IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV04597

BETWEEN	**TIFFANY BARRETT** (a minor who sues by her mother and Next friend Shirley Hinds-Smith)	**CLAIMANT**
AND	**SUZETTE ANN MARIE DESOUZA**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**SHIRLEY HINDS-SMITH**	**ANCILLARY DEFENDANT/ APPLICANT**

Mr. Charles E. Piper and Miss Marsha Locke instructed by Charles E. Piper & Associates for the claimant

Miss Stacia D. Pinnock Wright for the defendant

Heard: October 2, November 4, 2013 and February 20, 2014

APPLICATION FOR APPROVAL OF SETTLEMENT – CLAIMANT'S ENTITLEMENT TO INTEREST

SIMMONS, J

[1] On the 29th October 2007, the infant claimant, Tiffany Barrett, was injured as a result of a motor vehicle collision between the defendant's motor vehicle and that in which she was travelling. A claim was filed on her behalf on the 29th September 2008 in which Mrs. Shirley Hinds-Smith was stated to be her mother and next friend.

[2] The matter proceeded to mediation and a settlement was arrived at on the 16th June 2009. On the 21st October 2009, a Notice of Application for the approval of the settlement and appointment of trustees was filed by the claimant's former Attorneys-at-

Law, Messrs. Kinghorn and Kinghorn. In that Notice of Application, Mrs. Hinds-Smith was stated to be the grandmother of Tiffany Barrett.

[3] The application first came on for hearing on the 21st April 2010 and counsel for the defendant raised the issue of the absence of any input from the mother of the infant, Tiffany Barrett. The hearing was adjourned to 30th September 2010 and was further adjourned to the 15th November 2010, there being no further information with respect to the claimant's mother. No parties appeared on the adjourned dates.

[4] The claimant obtained new representation and a Notice of Change of Attorneys-at-Law was filed on the 2nd September 2013. An amended Notice of Application for the approval of the settlement and appointment of trustees was filed on the same date and the matter was heard on 2nd October 2013.

[5] On that date, the court approved the terms of the settlement and Mrs. Hinds-Smith was appointed as one of the trustees. Mr. Piper, who appeared for the claimant, indicated that he was of the view that this was an appropriate case in which an award for interest should be made in respect of the settlement sum. Counsel also indicated that he wished to make submissions on the issue of costs in respect of the 2013 Notice of Application.

Claimant's submissions

[6] Mr. Piper submitted that the claimant is entitled to interest on the amount of the mediated settlement from the date of the Mediation Agreement to the date of payment. He argued that the said settlement was akin to a judgment of the court and ought to attract interest at the statutory rate. In the alternative, it was submitted that the sum is a debt on which interest is recoverable either at a commercial rate or at the rate stipulated in ***section 51*** of the ***Judicature (Supreme Court) Act***.

[7] Counsel also submitted that the purpose of the application to approve the settlement is to ensure that the agreed sum is invested for maintenance, education and upbringing of the infant and as such, interest should accrue on that investment from the date of the agreed settlement.

[8] It was further submitted that interest should accrue from the date of the settlement as it was the defendant's actions which caused the delay in payment. Mr. Piper argued that upon conclusion of the mediation agreement the agreed sum became a debt upon which interest was payable in law. In those circumstances it was submitted that the defendant, her Insurers and/or their Attorneys-at-law ought to have held the sums in an interest bearing account until the Court made an order approving the settlement.

[9] With respect to the time which had elapsed between the date of the agreement and its approval by the court, counsel submitted that such delay was caused by the defendant.

[10] It was argued that the defendant's request for information regarding the mother of the infant was designed to delay the process for approval of the settlement, as there was no evidence that Mrs. Hinds-Smith could not properly act as a trustee. Counsel submitted that the defendant, her Insurers and/or their Attorneys-at-law have the responsibility of satisfying the court that their approach to the matter did not amount to an abuse of the court's process.

