

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 878 of 2019

BETWEEN:

BETTY MARSHALL

CLAIMANT

AND

**GRANTLEY ADAMS
INTERNATIONALAIRPORT INC.**

DEFENDANT

Before: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

**Dates of Hearing: 2020: June 2
 June 22**

Date of Decision: 2020: June 25

Appearances:

**Mr. Patterson K.H. Cheltenham, QC in association with Ms. Yasmin Brewster
for the Claimant**

Ms. Diana Doughlin for the Defendant

DECISION

INTRODUCTION

[1] The matter before me is a Notice of Application filed 12 February 2020 in which the claimant in this action seeks a payment in the sum of \$10,000.00

by way of an interim payment on account of damages claimed in the substantive action. This interim claim is made pursuant to **Rule 17.5** of **CPR**.

[2] The substantive action was filed by way of Claim Form and Statement of Claim on 3 July 2019.

[3] The Grounds of the application are seven and are set out in the Notice of Application as follows:

- (i) The Claimant, having sustained significant personal injuries including an injury to the left arm, an injury to the back of the head, an injury to the hip and an injury to the lower back as a result of a fall on the Defendant's premises on 4th July, 2016, filed a claim form and statement of claim on 3rd July, 2019;
- (ii) The Defendant, who is insured in respect of the claim, returned an acknowledgment of service to the Supreme Court Registry on 12th July, 2019 and admitted liability for the accident;
- (iii) The Defendant also filed a defence on 27th August, 2019 in which liability for the accident was admitted;
- (iv) A case management conference which was scheduled to be heard on 21st November, 2019 was adjourned until 25th June, 2020 to facilitate negotiations towards an amicable settlement;
- (v) Between 16th September, 2019 and 9th December, 2019, the Claimant repeatedly requested interim payments from the Defendant to cover the costs of medical reports without success;
- (vi) The interim payment which is being sought does not exceed the amount of damages likely to be awarded to the Claimant if the matter proceeds to trial;
- (vii) As a result of the injuries sustained, the Claimant has been unable to work steadily. She cannot afford the cost of the

medical reports and is experiencing great difficulty covering her monthly expenses. Further delay by the Defendant will result in the inability to ascertain the Claimant's prognosis, negotiate a settlement and bring closure to her matter.

[4] The claimant's Application was filed together with an Affidavit in Support of Interim Payment. This document iterated the factual matrix of this matter, detailing an accident in July 2016, injury to the claimant as a consequence thereof and the acceptance of liability by the defendant. The course of proceedings in the claim has been slowed by the defendant's invitation to the claimant to submit a quantified claim to facilitate negotiation.

[5] At paragraph [15] of the affidavit the claimant deposes to the fact that she has been advised by her attorney that her claim is likely to attract a substantial award of damages. Two things however are evident and significant in this regard: firstly, the Claim which articulates injuries to the left arm, back of the head, hip and lower back has been filed without medical reports, the documents exhibited thereto being National Insurance Sickness Benefit Claim Forms, miscellaneous receipts for medical services and copies of letters written by the claimant's attorney-at-law. Secondly, other than the fact that the claimant's attorney has advised her of her entitlement to substantial damages there is no assessment of damages or medical reports detailing the alleged injuries and the seriousness of the same. Counsel however exhibited

to her written submissions in this matter an extract from Kemp & Kemp addressing the range of awards for back injuries.

[6] It is also noteworthy that while the defendant has admitted liability for the injury sustained by the claimant as a result of their negligence, it has pointedly made no admission as to the personal injuries and damage suffered by the Claimant and has put her to strict proof of the same: see paragraph [6] of the Defence filed 27 August 2019. In fact, the issue of the nature and extent of the injury(ies) sustained by the claimant on July 2016 is likely to be cause for dispute as counsel for the defendant has made certain observations about the claimant's exhibited Claims for Sickness Benefit. She submits that the content of these forms raises questions with her client as to whether the claimant's injuries are connected to the accident for which they have accepted liability.

[7] Case management in this matter was adjourned at the request of the claimant in November 2019 to facilitate the parties' negotiation of the claim. Two requests for interim payments were apparently then made by the claimant by December 2019 to which the defendant has not responded.

[8] The claimant expresses a request for the order for an interim payment primarily to cover the costs of medical reports and secondarily, to cover expenses being borne by the claimant, who deposes in the affidavit of

February 2020 that she has had “to bear the costs of doctors’ visits, medication and physiotherapy, which are currently in excess of \$2,000.00”

- [9] This Affidavit exhibits copies of letters to the doctors and physiotherapists requesting medical reports and the response of these medical personnel by the submission of their invoices for payment stating the cost of the report. These reports will not be issued unless payments in the vicinity of \$5,000.00 can be made.

