

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Claim No. 1824 of 2015

BETWEEN:

ROGER DURANT

CLAIMANT

AND

ALBERT JOSEPH

DEFENDANT

*Before the Honourable Justice Cecil N. McCarthy, Judge of the High Court
via Microsoft Teams video conference*

Date of Hearing: 18 June 2020

Date of Decision: 31 July 2020

**Mr. Ryan J. L. Moseley of Moseley Persaud Attorneys-at-Law for the
Claimant**

Ms. Tamara H. Simmons for the Defendant

DECISION

INTRODUCTION

[1] In 1969 in response to delays in the civil justice system in England section 20 of the Administration of Justice Act was passed. That Act granted power

to make rules of court to empower the courts for the first time to make orders for interim payments before trial.

- [2] In 1970 this power was first exercised in respect of actions for damages for death or for personal injury.
- [3] Like so many other countries, Barbados would enact similar legislation to ameliorate the suffering of victims of accidents who would otherwise be forced to wait until trial and a decision thereon, or on many occasions, strike a compromise on unfavourable terms against a defendant who very often had superior bargaining power.
- [4] In Barbados, the Supreme Court of Judicature Act, Cap. 117A empowered the Rules Committee to make similar legislation which is now found in the Supreme Court Rules, 2008 (“the CPR”).

The Application for Interim Payment

- [5] In this application the claimant, Roger Durant (referred to herein as the claimant or Mr. Durant) has applied for an interim payment of \$83,000 pursuant to **CPR 17.5** and **17.6**.
- [6] It is the third such application made by the claimant, and in this case it is stated in the application filed 20 February 2020 to be made “*on account of*

special damages which the Court may hold the defendant liable to pay and in particular, past loss of earnings.”

[7] The parties had agreed that special damages in this matter would be capped at \$200,000.

[8] Thus far the claimant has been paid the sum of \$117,000 by way of interim payments.

[9] The grounds of the application as stated by the applicant are:

“(a) Liability is not an issue.

(b) The Defendant has filed an Acknowledgement of Service dated the 7th day of January, 2016 in the Supreme Court on the 11th day of January, 2016 wherein it was indicated that the Defendant only intended to defend the claim as to quantum.

(c) The value of any award for damages made by the Court is likely to exceed the sum sought herein as an interim payment.

(d) The Claimant is unable to work and is unable to fulfil his financial commitments and to support himself and is in need of the interim payment sought.

(e) The Claimant is unable to afford his continuing medical care.”

The Affidavit in Support of the Application

[10] In the affidavit in support of the application filed on February 21, 2020 the claimant deposed at paragraphs 2 to 7 as follows:

- “2. *I am advised by my Attorneys-at-Law, Mr. Ryan Moseley and Mrs. Dianna Boyann-Persaud of Moseley Persaud Attorneys that the said Application is made for payment on account of special damages which the Court may hold the Defendant liable to pay and in particular, past loss of earnings.*
3. *This is my third application herein for an interim payment and I refer to and rely on my affidavits filed herein on the 2nd day of November, 2016 and the 3rd day of October 2017 in support of this instant application.*
4. *I am advised by my counsel that I am entitled to receive special damages for past loss of earnings up until the time of trial as I was gainfully employed at the time of the accident.*
5. *I am further advised by my counsel that on the 12th day of September 2018, special damages for past loss of earnings were agreed herein at \$200,000.00. This agreement is confirmed in an exchange of email correspondence between my counsel and counsel for the Defence that is now shown to me, annexed hereto and marked “**Exhibit RD18**”. I am further advised that the said agreement was noted by the Court on the 24th day of October 2018.*
6. *To date I have received \$117,000.00 of the agreed \$200,000.00 agreed for past loss of earnings.*

7. *I continue not to be able to work and to incur expenses on a daily basis and I am finding it impossible to financially support my family and me.”*

[11] In the claimant’s affidavit filed on November 2, 2016 (“the 2016 affidavit”) the claimant deposed that the defendant was insured with C.G.I Consumers’ Guarantee Insurance Company Ltd. (“CGI”) in respect of the claim.

[12] In the 2016 affidavit the claimant annexed two letters of claim sent to CGI on September 14, 2015 and October 2, 2015 respectively.

[13] In the two letters the claimant assessed his claim as worth \$2,119, 158.76 plus legal fees and they reference several medical reports which I assume were submitted to CGI. The medical reports were not annexed to the affidavit.

[14] In another exhibit the claimant annexed letters from various companies which verified the claimant’s earnings at the time of the accident.