[11] Reference was made to the case of ***BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*** [1982] 1 All ER 925 at 974 where Mr. Justice Goff said:-

> *"The fundamental principle is that interest is not awarded as a punishment, but simply because the plaintiff has been deprived of the use of the money which was due to him".*

[12] Counsel also referred to the following passage in Burrows, ***Remedies for Torts and Breach of Contract, 3rd edition***:-

> *"the money due to the claimant comprises either the money that the claimant would have had but for the defendant's wrong or, where the wrongful loss was not of money, the damages themselves which it is felt the defendant should have paid to compensate the loss as soon as it occurred. In commercial cases it is then generally*

assumed that as a result of being deprived of that money the claimant has had to borrow it, whereas in non-commercial cases the assumption is simply that the claimant has lost the interest from investing that money."[1]

[13] Mr. Piper also directed the court's attention to the case of ***Jefford and another v. Gee*** [1970] 2 Q.B. 130 at 146 where Lord Denning, M.R. stated that *"interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him".* Reference was also made to page 144 of that judgment where the learned Judge said:-

> *"The Court of Admiralty did not apply the common law. It followed the civil law and gave interest on damages whenever the non-payment was due to the wrongful delay of the defendant".*

[14] Counsel also stated that Lord Denning, M.R. in his analysis of the law relating to the award of interest, in the above case, emphasized the phrase *"wrongfully withholding".* In this regard he referred to page 143 of the judgment where a passage from the case of ***London, Chatham and Dover Rly Co v South Eastern Rly Co*** [1893] A.C. 429 at 437 where Lord Herschell, L.C. said:-

> *"...I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events".*

[1] Page 348

[15] It was also submitted that the above principle was applied in ***Harbutt's "Plasticine" Ltd. V. Wayne Tank and Pump Co. Ltd.*** [1970] 1 Q.B. 447 where Lord Denning M.R. stated:-

> *"It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly".*

Mr. Piper urged the court to find that the claimant had been wrongfully kept out of pocket for over four years. That is, from the date of the mediated settlement to the date of its approval. He stated that in light of the fact that the claimant was an infant, the funds ought to have been placed in an interest bearing account for her benefit and paid to her trustees upon approval of the settlement.

[16] Finally, with respect to the issue of the costs of these proceedings, Mr. Piper submitted that in light of the fact that the claimant had to obtain alternative representation to pursue this application, this should be borne by the defendant.

Defendant's Submissions

[17] Mrs. Pinnock Wright submitted that no interest was payable on the sum of the mediated settlement. She argued that in the event that the court was minded to award interest, such an award should be limited to the period after the approval of the settlement for which the sum was outstanding. Reference was made to section 3 of the ***Law Reform (Miscellaneous Provisions) Act*** which counsel stated, gives the court the power to award interest on damages.

[18] With respect to the issue of delay, Counsel submitted that the query as to the whereabouts of the infant claimant's parents was not unreasonable. She stated that the request for information was not an attempt to delay the proceedings but was aimed at ensuring that the interests of the child were protected.

[19] Mrs. Pinnock Wright also stated that the request was made with a view to ensuring that the infant claimant's parents' position was not compromised and that the defendant obtained a valid discharge from the claim. She referred to the case of ***Yvette Vernon (next friend of Kiren Vernon) v. Central Drug Store & Diane Usher,*** Belize Supreme Court Action No. 142 of 1998 (delivered on the 29th February 2000), Shanks, J. said that the purpose of the approval of a settlement is as follows:-

> *"a) to protect minors and patients from any lack of skill or experience of their legal advisors which might lead to a settlement of a money claim for far less than it is worth;*
>
> *(b) to provide means by which the Defendant may obtain a valid discharge from a minor's or patient's claim;*
>
> *(c) to ensure that lawyers acting for a minor or patient are paid their proper costs and no more;*
>
> *(d) to make sure that money recovered by or on behalf of a minor or patient is properly looked after and wisely applied"*.

