IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 05455

BETWEEN	**FELICITAS LIMITED**	**CLAIMANT**
A N D	**FIESTA JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**RIU JAMAICOTEL LIMITED**	**2ND DEFENDANT**
AND	**PALMYRA RESORT & SPA LIMITED**	**3RD DEFENDANT**
AND	**BEDROCK BUILDING AND AGGREGATES LIMITED**	**4TH DEFENDANT**

Mr. B. St. Michael Hylton, Q.C. and Mr. Kevin Powell instructed by Michael Hylton & Associates for the Claimant.

Ms. Carol Davis the First Defendant.

Mr. John Vassell, Q.C. and Ms. Cindy Lightbourne for the Second Defendant.

The Fourth Defendant in person by its representative Mr. Devon Sterling

Heard: June 8th and 10th 2011

SIMMONS, J. (Ag.)

[1] This is an application by the second defendant to separate the trial of the issue of liability from that pertaining to damages. The said defendant also seeks an order to abridge the time for making this application. The parties have not taken issue with this aspect of the application. The fourth

defendant's representative, Mr. Devon Sterling did however indicate that he had not yet received the documents pertaining to this application. He was provided with a copy and participated in the proceedings.

[2] The application is supported by the affidavit of Hyacinth Lightbourne sworn to on the 31st May 2011.

[3] The affidavit states that the issue of damages would take a substantial amount of time to be dealt with due to the complexity of the issues in this matter. It was also stated that should the defendants succeed a substantial amount of time would have been wasted hearing evidence and submissions relating to damages. In addition, the deponent states that the separation of these issues will not affect the determination of liability.

[4] The court's jurisdiction to grant the orders sought is not in issue. **Part 26.1 (1) f** of the ***Civil Procedure Rules, 2002 (CPR)*** clearly states that the court may *"decide the order in which issues are to be tried."* This power must be exercised for the *"purpose of managing the case and furthering the overriding objective"* of dealing with cases *"justly"*. **Part 25** of the ***CPR*** sets out some of the methods by which the court may actively manage cases in furtherance of the overriding objective. Among these is the *"dealing with as many aspects of the case as is practicable on the same occasion".*

Applicant's / second defendant's submissions

[5] Mr. Vassell, Q.C., submitted that in the instant case where there is a clear demarcation between the issue of liability and damages, it would save time and costs for the issues to be determined separately. He directed the court's attention to paragraphs 8 to 13 of the Particulars of Claim which he stated deal with liability as against paragraphs 2 and 15 to 18 which relate to damages. He submitted that the issues to be determined by the trial Judge are whether the sand was stolen and if it ended up on the defendants' properties. In the event that someone is found to be liable the court would then proceed to consider the loss suffered by the claimant. It was also submitted that the issue of damages in this case was of a speculative and complex nature and could detain the court for a considerable period of time.

[6] He relied on the cases of ***Polskie Towarzystwo Handlu Zagranicznego DLA Elektrotechniki "Elecktrim" Spolka Z Ograniczona Odpowiadziolnoscia v. Electric Furnace Co. Ltd.*** **[1956] 2 All E.R. 306** and ***Coenen v. Payne*** **[1974] 2 All E.R. 1109** as to the principles to be applied by the court when considering this application. Mr. Vassell, Q.C. also referred to the Jamaican case of ***Paymaster (Jamaica) Limited and Grace Kennedy Remittance and Paul Lowe Claim No. CL 2000/P-82***

delivered the 30th April, 2010 in which the issues of liability and damages were separated. In that case the claimant did not succeed on the issue of liability. There is however, no written judgment on that aspect of the case.

Claimant's submissions

[7] Mr. Hylton, Q.C. argued that the application should be refused on the basis that the claim was not a complex one and the claimant having fully disclosed its case would be prejudiced if the application is granted. He submitted that the claim is one for damages for trespass and conversion and the defendants have denied the particulars of claim and have raised no issue regarding damages save that they have been challenged. He pointed out that the trial is scheduled to commence on the 4th July 2011, the claim having been filed in 2008 and the defences in 2009. This was followed by a case management conference approximately one year ago.

[8] Mr. Hylton, Q.C. sought to distinguish ***Coenen v. Payne*** from the instant case by pointing out that in ***Coenen,*** the order was granted on the basis that the amendment of the claim would have resulted in the time already allotted for the trial being inadequate. He submitted that the two weeks allocated for the trial of this matter contemplated a trial on both liability and damages and there is nothing that would justify the proposed change of course. He also argued that it is clear in the ***Coenen*** case the

determination of the damages was a complex issue. It was submitted that in this matter, there is no complexity, although the amount of damages may be great.

