

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. CV 1746 of 2018**

**BETWEEN:**

**TARA-MAHALIA SMITH**

**CLAIMANT/APPLICANT**

**AND**

**GRANDE CASS. MANAGEMENT  
(BARBADOS) LIMITED t/a SANDALS  
BARBADOS RESORT & SPA**

**DEFENDANT/RESPONDENT**

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

**Date of Decision: 28 June 2019**

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

**Ms. Alicia Archer for the Defendant/Respondent**

**DECISION**

**INTRODUCTION**

[1] Before me is an application filed on 23 January 2019 by the claimant, Ms. Tara-Mahalia Smith (“the claimant”) for an order that the defendant, Grande Cass. Management (Barbados) Limited t/a Sandals Barbados Resort & Spa

(“the defendant”) pays her the sum of \$35,000.00 by way of an interim payment. It is expressed to be made pursuant to *Part 17.2 (1)* of the *Supreme Court (Civil Procedure) Rules, 2008* (“*CPR*”).

- [2] The application is supported by two affidavits sworn by the claimant. The defendant filed no affidavit in response. I had the benefit of written and oral submissions from Counsel for the respective parties. Ms. Faye Finisterre in association with Ms. Sophia Billingsy appeared for the claimant and Ms. Alicia Archer for the defendant. For the reasons which follow, I have determined that the application must be refused.

## **THE PROCEDURAL RULES**

- [3] Interim payments are a species of interim remedies. *CPR 17.2(1)* provides that the Court may make an order for an interim remedy at any time. However, interim payments are more specifically regulated by *CPR 17.5* to *17.9*. *CPR 17.5* sets out the general procedure for making an application; and *CPR 17.6* specifies the conditions that must be satisfied before the Court may make an order.

- [4] *CPR 17.5(3)(b)* requires that an application be supported by evidence on affidavit. *CPR 17.5(4)* is a content-related rule. It provides that the affidavit must:

- (a) state the claimant’s assessment of the amount of damages or other monetary judgment that is likely to be awarded;

- (b) set out the grounds of the application;
- (c) annex or exhibit any documentary evidence relied on by the claimant in support of the application; and
- (d) where the claim is made under any relevant enactment in respect of injury resulting in death, contain full particulars of the
  - (i) nature of the claim in respect of which the damages are sought to be recovered; and
  - (ii) person or persons for whom and on whose behalf the claim is brought.

[5] **CPR 17.5(4)(d)** does not apply in this case as the claim is not in respect of an injury that resulted in death. Of the conditions in **CPR 17.6**, only that contained in **CPR 17.6(1)(d)** is relevant. However, context is important therefore I shall reproduce most of **CPR 17.6(1)**. I shall also reproduce **CPR 17.6(4)** which prescribes a bar in respect of the amount that may be awarded.

Those provisions read:

- 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 for costs; or

(e) ...

...

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

(5) The court must take into account

(a) contributory negligence; where applicable; and

(b) any relevant set-off or counterclaim.

[6] **Sub-rule (3)** which is referred to in **CPR 17.6(1)(d)** relates only to claims for damages for personal injuries involving two or more defendants. It is not relevant here. Though it will usually do so, a court is not bound to grant an interim payment merely because it is satisfied that one of the conditions in **CPR 17.6(1)(d)** has been met. It is a matter for the court's discretion.

## **THE ISSUES**

- [7] Two primary issues are of concern. These are (i) whether the claimant's affidavits satisfy the content-requirements imposed by *CPR 17.5(4)* and (ii) whether the application has met the condition set out in *CPR 17.6(1)(d)*.

