Civil App. No. 8 of 2011)**, **Williams JA** explained the nature of interim payments as follows:

> "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."

[55] **Williams JA's** dictum exposes, among other things, the fact that the claimant enjoys an advantage over the defendant in the assessment of the amount of damages or other monetary judgment that is likely to be awarded since it is the claimant who is in control of the relevant documentary evidence which underlie the claim for damages. By imposing an obligation on the claimant to state his/her assessment of the amount of damages or other monetary judgment that is likely to be awarded in the supporting affidavit, ***CPR 17.5 (4) (a)*** seeks to ensure that the defendant is on equal footing with the claimant

in respect of the claimant's assessment of the amount of damages being sought. This is especially so since, by ***CPR 17.5 (4) (c)***, the claimant's statement of his or her assessment of the likely amount of the final judgment must have annexed to the affidavit in support of the application the documentary evidence relied on in support of that assessment. Indeed, we would observe that it was the absence of the ***CPR 17.5 (4) (a)*** statement and the ***CPR 17.5 (4) (c)*** annexures that necessitated the appellant's application for specific disclosure in an attempt to put himself on equal footing with the respondent.

[56] The second objective of ***CPR 17.5 (4) (a)*** is to ensure that an interim payment application is dealt with in a way which is proportionate. As has already been seen, ***CPR 17.1 (h)*** confers a broad discretion on the court to make an order for an interim payment. However, the rule in ***CPR 17.6 (4)*** significantly constrains the exercise of the court's broad ***CPR 17.1 (h)*** discretion to order interim payments as follows:

> "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

This rule is a sure indication that the court's power to grant an interim payment is restricted to an amount that is not more than a reasonable proportion of the likely amount of the final judgment. In our view, ***CPR 17.5 (4) (a)*** is

intimately intertwined with and is a lynchpin requirement in the exercise of the court's power under ***CPR 17.6 (4)***. The statement required under that rule is necessary for the court's determination of "a reasonable proportion of the likely amount of the final judgment" against the defendant. Indeed, it is the ***CPR 17.5 (4) (a)*** statement which allows the court to take into account contributory negligence and any relevant set-off or counterclaim as contemplated by ***CPR 17.6 (5)*** in determining the proportion of the final judgment for which the defendant is liable.

[57] The third objective of ***CPR 17.5 (4) (a)*** is to ensure that an interim payment application is dealt with expeditiously and fairly as contemplated by ***CPR 1.1 (2) (d)***. It appears to us self-evident that the ***CPR 17.5 (4) (a)*** statement conduces to the expeditious and fair disposition of an interim payment application. This is even moreso since, compliance with ***CPR 17.5 (4) (a)*** triggers ***CPR 17.5 (4) (c)*** which requires the claimant to disclose the documentary evidence relied on in support of his or her assessment by annexure to the affidavit in support of the application. The availability of such evidence inevitably lends to expedition in the disposal of an interim payment application. Indeed, as we have already noted, the respondent's non-compliance with ***CPR 17.5 (4) (a)***, in this case, resulted in the appellant having to file an application for specific disclosure of documents which

should have been annexed to the affidavit in support. This not only impaired expeditious disposition of the application but also added to its expense.

[58] It is clear from the foregoing that the stipulation in ***CPR 17.5 (4) (a)*** rests at the hub of interim payment adjudication. It ensures that the parties to the application are on an equal footing, that the court can deal with the application in a proportionate manner and it functions to ensure expeditious and fair disposition of the application.

[59] What is also clear from the foregoing is that the ***CPR 17.5 (4) (a)*** rule is of crucial importance in the exercise of the judge's discretion in granting an order for an interim payment. ***CPR 17.1 (1) (h)*** confers a broad discretion on a court to grant an order for interim payment. However, this broad discretion is limited by the rule in ***CPR 17.6 (4)*** to an order of not "more than a reasonable proportion of the likely amount of the final judgment". The ***CPR 17.5 (4) (a)*** rule is necessary for the exercise of the court's discretion within the constraints of ***CPR 17.6 (4)***.

[60] It is our judgment that, for the foregoing reasons, an applicant for an order for an interim payment must strictly comply with the stipulation in ***CPR 17.5 (4) (a)***. It follows therefore that **Chandler J** erred in law in holding that the respondent had "complied with the general procedure for interim payments

under **CPR rule 17.5**" by submitting cases on quantum and giving a local equivalent on the sums awarded in those cases.

[61] **Chandler J** also erred in law in holding that there was no need for compliance with ***CPR 17.5 (4) (a)*** by the respondent since her application was not for general damages but for special damages which she had quantified. The judge's discretion is limited by ***CPR 17.6 (4)*** to an order of not more than a reasonable proportion of the likely amount of "the final judgment". It was therefore not open to the judge to award as an interim payment the special damages claimed by the respondent unless this was shown to be not more than a reasonable proportion of the likely amount of "the final judgment". To make such a determination, it was necessary to have a ***CPR 17.5 (4) (a)*** statement before the court.

[62] Having regard to the foregoing, we would set aside the exercise of the judge's discretion and would normally proceed to exercise an independent discretion of our own. However, this is not possible in this case because of the absence of the respondent's ***CPR 17.5 (4) (a)*** statement. In the absence of that statement, we are unable to carry out the essential task of estimating the likely amount of "the final judgment".

The Appeal against the Costs Order

[63] ***CPR 64*** and ***CPR 65*** make provision for the principles which should guide a court in the exercise of its **section 85** discretion. More particularly, ***CPR 64.6 (1)*** contains the general rule on entitlement to costs by an order of the court. That rule provides that, as a general rule, the successful party is entitled to an order for costs. However, the other provisions in ***CPR 64.6*** set out factors which may justify a court departing from the general rule.

[64] The appellant was successful in his application for specific disclosure. He was therefore entitled to ***CPR 64.6 (1)*** operating in favour of an order for costs in his application in the absence of factors justifying a departure from the general rule. Without any express justification, **Chandler J** departed from the general rule in ordering costs in the cause and not costs in any event as claimed by the appellant. In our judgment, **Chandler J** erred in law in so ordering.

[65] We have had regard to the factors laid out in ***CPR 64.6*** and are of the view that the appellant was entitled to costs against the respondent for a number of reasons. First, the respondent failed to comply with the provisions of ***CPR 17.5 (4) (a)*** in that she did not state in her affidavit in support of her application for an interim payment an assessment of the amount of damages or other monetary judgment that was likely to be awarded. Second, the respondent failed to comply with ***CPR 17.5 (4) (c)*** in not annexing relevant

documents to her affidavit in support. Third, it was unreasonable for the respondent to maintain that this non-compliance was not fatal to her application for an interim payment. Fourth, the respondent's pursuit in prosecuting her application in spite of her non-compliance gave rise to the appellant having to file an application for specific disclosure which increased the cost of the proceedings. Fifth, the onus was on the respondent to provide the court with the evidence required to prosecute her application. Sixth, the respondent's non-compliance with ***CPR 17.5 (4)*** could easily have been cured by filing a supplemental affidavit when the issue of non-compliance was raised by the appellant.

[66] Having regard to all of the circumstances of this case, we are of the view, that as a result of the respondent's persistent non-compliance with the provisions of ***CPR***, the appellant is entitled to all the costs incurred in the proceedings in the court below. Accordingly, we set aside the discretion exercised by **Chandler J** in respect of costs, and substitute an independent discretion of our own.

DISPOSAL

[67] For all of the foregoing reasons the appeal is allowed and the appellant shall have his costs in this appeal and in the court below to be assessed if not agreed.

Justice of Appeal

Justice of Appeal

Justice of Appeal