The Submissions

- [10] Counsel for the claimant argued that, pursuant to **Rule 17.3** of **CPR**, this Court should order an interim payment of \$10,000.00 to cover the cost of the three medical reports at a cost of \$4,800.00, expenses which to date have totaled in the vicinity of \$2,000.00 and a portion for pain and suffering.
- [11] Counsel for the claimant relied primarily on two judgments of the High Court **Tyrell O’Neal McCollin v Sheradon Holder and Darrie Hoyte No. 972 of 2015** (delivered August 2018) and **Tara-Mahalia Smith v Grande Cass Management (Barbados) Limited t/a Sandals Resort & Spa** (delivered June 2019). Reference was made to the Court of Appeal case of **Roger Brathwaite v Paulette Atkins Civil Appeal No. 20 of 2016** (delivered February 2019).

- [12] Counsel for the defendant has resisted the application on two grounds which are interconnected. The first is that the claimant has failed to comply with **Rule 17.5 (4)(a)** which requires the claimant's affidavit to "state the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded".
- [13] The second ground is that the claimant has not satisfied the condition stated in **Rule 17.6 (1)(d)** which states that the court "may" make an interim payment "only if" "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."
- [14] She argues at paragraph [21] of her written submissions that "Without medical evidence as required under **CPR 17.5 (4)(c)** establishing a nexus to the claimant's injuries to the accident at issue it is not possible to make a statement of assessment of the likely amount of the final judgment." And at paragraph [30] that "... it is not possible at this stage to know whether the documentary evidence concerning her injuries that it is requested the defendant pay for, relates at all to the accident."
- [15] Counsel for the defendant submits that in view of the above, the application is premature. Her main rationalisation of this position is on the ground that the Court is not able to ascertain whether judgment for the claimant will be

for a substantial amount of money or for that matter any assessment of the likely amount of the final judgment.

[16] Counsel for the claimant argued that the conditions listed by **Rule 17.6 (1)** are to be read disjunctively and that the **Rule** requires the court to be satisfied that one of the conditions has been met. She argues that once the defendant has satisfied the Court pursuant to **Rule 17.6 (1)(a)** that the defendant has admitted liability to pay damages or some other sum of money to the claimant, the court is not required to be further satisfied, pursuant to **Rule 17.6 (1)(d)**, 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.

[17] In view of the circumstance that no medical reports have been furnished by the claimant, counsel for the claimant argues that “A claimant who has not been furnished with medical reports is incapable of providing an assessment in the form of a specific figure. This is different from a claimant who has medical reports but refuses or neglects to make the assessment or to annex the reports to his supporting affidavit.” Counsel submits that what is a sufficient assessment should be considered on a case by case basis and that in the case at bar, the claimant, having satisfied the requirements of **Rule 17.5 (4)(a)**,

should be granted an interim payment in the sum of \$10,000.00 or such other sum as the court deems just.

Issue Arising

[18] Whether the claimant's failure to provide an assessment of damages in accordance with **Rule 17.5 (4)(a)** is fatal to the application herein for an interim payment.

[19] Or, as articulated by counsel for the claimant: Whether a court may make an order for an interim payment pursuant to **Rule 17.5**, in circumstances where there are no medical reports and the claimant's supporting affidavit does not contain a specific figure representing the claimant's assessment of damages or other monetary judgment that is likely to be awarded at trial.

DISCUSSION

[20] This application is governed by **Part 17** of **CPR** intituled "Interim Remedies".

[21] **Rule 17.5** sets out the procedure to be followed in an application for an interim remedy with **17.5(4)** specifying the content requirements of the affidavit to be filed in support. An important component of the content required is purely evidential. In **Roger Brathwaite v Paulette Atkins Civil Appeal No. 20 of 2016 (Roger Brathwaite)**, discussed in greater detail below, **Burgess JA** speaks to this evidential requirement in the following terms at paragraph [57]:

“... 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 leads to expedition in the disposal of an interim payment application.”

[22] **Rule 17.6** enumerates the conditions to be satisfied and matters to be taken into account by the court before granting an order for interim relief. The wording is interesting. It introduces an element of judicial discretion in the use of the word “may”, circumscribed by the use of the words “only if”. Thus it states as follows:

“**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;

...

[23] **Rule 17.6 (2)** is generally of critical importance in the determination of whether to make an interim payment, though not so within the factual matrix of the case at bar. It states as follows:

“(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.