## **THE STATEMENTS OF CASE**

- [8] Before turning to the claimant's affidavits, I will outline the statements of case that have been filed by the parties in order to discern the issues in the proceedings. The relevant documents are the claimant's claim form and annexed statement of claim filed on 2 January 2019; the defendant's defence filed on 30 January 2019; and the claimant's reply filed on 5 May 2019.
- [9] The claim form discloses that the claim is one for damages for personal injury and consequential loss arising from the defendant's "negligence and/or breach of statutory duty" "which occurred on September 24, 2018". It is common ground that on that date the claimant was employed by the defendant as a restaurant server and that she fell in a restaurant on the defendant's premises. The parties also agree that the defendant is the occupier of certain premises within the meaning of the *Occupiers Liability Act, Cap. 208* ("*OLA*") and *section 2* of the *Safety and Health at Work Act, Cap. 356* ("*SHAW*").
- [10] The claimant asserts that the premises is a "workplace" within the meaning of *SHAW* and a place to which *sections 6, 7, 8* and *43* of that Act applied at the

time of the fall. She asserts further that “[b]y operation of section 4 of *OLA* the Defendant owed to the Claimant ... the common duty of care”. The defendant admits the applicability of *section 4* of *OLA* but states that “only sections 6(5) and 6(6), 7(1)(a) and (b), 7(4) and 7(5), 8 and 43 of [*SHAW*] apply to the Defendant’s premises”. Among the general purposes of *SHAW* as expressed in its long title is the securing of “the health, safety and welfare of persons at work”; and the consolidation of the law relating to health, safety and welfare in the workplace.

[11] At paragraph 4 of her statement of claim, the claimant asserts that the accident was caused by “the negligence and/or breach of statutory duty under section 6 of [*SHAW*] and/or section 7 of [*SHAW*] and/or section 43 of [*SHAW*] and/or section 4 of [*OLA*].” However, she provides no particulars in respect of the alleged breaches of statutory duty, only in respect of negligence. She states those to be:

- i. Causing or permitting the accumulation of some liquid or other substance on the floor of the said workplace.
- ii. Failing to institute and/or maintain any or any adequate system for the inspection of the said floor and/or removal of the said substance.
- iii. Failing to provide any warning whatsoever of the presence of the said substance on the floor.
- iv. Failing to fence off the area where the substance was lying.

- v. Failing to take reasonable steps to ensure that the premises were reasonably safe for the Claimant.
- vi. Failing to maintain the said workplace in an efficient state.
- vii. Failing to keep (*sic*) the floor properly maintained and free from obstructions and/or substance that is likely to cause a person to slip.

[12] In the remainder of the statement of claim, the claimant particularises the injuries and loss which she allegedly sustained; the treatment she has undergone; and the effects of the injury on her. She also provides details of the relevant medical reports. The defendant puts her to strict proof in these respects.

[13] The defendant denies that the floor was wet before the claimant fell or that the accident was caused by its negligence or breach of statutory duty. It denies any responsibility for the accident which it alleges was caused by the defendant's negligence in failing to wear "the appropriate approved footwear". It states further that if the court finds that the accident was caused partly by its negligence and partly by the negligence of the claimant, it claims contributory negligence pursuant to *section 3* of the *Contributory Negligence Act Cap 195*.

[14] The defendant asserts at paragraph 4 that:

- a. There was no water or other liquid on the floor before the Claimant fell and denies that it allowed any liquid or other substance to accumulate on the floor. The only substance

on the floor was subsequent to the Claimant's accident when the dishes she was carrying fell;

- b. The Defendant has instituted and maintains an adequate system for inspection and cleaning as follows:
  - i. Every restaurant goes through a deep cleaning process at the end of the shift and when the restaurant is closed for the day;
  - ii. In the morning the restaurant is cleaned again and prepared for breakfast and then cleaned afterwards for dinner.
  - iii. Each employee is responsible for identifying and reporting hazards in their work area and then following up to ensure that the matter has been rectified. In identifying the hazard they are required to put signage for wet floors.
  - iv. The Manager does snagging to identify flaws and faults and reports the same to upper management, engineering or housekeeping depending on the nature of the issue.
  - v. Each employee undergoes a system of on-the-job training pertaining to their specific duties and other general matters.