[20] Counsel placed particular emphasis on paragraph (d). She stated that between September 2010 and the date of hearing of the application no affidavit had been filed on the claimant's behalf to address the issue that was raised. In those circumstances, it was submitted that the claimant is the one who is responsible for the delay. Mrs. Pinnock Wright also made the point that the claimant could have instructed other counsel to prosecute the matter before 2013.

[21] Reference was also made to **Part 74.12** of the ***CPR*** which states that where an agreement has been reached at mediation the Court is required to make an order in terms of such agreement. It was pointed out that where an infant is involved such agreements are not valid until approved by the Court. Reference was made to the cases of ***Dietz v. Lennig Chemicals Limited*** [1969] 1 A.C. 170, ***Drinkall v. Whitwood*** [2004]

1 W.L.R. 462 and ***Brennan v Eco Compositing Limited and another*** [2007] 1 WLR 773 in support of that submission.

[22] In the latter case, the claimant was injured in an accident and as a consequence became a patient. Proceedings were commenced on the claimant's behalf and in September 2005 the defendants made a payment into court pursuant to CPR Part 36. By virtue of CPR Part 21.10 the payment into court could not be validly accepted without the court's approval. In March 2006, the claimant's solicitors notified the defendant that the claimant wished to accept the payment. The order for approval of the settlement was granted on the 3rd October 2006.

[23] An issue arose as to who was entitled to the interest which had accrued on that sum. The question which had to be answered was whether or not the claimant "accepted" the payment in when it was accepted on his behalf or when the court had given its approval. The court held that a claimant was only entitled to receive interest from the date when the offer was approved by the court.

[24] Counsel submitted that in light of the decisions in these cases interest should not accrue on the mediated sum before the date of the order for the approval of the settlement.

[25] Mr. Piper, in his response, stated that whilst the mediation settlement is not a judgment, it is an agreement between duly authorized persons, in terms which are subject to the approval of the court. It was submitted that it would make nonsense of the mediation process if in the case of an infant or patient the parties could renege on the agreement prior to the court's approval. Such a course of action, he said, would go against the spirit in which the settlement was arrived at and would be contrary to the overriding objective.

[26] He also submitted that in the case of mediated settlements the paying party becomes indebted to other party subject only to the court's approval and both parties are expected to cooperate in the approval process.

[27] Mr. Piper indicated that he was unable to find any authorities which have dealt with a situation such as this one and it is an indication of special circumstances in this case. He submitted that the cases of ***Dietz v. Lennig Chemicals Limited***, ***Drinkall v. Whitwood*** and ***Brennan v Eco Compositing Limited and another*** which were cited by counsel for the defendant are of no assistance to the court.

The Law

Is the claimant entitled to interest on the settlement sum?

[28] In this matter, the claimant filed an action for damages. An award of damages is intended to compensate the claimant for any damage, loss or injury which he has suffered as a result of the defendant's actions. The sum awarded was described by Lord Blackburn in ***Livingstone v. Rawyards Coal Co.*** (1880) 5 App Cas. 25 at 39 as:

> *"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

[29] ***Section 3*** of the ***Law Reform (Miscellaneous Provisions) Act*** gives the court the power to award interest on such damages. The section states:-

> *"In any proceedings **tried** in any Court of Record for the recovery of any debt or damages, the Court may if it thinks fit, order that there should be included in this sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment…"*
>
> [emphasis mine]

[30] It is well known that an award of interest is designed to compensate a claimant for being kept out of his money (see ***Pickett v. British Rail Engineering*** [1980] A.C. 136 at 151and ***Jefford v. Gee*** [1970] 1 All E.R. 1202). This principle was accepted by the court in ***Central Soya of Jamaica Limited v. Junior Freeman*** (1985) 22 J.L.R. 152.