[15] At paragraph 15 of the 2016 affidavit the claimant deposed as follows:

“I have also been advised by my attorneys-at-law that I am likely to be awarded damages in the sum of at least \$1,000,000.00 or more ...”

The Affidavit in Response

[16] By affidavit in response filed May 15, 2020, the General Manager of CGI, Mr. Peter Harris (“Mr. Harris”) swore an affidavit in response to that filed in support of the claimant’s application.

- [17] In the affidavit in response, Mr. Harris confirmed the agreement between the parties that the claimant should be paid \$200,000.00 for damages for past loss of earnings.
- [18] Mr. Harris deposed further that some time after the agreement between the parties it was discovered that the claimant had received \$90,677.00 over the period February 2017 to April 2019 in the capacity of a trade supplier of vehicle accessories to Courtesy Garage Ltd. This was confirmed in a letter of September 12, 2019 from Courtesy Garage Ltd.
- [19] In the said affidavit in response, Mr. Harris raises the possibility of the claimant being over compensated since CGI was unaware that the claimant had received money.
- [20] Mr. Harris requested that the court decline the application for an interim payment since there should have been full and frank disclosure of these facts.

Brief Factual Background

- [21] At all material times, Mr. Durant was self-employed as a diesel mechanic and maintained contracts with and worked for several businesses including db Productions, Skyline Cargo Ltd, Golden Acres Farm and Standard Distributors.

[22] On 31 December 2012 while riding his motorcycle at Mangrove, St. Philip, Mr. Durant was involved in an accident with a motor vehicle owned and driven by the defendant, Albert Joseph.

[23] As a result of the accident Mr. Durant sustained personal injuries, loss and damage.

[24] In the 2016 affidavit at paragraphs 9 and 10 respectively he deposed:

“9. I sustained severe injuries to both of my arms, hands, wrists, my back, neck, head and feet and sought medical attention from various medical professionals. My injuries are correctly particularized in my Statement of Claim filed herein as is the history of my medical treatment.

10. As a result of my injuries I was unable to continue working. I did return to work briefly on a trial basis but I could not perform my duties and I had to stop. I still experience pain in my left wrist and hand and my right hand on a daily basis. I have difficulty driving or doing anything with my hands for long periods.”

[25] A claim form and statement of claim were filed on 31 December 2015 claiming damages for personal injury and loss.

[26] By acknowledgment of service filed 11 January 2016 the defendant stated that he would defend the claim only as to quantum.

The Plaintiff's Submissions

- [27] When this matter came on for hearing before me on the 18th day of June 2020 both parties made oral submissions.
- [28] Counsel for the claimant, Mr. Ryan Moseley first addressed the court on whether the affidavit in support as filed complied with **CPR 17.5 (4)(a)**. That provision mandates the applicant to “state the claimant’s assessment of the amount of damages or other monetary judgment that is likely to be awarded”.
- [29] Mr. Moseley submitted that the affidavit of 2 November 2016 exhibited an assessment of the damages in the form of letters to CGI. And since this affidavit was referenced in paragraph 2 of the affidavit in support there was compliance with the requirements of the CPR.
- [30] In the same submissions counsel indicated to the court that the previous affidavits were only being referenced in respect of the claim with respect to special damages and they had nothing to do with general damages.
- [31] Mr. Moseley submitted that the parties had entered into an agreement evidenced by an exchange of e-mails to the effect that damages for past loss of earnings were agreed at \$200,000.00 of which \$117,000.00 were paid to the claimant as special damages.

[32] Mr. Moseley submitted that the claim for past loss of earnings was based on evidence provided to the defendant's insurers that the sum of \$6,659.77 per month was being lost by the claimant as a result of the accident.

[33] On that basis, Mr. Moseley submits that the sum requested for past loss of earnings could be paid without their being any risk of overpayment.

The Defendant's Submissions

[34] Counsel for the defendant, Ms. Tamara Simmons contended that even though the defendant had agreed to pay the sum of \$200,000.00 to the claimant for special damages this agreement was based on the understanding that the claimant was receiving no payments.

[35] Ms. Simmons submitted that the monies paid to the claimant by Courtesy Garage Ltd should have been disclosed to the defendant.

[36] Ms. Simmons argued that even though the claimant purported to have transferred the money to a company in St. Vincent there is no proof of this.

[37] Ms. Simmons contended that if the court were to accept the suggestion that the monies were paid over to the company in St. Vincent this would be ill-advised since there is no documentary proof of this.

[38] Ms. Simmons submitted that whether the money was paid to a third party is a matter that ought to be determined at trial where the accuracy of the

submissions could be tested on cross-examination and any documentary proof of payment of the monies to a third party provided.