[15] Paragraphs 4(c), (d), and (e) respectively state that there was no need to provide any warning; fence off the area; or take any steps to ensure the safety of the claimant since there was no substance on the floor prior to the fall. Further, at paragraph 4(c), the defence outlines the system that it alleges is in place in the event of a substance being found on the floor.

[16] At paragraph 4(f), the defendant avers that at all times it maintained the work premises in an efficient state and that cleaning is also done during the service period as the need arises. It asserts further that it maintains a handbook which specifically addresses health and safety in the work place and “the steps each employee must undertake to comply” (*sic*). At paragraph 4(g), it asserts that it took the following steps on the day of the accident to ensure that the floor was properly cleaned and kept free of obstructions or substances:

- i. The restaurant was cleaned prior to its opening for breakfast;
- ii. The supervisor walked the floor before and during the service period.

[17] In her reply, the claimant denies any negligence on her part. At paragraph 1, she states that she “will rely on the following facts as raising an inference of negligence because *res ipsa loquitur*”:

- (a) The Defendant was the occupier and in sole control of the premises at the time the Claimant fell;
- (b) It was more likely than not that the fall was caused by an obstruction and/or substance likely to cause a person to slip on the floor being on the floor, and that the Defendant had been negligent.
- (c) If the Defendant had exercised proper care, the fall would not have occurred. Therefore the very happening of the fall and the Claimant’s resulting injuries are evidence of the Defendant’s negligence

- (d) There is no plausible explanation for the cause of the fall other than the negligence of the Defendant.
- (e) It was reasonable to infer that the fall had been caused by the Defendant's negligence, as above.

## **THE AFFIDAVITS**

[18] I come now to the claimant's affidavits. At paragraph 3 of her first affidavit, she deposed to the fall and the circumstances leading up to it in this way:

On Monday September 24, 2018, while I was at work in the employ of the Defendant, I was carrying a shoulder tray of dirty dishes when I slipped on a wet floor and fell, injuring my knee.

[19] In paragraphs 4 to 13, the claimant deposed to the details of the injury; and the medical treatment and advice which she obtained. She exhibited with her affidavit copies of the related medical reports. After deposing to her personal circumstances and needs subsequent to the fall, she ends her affidavit in this way:

I am also advised by my Attorney-a-Law (*sic*), 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 plus special damage (*sic*) and the \$35,000.00 is a reasonable proportion of that or any likely award of damages.

[20] In her second affidavit, the claimant deposed to her post-surgical condition and exhibited a number of receipts and other documents. In the last paragraph, she repeated that she was advised by Ms. Finisterre that if the action proceeds

to trial, she is “likely to be awarded a substantial sum of money in damages of which the sum claimed is a reasonable proportion”.

## **SUBMISSIONS AND DISCUSSION**

[21] It is against this background that I come to the issues. I will first consider whether the claimant’s evidence satisfies the requirements of **CPR 17.5(4)**, a provision which I reproduced at paragraph [4]. So far as is relevant to this case, that sub-rule requires that the affidavit (i) “state the claimant’s assessment of the amount of damages ... that is likely to be awarded” (**CPR 17.5(4)(a)**); (ii) set out the grounds of the application (**CPR 17.5(4)(b)**); and (iii) “annex or exhibit any documentary evidence relied on by the claimant in support of the application” (**CPR 17.5(4)(c)**).

[22] Citing *Brathwaite v Atkins Civ. App. No 20 of 2016 (date of decision, 27 February 2019)*, Ms. Finisterre submitted that the claimant has satisfied those requirements. I will return to *Brathwaite*. It is only relevant to the requirement set out at **CPR 17.5(4)(a)**. There is no issue that the claimant has met the third requirement. She has exhibited the documentary evidence on which she relies in support of the application.

[23] The claimant did not comply with **CPR 17.5(4)(b)**. That requires her to state the grounds of the application in the affidavit. However, **CPR 26.4(2)** provides that a failure to comply with a rule does not invalidate any step taken

in the proceedings, unless the court so orders. The defendant took no objection to the application on this basis; and I saw no reason to bar the hearing of it on this account. That is not to say that a breach of **CPR 17.5(4)(b)** ought lightly to be ignored. In appropriate cases, a claimant who fails to meet this requirement could face condign consequences.