[31] It is equally clear that an award of interest is not designed to punish the paying party. In ***General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd*** [1975] 2 All ER 173 at 192, Lord Salmon in his dissenting judgment said:-

> *"Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment. No one suggests that the appellants acted dishonestly or unreasonably in withholding the money for five years; nor that they caused any of the delay in the granting of the patent. This, however, in my view, has little relevance. They enjoyed the use of the money during the whole of this time and in law it is deemed to have been due to them from the beginning of that period."*

[32] Lord Wilberforce, in his delivery of the judgment of the court at 836 stated the principle in the following terms:-

> *"Where a wrong-doer has failed to pay money which he should have paid, justice, in principle, requires that he should pay interest over the period for which he has withheld the money."*

[33] It is also accepted that unless a claimant is guilty of unwarrantable delay, interest should be awarded to the date of judgment. Where there has been, for example, protracted delay in commencing an action or proceeding to trial, the period for which interest is awarded may be reduced. (See ***Metal Box v. Currys*** [1988] 1 W.L.R. 175). A similar view was expressed by Rowe, P. in the ***Central Soya*** case where he said:-

> *"…plaintiffs and their legal advisors however would do well to remember that where a plaintiff has been guilty of unreasonable delay in bringing his action to trial, it may be appropriate for the trial judge to make a corresponding reduction in the period for which interest is given".*[2]

[34] The court's power to award interest is therefore discretionary. For example, whilst interest on general damages will generally run from the date of service of the claim, there may be instances where the justice of the case warrants a departure from this rule.

[35] A mediation settlement is however, a form of compromise. As such, the law of contract forms the basis of the law relating to this issue. It is settled law that parties to a contract are bound by its terms. In ***Gillespie Bros & Co v Cheney, Eggar & Co*** [1896] 2 QB 59 at 62 Lord Russell of Killowen CJ said:

> *'… When the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement'.*

[36] ***Part 74*** of the ***C.P.R.*** deals with mediation and ***Part 74.12 (1)*** states that:-

> *"Where an agreement has been reached, the court must make an order in terms of the report [pursuant to rule 42.7]. "*

(***Part 42*** of the ***C.P.R.*** deals with consent orders and judgments).

[37] The terms of a Mediation Agreement clearly constitute a contract as between adults. However, the effect of ***Part 74.12 (1)*** is that a matter is not truly settled until such

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[2] (1985) 22 J.L.R. 152 at 167

settlement has been approved by the court. As a result, there is no binding contract and a defendant would not be discharged from liability unless or until the court gives its stamp of approval.

[38] Where a minor is concerned, the Rules stipulate an additional requirement in that any proposed settlement is subject to the court's review. **Part 23.12 (1)** of the Civil Procedure Rules 2002 states:-

> "Where a claim is made –
>
> *(a) By or on behalf of minor or patient; or*
> *(b) Against a minor patient,*
> *no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, or on behalf of, or against the minor or patient, without the approval of court."*

[39] Additionally, ***Part 42.7 (3)*** clearly states that its provisions do not apply where any party is a minor or patient. It is also clearly stated that the rule does not apply *"where the court's approval is required by these Rules or any enactment before an agreed order can be made".*

[40] In ***Dietz v. Lennig Chemicals Limited*** (supra) Lord Pearson stated that the settlement sum in which the infant claimant had an interest was only a proposed settlement until it was approved by the court.

[41] This principle was applied by the court in ***Drinkall v. Whitwood*** (supra), where it was held that the acceptance of a partial settlement did not constitute a binding agreement until it was approved by the court.

[42] It is clear from the authorities that where an infant is a party to litigation, the court is primarily concerned with ensuring that any settlement arrived at is in that child's best interests. It is therefore in my view exercising a supervisory role and as such any proposed settlement agreement should be subject to close scrutiny.

[43] The instant case is somewhat unusual, in that the court is being asked to consider the matter of interest which was not included in the terms of the proposed settlement. This is an important consideration in matters such as this which require a further step to be taken before the funds can be disbursed in accordance with the agreement.

[44] In this matter, there is no dispute that the question of whether interest should be paid on the settlement sum for the period between the date of the agreement and the granting of the order approving that settlement was not considered. What is being sought is a variation of the terms of the agreement.