[39] Ms. Simmons argued that the court should order an early trial rather than accept the claimant's suggestion that the monies were paid over to a third party. To do so she contends, would run the risk of overpayment of damages.

The Relevant CPR Provisions for Interim Payments

[40] Interim payments are governed by **CPR 17.5** to **17.9**. The rules relevant to the application are found in **CPR 17.5** and **17.6**.

[41] The relevant parts of **CPR 17.5** are:

“17.5 (1) The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgment of service applicable to the defendant against whom the application is made.

(2) The claimant may make more than one application for an order for an interim payment even though an earlier application has been refused.

(3) Notice of an application for an order must be

(b) supported by evidence on affidavit.

(4) 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.*
- (5) *Where the respondent to an application for an interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply, the party must*
 - (a) *file the evidence on affidavit;”*

[42] The material parts of **CPR 17.6** are:

- “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 form of money to the claimant.*
 - (2) *In addition, in a claim for personal injuries, the court may make an order for the interim payment of damages only if the defendant is*
 - (a) *insured in respect of the claim;*
 - (b) *a public authority; or*
 - (c) *a person whose means and resources are such as to enable that person to make the interim payment.*
 - (4) *The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.”*

[43] In this case the defendant has admitted liability to pay damages and is insured in respect of the claim. There is, therefore, no dispute that the

defendant is a person who can be ordered to make an interim payment if the relevant procedural rules have been satisfied.

THE ISSUES AND ANALYSIS

[44] There are two broad issues that arise on the facts:

1. Has the defendant complied with the requirements of **CPR 17.5 (4)**?
2. If the defendant has complied with the requirements of **CPR 17.5 (4)** can I ensure that any interim payment that I may order is not more than a reasonable proportion of the likely amount of final judgment?

[45] When this matter first came before me I requested that counsel for the claimant consider whether the application before the court satisfied the requirements of **CPR 17.5 (4)** and more specifically **CPR 17.5 (4)(a)** since that provision was recently considered by the Court of Appeal in **Brathwaite v Atkins** (Civil Appeal No 20 of 2016, date of decision February 27, 2019).

[46] In **Brathwaite**, the court at first instance had granted an interim payment in a personal injury claim in circumstances where the court had only received a quantified claim with respect to the special damages.

[47] In that case, the claimant had sought an interim payment to cover the expenses related to surgery on the sacroiliac joint to which the claimant had

previously agreed. The cost of the surgery and attendant expenses were quantified on the basis that this figure was a kind of special damages as distinct from general damages and the learned judge ordered an interim judgment.

[48] On appeal, the Court of Appeal held that in the absence of a statement showing the claimant's assessment of the damages or the monetary judgment that is likely to be awarded as required by **CPR 17.5 (4)(a)** the court could not properly exercise its discretion to award an interim payment of no "more than a reasonable proportion of the likely amount of the final judgment" as mandated by **CPR 17.6 (4)**.

[49] The Court of Appeal therefore held that an order for interim payment must strictly comply with the stipulation in **CPR 17.5 (4)(a)**.

[50] It is also important to note that while the Court of Appeal emphasized **CPR 17.5 (4)(a)**, on more than one occasion the court drew attention to the failure to comply with **17.5 (4)(c)**.

[51] In overturning the order of the learned judge at first instance, the court said at paragraph 65 of the judgment in the case:

*"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."

[52] A fair reading of the above passage is that a failure to strictly comply with **CPR 17.5 (4)(a)** and **CPR 17.5 (4)(c)** is fatal to an application for interim payment.

[53] In the instant application, there is no statement of "the likely amount of damages" in the affidavit in support of the application for interim payment.

[54] Secondly, the documentary evidence to support the general damages is not annexed or exhibited as required by **CPR 17.5 (4)(c)**.

[55] Mr. Moseley insisted that the claimant had complied with the above rules because at paragraph 3 of his affidavit in support the claimant deposed:

“This is my third application for an interim payment and I refer to and rely on my affidavits filed herein on the 2nd day of November, 2016 and the 3rd day of October, 2017 in support of the instant application”.

[56] I have perused carefully the affidavits submitted and while there is a partially quantified claim in the 2016 affidavit, the medical reports referred to in the claim were not annexed to the affidavit.

[57] I am of the view that a letter quantifying a claim is not enough to fulfil the requirements of **CPR 17.5 (4)(c)**, it must annex the medical evidence on which the quantification is based.

[58] The other significant factor in the case was that in his oral submissions counsel specifically said, and I quote:

“We are not asking the court to look at the previous affidavits other than for special damages. It has absolutely nothing to do with general damages.”