[24] I come now to **CPR 17.5(4)(a)**. In an apparent reference to this sub-rule, Ms. Finisterre submitted that the claimant provided authorities to aid the Court in assessing the amount of damages likely to be awarded. The authorities to which Counsel referred were contained in her written submissions. They were not mentioned in the claimant's affidavit.

[25] In *Brathwaite*, the Court of Appeal held, at *paragraph [60]*, that an applicant must strictly comply with **CPR 17.5(4)(a)**. It went on to state that the first instance judge had “erred 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.”

[26] The real issue before me is whether the claimant has satisfied the requirements of **CPR 17.5(4)(a)**. Is her evidence that she has been advised by Ms. Finisterre that, based on the medical evidence to date, she estimates that “the award for

pain and suffering and loss of amenities would exceed \$150,000.00 plus special damages” enough?

[27] Ms. Finisterre submitted that *Brathwaite* could be distinguished. She urged that the respondent in that case had not included the assessment of the likely amount of damage in her affidavit as required by *CPR 17.5(4)(a)* or annexed the documents in accordance with *CPR 17.5(4)(c)*. She contended that the evidence contained in the claimant’s affidavits effectively complied with *CPR 17.5(4)(a)*.

[28] Ms. Archer submitted that in *Brathwaite* the Court of Appeal did not state what is required in order to comply with *CPR 17.5(4)(a)*. She suggested that, at minimum, the affidavit ought to have linked the authorities to the facts asserted by the claimant. She submitted that the “bare statement” contained in paragraph 24 of the claimant’s first affidavit was insufficient. I understood her submission to be that the affidavit should contain a detailed assessment showing how the figure mentioned was arrived at. She considered that to be the effect of *Brathwaite*.

[29] I do not think that *Brathwaite* has that effect. The Court of Appeal framed the issue in that case in this way, at *paragraph 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?

[30] The Court of Appeal answered that question by concluding that strict compliance with **CPR 17.5(4)(a)** is required. In the Court's opinion, it mattered not that the respondent had proffered submissions on cases and conversion rates to assist the Court with the assessment of general damages. There was no evidence of her assessment of the amount of damages likely to be awarded.

[31] At *paragraph 56* of *Brathwaite*, having reproduced **CPR 17.6(4)** which precludes the Court from ordering an interim payment of more than a reasonable proportion of the likely amount of the final judgment, the Court of Appeal continued:

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.

[32] Hence, though not specifying what is required of an applicant for compliance with *CPR 17.5(4)(a)*, the Court of Appeal is clear that the statement is necessary for the court's determination of the likely amount of the final judgement. The Court returned to this theme at *paragraphs 61* and *62*. In *paragraph 61*, it stated that it would have been necessary for the judge to have a *CPR 17.5(4)(a)* statement before him in order to determine whether any ordered amount was a reasonable proportion of the likely amount of the final judgment. At *paragraph 62*, having determined that it would set aside the judge's discretion, the Court of Appeal concluded that in the absence of a *CPR 17.5(4)(a)* statement, it was unable to estimate the likely amount of the final judgment.

[33] I accept Ms. Archer's submission that while the Court of Appeal determined that a *CPR 17.5(4)(a)* statement is necessary, it does not state what is required of such a statement. Commenting on a like provision in Antigua, in *Andrew v Moorjani Caribbean Ltd Claim No. ANUHCV 1992/0232 (date of decision, 13 August 2007)*, at *paragraph 13*, Thomas J opined that the statement is "purely for the guidance of the court". He went on to state that "further guidance must come from the medical reports which are exhibits to the affidavit in support."