- [24] There is no dispute that this matter falls within **Rule 17.6 (2)(a)**.
- [25] One of the critical considerations addressed in **Rule 17.6** can be found at **17.6 (4)** and **(5)** which provide respectively, that “the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment” and that the Court must take into account “(a) contributory negligence, where applicable; and (b) any relevant set-off or counterclaim”.
- [26] The case of **Roger Brathwaite** is of direct relevance and applicability to the issue that has arisen in the matter before me.
- [27] The issue in the appeal of **Roger Brathwaite**, outlined by **Burgess JA** at paragraphs [2] and [41] of the judgment, is whether **Chandler J** erred in making an interim payment in circumstances where the respondent had failed to comply with **CPR 17.5 (4)(a)**. In its long form the Court of Appeal framed the issue thus: 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?
- [28] This, to my mind, mirrors the issue in the case at bar. As in this case, the claimant therein did not 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)** in her affidavit in support. Although, unlike this matter, there was medical evidence.

[29] The appellant Roger Brathwaite took issue with the finding of **Chandler J** that, despite this deficit, the respondent has “complied with the general procedure for interim payments under **CPR 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”.

[30] **Chandler J** noted the absence of a quantified claim in the matter before him, but felt that he had a discretion which he could exercise in the circumstances, and he did so. It was his view, that the amount sought represented the cost of a surgery, the reasonableness of which had not been challenged and he was satisfied that there was a nexus between the 2011 accident which caused the injuries for which the surgery was required.

[31] The significance of the Court of Appeal’s decision, in my opinion, is to be found at paragraphs [53] to [59] where the Court explored the “three unmistakable objectives” of **CPR 17.5 (4)(a)**. These were iterated as equal footing, proportionality and expedition and fairness, a reference to the Overriding Objectives of **CPR**. And most importantly, that Court’s finding “that the stipulation in **CPR 17.5 (4)(a)** rests at the hub of interim payment

adjudication” and “of crucial importance in the exercise of the judge’s discretion in granting an order for interim payment”.

[32] From this flows the Court’s finding that the broad discretion at **CPR 17.1 (1)(h)** is circumscribed by **CPR 17.5 (4)(a)** and **CPR 17.6 (4)** and the definitive statement at paragraph [60] as follows:

“[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)**.”

[33] Not only was it the Court of Appeal’s finding that **Chandler J** erred in holding that there was no need for compliance with **CPR 17.5 (4)(a)**, but he also erred in so far as his 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.”

[34] In **Tara-Mahalia Smith v Grande Cass. Management (Barbados) Limited t/a Sandals Resort & Spa CV 1746 of 2018** (decision delivered 28 June 2019) **Alleyne J** opined “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.” At paragraph [35] the learned judge states what in his opinion **CPR 17.5 (4)(a)** requires, but it cannot be ignored that this opinion is in a context where the supporting affidavit deposed specifically to the claimant’s injuries and annexed related medical reports, together with counsel’s opinion of an estimate of damages likely to be awarded by a court. Thus, my learned brother felt justified in concluding therefrom that “the claimant [had] 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.” Significantly, the judge rightly reminded himself that **CPR 17.6(4)** precludes the court from awarding more than a reasonable proportion of that amount and that **CPR 17.6 (1)(d)** requires that the Court be satisfied that the claimant would obtain a judgment if the claim went to trial: see paragraph [40] and [41] of this judgment. This is not the context of the case before me and I did not find it applicable.

[35] The opinions expressed by my learned brother at paragraph [46] are not supportive of the claimant’s arguments in the matter at bar. That paragraph speaks to the standard of proof in satisfying **CPR 17.6 (1)(d)** and concludes that it is a stringent one. He states as follows:

“[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.”

CONCLUSION

[36] Without the medical evidence and assessment it is impossible for a court to make a finding under **CPR 17.6 (1)(d)**, that is, that if the claim went to trial the claimant would obtain judgment against the defendant for a substantial amount of money.

[37] Without the medical evidence and assessment, it is impossible for a court to comply with **CPR 17.6 (4)**, that is, order an interim payment that does not exceed a reasonable proportion of the likely amount of the final judgment. The case law on the interpretation of this provision posits that the Court should err on the side of caution in avoiding the risk of overpayment where the claimant may be unable to repay the excess.

[38] I accept and adopt the statement of **Aboud J** in the case of **Sobers v PriceSmart Trinidad Limited & Anor CV2792 of 2001** that:

“A quantification of the sum that will be won must be built on the foundation of a medical, and not a legal opinion.”

DISPOSAL

[39] For the foregoing reasons, this Court is satisfied that the claimant has not satisfied the procedural conditions necessary for it to consider the exercise of its discretion to order an interim payment.

[40] Accordingly, the application is dismissed.

COSTS

[41] I see no reason to depart from the general rule on entitlement to costs as outlined at **Rule 64.6 (1)** of **CPR**. The defendant is entitled to the costs of this application to be assessed, if not agreed.

[42] The matter is set down for case management on 3 September, 2020 by Zoom hearing.

[43] On the application of the claimant, leave was granted to appeal.



MARGARET REIFER
Judge of the High Court