[59] Based on the procedural regime set out in **CPR 17 (5)(4)** and **17 (6)** it is my view that if an application is made pursuant to those rules it cannot ignore the general damages component of the claim since it is an assessment of the general damages along with the special damages that will permit the claimant to give an assessment of the amount of damages or other monetary judgement that is likely to be awarded.

- [60] Mr. Moseley commits the very error which in **Brathwaite** the Court of Appeal held to have been made by the court at first instance.
- [61] **CPR 17.6 (4)** fetters my discretion and only permits me to make an order of *“not more than a reasonable proportion of the likely amount of the final judgment.”*
- [62] In order for me to make this determination I must make an assessment of the general damages along with the special damages (the likely amount of the final judgment).
- [63] I should point out that parties are free to make voluntary agreements with respect to any aspect of damages. Therefore, the parties were within their rights to make the agreement with respect to the special damages if they so desired.
- [64] However, once it is resolved to make an application for interim payment to the court then the requirements of **CPR 17.5** and **17.6** must be satisfied.
- [65] In my judgment the failure to comply with the requirements of **CPR 17.5 (4)** is fatal to the application for an interim payment.
- [66] The defendant opposed the application on the basis that the claimant had received payments for services which may, in all the circumstances, render it dangerous for the court to make an interim payment unless it could be sure that the moneys received by the claimant are not in fact for past loss of earnings.

[67] The defendant complained that his insurers had discovered that the claimant received several payments from Courtesy Garage Ltd.

[68] In his oral submissions, counsel for the claimant took issue with paragraph 8 of the affidavit in response. However, learned counsel must take note of **CPR 17 (5)(a)**, which provides:

“Where the respondent to an application for an interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply that party must

(a) file the evidence on affidavit”

[69] If indeed the claimant had documentary evidence to show that the monies received by the defendant were not earnings then the evidence should have been submitted to the court by way of affidavit. Indeed learned counsel for the claimant could also have applied for a short adjournment to have the application amended to comply with the requirements stipulated by the Court of Appeal in **Brathwaite**.

[70] On the state of evidence before the court, I am compelled to accept the caution that Ms. Simmons has warned the court to exercise with respect to the grant of the interim payment. I therefore consider that the uncertainty with respect to the nature of the funds received by the claimant is another reason why I should exercise my discretion to refuse the application for interim payment.

[71] The Court has no inherent power to award interim payment of damages at common law (see **Moore v Assignment Courier Ltd 1977 1 W.L.R. 638**)

The scheme for granting this interim remedy is now set out in the CPR made under the power granted by the Supreme Court of Judicature Act Cap. 117A.

Particular attention should therefore be paid to **CPR 17.5** and **17.6**. Of course, it is always useful to consider the case law on the subject. An understanding of **Brathwaite** can avoid errors in the application to the court.

[72] It seems to me that the provisions of the CPR require at a minimum that:

(1) the applicant should state the grounds of the application. In this regard care should be taken to ensure that the court is referred to the conditions in **17.6 (1)**, **17.6 (2)** and **17.6 (4)** and the other provision of **17.6** where relevant.

(2) The application must be accompanied by an affidavit which must:

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

(b) annex or exhibit any documentary evidence relied on by the claimant in support of the application.

[73] In my opinion **CPR 17.5 (4)(a)** requires that an assessment be done of not only the special damages but the general damages to the extent that the documentary evidence permits.

[74] In respect of **CPR 17.5 (4)(a)** it should be noted that the assessment of damages is made on medical evidence usually in the form of medical reports. Therefore, the reports ought to be annexed to the affidavit in support. The reports permit the judge to make an objective assessment of the likely damages, which in turn allows him or her to exercise the discretion that must be exercised pursuant to **CPR 17.6 (4)** *“to not order an interim payment of more than a reasonable proportion of the likely amount of final judgment”*.

DISPOSAL

[75] For the foregoing reasons the application for interim payment is dismissed.

[76] In his submissions to the court Mr. Moseley made reference to the claimant’s recent medical diagnosis which makes the need for the interim payment more urgent for him.

[77] The above statements were not part of the evidence in the case. If Mr. Moseley feels strongly about it **CPR 17.5 (2)** allows him to make another application to the court. He may wish in those circumstances to first request the defendant to make a further payment voluntarily.

[78] **CPR 17.8** permits me to order an early trial when hearing an application for interim payments and I, therefore, order that this matter be set down for an early trial before a judge of the Civil Division.

[79] I also invite the parties to meet with a view to agreeing costs with respect to this application. Failing agreement, I will hear the parties on costs.

Cecil N. McCarthy
Judge of the High Court