[34] There is also some relevant discussion in *Sobers v Princesmart Trinidad Limited & anor CV2792 of 2001 (decision of the High Court of Trinidad and Tobago, date of decision, 22 March 2012)*. In that case, Aboud J stated at *paragraph 20*:

I expressed reservations about whether the claimant had satisfied the court of the likely amount to be recovered at the trial, and whether the sum of \$57,980 was a reasonable proportion of it. This is a Part 17.4(4) obligation ... There is no opinion expressed in support of the application that states or demonstrates the likely amount expected to be won at the trial. The affidavit in support refers to and attaches a pre-action letter but its contents are not described under oath as being a fair estimate of the amount she will win nor does the claimant swear that she has been advised by her attorneys and believes that she is bound or even likely to win the sums claimed in the pre-action letter. In that letter, the claimant's attorney claims entitlement to \$482,013.80, a not insubstantial sum. Of course, when one is writing a letter to a potential defendant one can put almost any figure on the paper. A supporting affidavit in an application for an interim payment is a different matter. ... A quantification of the sum that will be won must be built on the foundation of a medical, and not a legal opinion.

[35] I detect nothing in the authorities which requires a detailed assessment inclusive of legal authorities and a discussion of how those authorities support the amount asserted. *CPR 17.5(4)(a)* merely requires that the applicant “state” his “assessment of the amount of damages ... that is likely to be awarded.” In my judgment, it is enough for the affidavit to set out the amount which the deponent considers to be appropriate under identified heads of loss.

[36] In this case, the claimant has deposed that she has been advised by Ms. Finisterre that “on the medical evidence thus far she estimates the award for

pain and suffering to be in excess of \$150,000.00 plus special damage”. In that affidavit she deposed to her injuries and annexed related medical reports. She exhibited an invoice from the orthopaedic surgeon whom she deposed in her second affidavit performed surgery on her injured knee. In the latter affidavit, she also exhibited receipts for transportation, physiotherapy, a medical report from her surgeon, and a medical history report in respect of which she gave supporting evidence.

[37] I think that the claimant has done enough to provide any necessary evidential basis for the Court to go on to consider what would be the likely amount of any final judgment. *CPR 17.6(4)* precludes the Court from awarding more than a reasonable proportion of that amount. In *McCollin v Holder No. 972 of 2015 (date of decision, 30 August 2018)*, at *paragraph 14*, I sought to demonstrate that this assessment should be carried out on a conservative basis. These limitations are necessary to protect a defendant from the risk of overpayment.

[38] *Adrian Zuckerman* posits at *paragraph 10.308* that “where there is a range of likely outcomes, the court should err on the side of caution and choose an amount at the bottom of the range.” (*Zuckerman on Civil Procedure: Principles of Practice 3<sup>rd</sup> edition*) It follows that a Court should confine itself

to what is supported by the affidavit even though it may be obvious to it that there may be added elements to the claim that will impact the final award.

[39] This brings me to the second issue. The parties accept that the application in this case is predicated on the condition set out in **CPR 17.6(1)(d)**. The effect of this rule is that the Court may only grant the application if it is satisfied that if the claim went to trial, the claimant would obtain a judgment against the defendant for a substantial amount of money or for costs.

[40] In her written submissions, Ms. Finisterre summarised the claimant's case as contained in her statements of case and went on to submit that "she *prima facie* has satisfied the condition of liability and will be entitled to loss and damages". However, for the application to succeed, more than a *prima facie* case must be established. **CPR 17.6(1)(d)** requires that the Court be satisfied that the claimant would obtain a judgment if the claim went to trial.

[41] In *Smith v Grand Cass Management, CV No. 1746 of 2018 (date of decision, 4 January 2019)*, I considered the standard that has to be attained by an applicant who seeks an interim payment on this ground. After reviewing the authorities, the Court concluded at *paragraph [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.

[42] On reflection, it might well be that the statement does not sufficiently express the requirement for a finding of inevitability in respect of the defendant's prospective liability for a substantial amount of damages or costs. A finding of mere likelihood of such an outcome is not enough.