[45] It is my view that the court should not, as a matter of course, seek to vary the terms of any such settlement. The circumstances of the case must warrant such action and the discretion of the court should in my opinion be exercised sparingly.

[46] Whilst it is clear that the court can enquire into the sufficiency of the sum being offered as compensation and decline to approve the settlement in appropriate cases, the question of whether interest should be awarded on that sum from the date of the settlement to that of payment, is not so easily answered. This is not a situation in which there has been a protracted delay in the payment of the approved sum by the defendant. What is being alleged is that the defendant's actions delayed the process of approval.

[47] I am particularly mindful of the fact that although a Mediation Agreement entered into on behalf of an infant claimant is not binding on the parties until it is approved, it does represent an agreement between parties who were competent to settle its terms. Where an agreement is in writing, as in this case, the intention of the parties must be construed by reference to that document. The court will only permit the insertion of an implied term if it is necessary to give effect to the agreement. It is therefore my view that a court should not without compelling reasons, depart from the agreed terms.

[48] Where matters are settled whether at mediation or in court, the issue of the payment of interest may not be specifically addressed as it is contemplated that payment will be made within a reasonable time. In some cases, the settlement is said to

include interest and costs. However, a further step is required where minors are concerned. It follows therefore that applications for the approval of settlements should therefore be made as expeditiously as possible and set down for hearing as a matter of priority.

[49] The claimant has taken issue with the defendant's Attorney's request for information pertaining to the infant claimant's mother. I do not agree that payment of the settlement sum in the absence of that information would have exposed counsel to liability, as she would have been acting on the basis of an order of the court. However, the issue is one that could properly have been raised by the court in the exercise of its discretion under ***Part 23.12 (1)*** of the ***C.P.R.*** and as such ought to have been addressed by the claimant within a reasonable time.

[50] Mrs. Shirley Hinds-Smith was described as the mother of the infant claimant throughout the proceedings. It wasn't until the commencement of the proceedings for approval of the settlement that it was revealed that she is in fact her grandmother. It must also be borne in mind that the claimant did nothing to advance the matter between the 21st April 2010 and the 2nd September 2013 when the amended application was filed.

[51] I agree with Mr. Piper that where it is clear that the actions of a defendant are designed to frustrate the process and result in a considerable delay in obtaining the court's approval of the settlement, an award of interest may be appropriate. However, I do not agree with counsel that it is the defendant's request for information which caused the delay in this matter. The information requested was relevant and could have been requested by the court. The claimant failed to pursue the matter with alacrity and as such must bear the responsibility for the delay in obtaining the order.

[52] With respect to the issue of the costs, where proceedings are contested the court has the jurisdiction to award costs. The general rule is that costs follow the event and as such an award is usually made to the winning party.

[53] In this matter, there has been a settlement and this application is a part of the process towards its conclusion. The mediation agreement is silent on the issue of costs.

This is clearly a matter which could have been dealt with in the agreement. In the absence of any evidence that the issue of costs was discussed and remained outstanding up to the date of the application, it seems reasonable to conclude that each party was expected to bear its own costs.

[54] In addition to this, having found that the claimant is responsible for the delay in this matter, it is my view that the court should not in these circumstances vary the terms of the agreement to compel the defendant to pay the costs of the application. I am also mindful of the fact that the Mediation Agreement apart from stipulating the sum to be paid to the claimant, states that the said sum is *"in full and final settlement"* of the claim in respect of both personal and property damage.

[55] It is acknowledged that the delay in this matter has had a negative impact on the infant claimant. However, there is no basis on which to award interest from the date of the settlement.

[56] Perhaps it may be useful for parties to stipulate the time period in which the applications are to be made and provide for the payment of interest for the period between the filing and the hearing of the application.

[57] It is therefore ordered that-

i) The claimant's application for interest from the date of the mediation agreement is refused; and

ii) Each party is to bear its own costs in respect of this application.