[43] Additionally, I am mindful of the critical comments made by the Court of Appeal of England and Wales in *Her Majesty's Revenue & Customs v The GKN Group* [2012] 1 WLR 2375 to two aspects of that formulation as derived from earlier authorities. In that case, the court attempted a detailed analysis of *Part 25.7(1)(c)* of the *English Civil Procedure Rules* which is in like terms to *CPR 17.5(1)(d)*. At *paragraph [35]*, it criticised references to a burden being a high one on the basis that it leads to a danger of mixing the concept of burden of proof with that of the standard of proof.

[44] Secondly, in *Her Majesty's Revenue & Customs*, at *paragraph 33*, the court rejected the notion of a flexible civil standard of proof, commenting that there is only one civil standard – the balance of probabilities. In so doing, it adopted pronouncements uttered in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 5638 and *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11. In *re B*, the House of Lords

held “that there is only one civil standard of proof, and that is that the fact in issue more probably occurred than not” (*paragraph 13*).

[45] In *Electric Sales and Services Limited v Hoyte Civ. App. No 8 of 2011 (31 January 2012)*, the Court of Appeal considered the requisite standard of proof in respect of an identical requirement in the *Rules of the Supreme Court, 1981*. It stated, at *paragraph 27*, that “... the standard of proof required of the plaintiff [is] on a balance of probabilities but to a high standard”.

[46] However the standard of proof in civil cases may be conceptualised, it is clear that the test for the making of an award on the condition set out in *CPR 17.6(1)(d)* is a stringent one. The test is whether the claimant would obtain judgment against the defendant for a substantial amount of money or costs. It is not enough for him to show that these end results are likely or even highly likely. He must establish that they are inevitable. The court must be satisfied that it is more probable than not that such will be the outcome.

[47] Ms. Finisterre underscored the fact that the defendant did not adduce any evidence and that the only evidence before the Court relevant to liability was the claimant’s statement that she had fallen on a wet floor. She referred to a passage found at *paragraph 12* in *Triuva Kapitalverwaltungsgesellschaft v Galliford Try Construction Ltd [2017] EWHC 275 (TCC)* in which O’Farrell J stated “[t]he 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” [emphasis mine].

[48] Further, Counsel referred to *Ward v Tesco Stores* [1976] 1 All ER 219 and a passage found at *paragraph A69* of *Personal Injury Schedules: Calculating Damages*, 3<sup>rd</sup> ed. in respect of how this evidence may be treated. In the passage from *Personal Injury Schedules*, the authors discuss generally the role of legal and factual presumptions in the assessment of damages. The following passage appears in a footnote after their statement that “the facts may also lend themselves to the application of additional presumptions (or inferences)”:

For example, where injury would not normally occur in the absence of negligence, a rebuttable evidential presumption of negligence may apply (traditionally described as ‘res ipsa loquitur’ or ‘the matter speaks for itself’): *Scott v London and St Catherine Dock Co* (1865) 3 H & C 596. However an inference of negligence may not be drawn in a complex matter which requires the assistance of expert evidence to resolve, such as a neurological defect following a spinal injection: *Ratcliff v Plymouth and Torbay Health Authority* [1998] PIQR P170.

[49] In *Ward v Tesco Stores*, the plaintiff had slipped on a supermarket floor on which yogurt had been spilled. The majority of the Court of Appeal considered that an inference of negligence had arisen on the evidence in response to which the defendant had not provided an explanation. The

material particulars may be sufficiently gleaned from the headnote to the report set out at *page 219, letters g and h*:

It was the duty of the defendants and their servants to see that the floors were kept clean and free from spillages so that accidents did not occur. Since the plaintiff's accident was not one which, in the ordinary course of things, would have happened if the floor had been kept clean and spillages dealt with as soon as they occurred, it was for the defendants to give some explanation to show that the accident had not arisen from any want of care on their part. Since the probabilities were that, by the time of the accident, the spillage had been on the floor long enough for it to have been cleared up by a member of the defendant's staff, the judge was, in the absence of any explanation by the defendants, entitled to conclude that the accident had occurred because the defendants had failed to take reasonable care.

[50] In respect of contributory negligence, Ms. Finisterre submitted that the burden was on the defendant to establish any likely contribution. She cited *Smith v Bailey [2014] EWHC 2569* in support of that submission. In response, Ms. Archer submitted that the question of contributory negligence is irrelevant since, according to her, the Court cannot determine that the defendant bears any liability.

[51] Ms. Archer cited *Psycare v Mundy & Ors [2013] EWHC 4573 (Ch)* in support of the following propositions which are accepted by this Court as being applicable to applications grounded in *CPR 17.6(1)(d)*: (i) where there are significant differences between the parties on the facts, the court is in no position to conduct a mini-trial; (ii) the interim payment procedure is not

suitable where the factual issues are complicated or difficult points of law arise; (iii) the court has to be satisfied on the material before it that the claimant would actually succeed on the claim; and that he would obtain a substantial amount of money.

[52] Counsel submitted further that the requirements of **CPR 17.6(1)(d)** are conjunctive and that unless the court is satisfied as to the establishment of liability at trial, the issue of quantum is irrelevant. That is not in dispute. She urged that there is no evidence before the court on which it may assess the likelihood of the claimant's success at trial. She contended that the affidavits do not address the issue of negligence or contributory negligence.

[53] Turning to the submissions in respect of *res ipsa loquitur*, Ms. Archer submitted that this doctrine does not assist the claimant. Citing ***Walrond v National Assistance Board Civ. App No. 16 of 2008 (date of decision 3 June 2011)***, a decision of the Court of Appeal, she submitted that, even if it applied, the onus remains on the claimant to prove her case. Counsel urged also that the duty to provide a safe place of work does not mean that an employer must eliminate every foreseeable risk. Relying on ***Latimer v AEC [1953] A.C. 643***, she submitted further that the relevant question is what would a reasonably prudent employer do in the circumstances.

[54] In respect of the absence of evidence by the defendant, Ms. Archer submitted that it was not necessary for it to file an affidavit since the claimant's evidence had not risen to the level that required a response. She also reminded the Court that in its pleaded case, the defendant denies that the floor was wet before the claimant fell.

[55] It is essential for this Court to determine what it may look at in resolving this application and what, if any, inferences it may draw from the fact that the defendant has not filed an affidavit. In respect of the first consideration, I do not think the reference in *Triuva* to "on the basis of the evidence currently before the court", means that the Court must confine itself to the evidence that is before it.

[56] A trial takes place in the context of the statements of case which define the issues between the parties. These are among the material to which the Court must have regard when it is considering whether the *CPR 17.6(1)(d)* condition has been satisfied. Indeed, at *paragraphs 16* and *20*, O'Farrell J went on to consider the pleaded cases of the parties. The collection of evidence and pleadings was also reviewed in *Electric Sales*. In *Her Majesty's Revenue & Customs*, at *paragraphs 36* and *38*, the court acknowledged that the judge hearing the application must consider the "material" he has before him at the time of the hearing.

[57] In respect of the affidavit evidence, I have to be mindful that this is not the trial. A final decision on the issue of whether or not the floor was wet prior to the claimant's fall, or any other aspect of the claim cannot be reached at a pre-trial hearing. This limitation on the use to which affidavit evidence may be put at this stage of proceedings has been acknowledged by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board & anor* [2014] UKPC 31.

[58] *Alternative Power Solution Ltd* involved a review of an injunction that had been granted in favour of the first respondent restraining the second respondent from honouring a letter of credit issued by the first respondent to the appellant. The courts below held that there was enough evidence of fraud to engage the fraud exception to a bank's obligation to make a payment under a letter of credit. At *paragraph 59*, the Board agreed with reasoning articulated by Rix J in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, at *page 202*, which included a statement that "a final decision on the beneficiary's alleged fraud cannot be reached at a merely pre-trial hearing".

[59] Hence, in determining this issue, I must have regard to the pleadings and the claimant's affidavit. It is a fact that the defendant has filed no affidavit. However, despite this failure to refute the claimant's evidence to this effect,

it is not open to me to find that the floor was wet before she fell. I must consider also the denial in the defence and the fact that the assertion made by the claimant in her affidavit remains a live issue to be dealt with at trial.

[60] This brings me to consideration of the approach which a court should take when considering whether the *CPR 17.6(1)(d)* condition is satisfied. In *Her Majesty's Revenue & Customs*, the court at *paragraph 36* suggested the following approach:

Considering the wording [of the rule] without reference to any authority, it seems to me that the first thing the judge considering the interim payment application ... 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?

[61] That is not the approach required for purposes of *CPR 17.6(1)(d)*. The court which is hearing an interim payment application must be mindful that its fact-finding powers are limited. The application is an interlocutory one. Taking account of the material before him, the judge must determine whether the applicant would obtain judgment for a substantial amount of money from the respondent. To assume the role of a hypothetical trial judge may induce error in how the evidence is treated.

[62] The two approaches may yield different results. Let us assume, for purposes of illustration, that the question of whether the floor was wet prior to the fall

is decisive of the issue of liability (that is not to say it is or is not). Assuming the role of the trial judge and following a directive to determine the matter on the basis of the material before it, there is a risk that a court might make a finding of fact that the floor was wet prior to the fall, on the basis of the claimant's unanswered evidence. The evidence could be taken as resolving the conflict on the pleadings. The result no doubt would be that the court is satisfied that the claimant would obtain judgment.

[63] That possibility is not open to a court sitting at a pre-trial hearing. If the court takes account of the unanswered affidavit and the conflicting statements of case, its answer as to whether the claimant would obtain a judgment must be "I do not know". That is so because the judge would have his feet firmly planted in the reality that he is hearing an interlocutory application and not the trial. He remains aware that he cannot make a finding on the affidavit evidence that is binding at the trial. He is mindful that at the trial, the defendant would be entitled to cross-examine the claimant on her evidence that the floor was wet prior to the fall and to adduce evidence to prove its assertion that the claimant fell because she was wearing improper footwear. He would therefore readily accept that it is impossible for him to predict the outcome of the trial.

[64] I have seen no authority that binds this Court which supports the approach advocated in *Her Majesty's Revenue & Customs* and I will not adopt it. The

claimant's assertion that there was a substance on the floor which caused her to fall is central to her claim in negligence. Her failure to set out particulars of the breach of statutory duties she alleges in her statement of claim limits my consideration as to whether a finding of liability is inevitable to the claim in negligence. At this stage, neither the Court nor the defendant knows the specifics of her claim in those other respects. Therefore, it is impossible to predict that she would succeed on the remainder of the claim.

[65] In respect of negligence, while the defendant filed no affidavit in response to the claimant's evidence that she slipped on a wet floor, in its defence it denies that the floor was wet and asserts that the claimant fell because she was wearing improper footwear. It also avers, in effect, that it had what it purports to be a safe system of work. The issue of what caused her to fall can only be determined at trial. For the same reason, the Court cannot infer negligence whether by reference to the doctrine of *res ipsa loquitur* or otherwise. In the circumstances, it is unnecessary for me to consider the issue of contributory negligence.

[66] In any event, given the conflict on the pleadings, it would be inimical to the ends of justice to award an interim payment in the sum of \$35,000.00 to an applicant who has deposed to financial hardship. Whither the defendant's money, if she loses?

## **DISPOSAL**

[67] The claimant has not satisfied this Court that she would obtain judgment against the defendant if her claim went to trial. I must therefore refuse her application. However, *CPR 17.8* empowers the Court on hearing an application for an interim payment to exercise its powers of case management under *CPR 25* and *26* and, in particular, to give directions for an early trial of the claim. I will discuss with the parties what directions may be appropriate at this stage. I will also hear them on the issue of costs.

OLSON DeC. ALLEYNE  
JUDGE OF THE HIGH COURT