[9] In relation to the ***Paymaster case*** Mr. Hylton, Q.C. stated that the decision of the Court to treat the issues separately was based on the complexity involved in assessing damages for a breach of copyright.

[10] With respect to costs, it was submitted that if the issues were to be tried separately this would increase the costs of litigation. He highlighted the fact that two weeks have already been allocated to this matter and more time will have to be scheduled to deal with damages. He also argued that it would be possible to appeal on the issue liability and then also on that of damages.

First defendant's submissions

[11] Miss Davis also argued that the application should not be granted. She stressed that the general rule as stated in the ***Polskie*** case is that both issues should be heard at one trial unless there is a clear demarcation of the issues and in the instant case there is no such demarcation. In this regard she referred to paragraph 16 (a) of the Particulars of Claim which states the amount claimed to "import, transport, offload and spread 6,000 cubic yards of beach sand" as impacting on both issues. It was also argued

that there was no good reason to separate the issues as the witness statements already submitted by the parties related to both aspects of the case. In addition, it was submitted that the severance of the trial may result in some confusion as to the evidence that is to be presented at the relevant time.

[12] Counsel also pointed out that experts' reports have already been submitted in relation to the issue of liability whereas no such reports have been submitted on the issue of damages. She also argued that the experts may have to return for the trial in relation to damages and that this would result in an increase in costs.

Fourth defendant's submissions

[13] Mr. Sterling adopted the position taken by Miss Davis and indicated that in his opinion all aspects of the case ought to be dealt with at the same time.

The law

[14] It is accepted that the general rule is that the issues of liability and damages ought to be tried together. This has been stated in the cases of ***Polskie Towarzystwo Handlu Zagranicznego DLA Elektrotechniki "Elecktrim" Spolka Z Ograniczona Odpowiadziolnoscia v. Electric Furnace Co. Ltd.*** and ***Coenen v. Payne*** which have been cited by Mr.

Vassell, Q.C. These cases provide some guidance to the court which must also bear in mind the overriding objective of dealing with cases *"justly".*

[15] In ***Polskie*** the plaintiff who was engaged in the business of purchasing industrial plants on behalf of the Polish Republic claimed damages for breach of contract to supply industrial plant. It was alleged that the defendant knew that the plaintiff needed the plant for transfer to the Polish steel board. They also alleged that they had already shipped some parts of the plant to the steel board at the time when the defendants breached the contract and that those parts were of no value without those which the defendant had failed to supply. At first instance an order was made for questions of liability to be determined at trial and for damages to be assessed by an official referee. On appeal, the court stated that such an order should not be made unless there was a clear line of demarcation between the issues on the face of the pleadings. The court found that the issues should not have been separated and allowed the appeal. In arriving at his decision Jenkins, L.J. considered the provisions of ***Order 36, r. 7*** of the English Rules of the Supreme Court which contains a similar provision to **Part 26.1 (1) f** of the ***CPR*** and agreed that the court has the power to make such an order and stated that it is a matter for the discretion of the Judge. In that case it was acknowledged by the court that such orders were

rarely granted. The court in its deliberations referred to the headnote in ***Smith v. Hargrove (2)*** **(1885) 16 Q.B.D. 183** which states:-

> *"Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Order 36, r. 8 to order the question of liability to be tried, and the question of damages to be postponed until afterwards."*

[16] Jenkins, L.J. proceeded to examine the pleadings and formed the view that it was not possible at that stage to ***"sufficiently"*** *define the line of demarcation* ***"to make it practicable for a division to be effected".*** The court also appeared to have been influenced by the fact that the damages were to be dealt by a referee and not the judge who would have adjudicated on the facts. Another factor appears to have been the concern that the referee may not have been in a position to determine matters of law that were raised on the pleadings.

[17] I have examined the paragraphs of the Particulars of Claim referred to by Mr. Vassell, Q.C. and in particular paragraphs 10 and 11 which were stated to refer only to the issue of liability. Paragraph 10 alleges that 6,000 cubic yards of sand was removed by the fourth defendant from the Coral

Springs Property which is owned by the claimant. Paragraph 11 alleges that the sand was delivered to the defendant hotels. I have also considered paragraph 16 (a) which was referred to by Miss Davis on this point.

[18] The first defendant has pleaded that whilst it received sand from the fourth defendant it was less than the amount for which they had contracted. The fourth defendant has denied removing any sand from the claimant's property and has stated the source from which it obtains sand.

[19] The defendants in this matter are all separate legal entities. There is no allegation that the defendant hotels had any connection with each other. It is my view, that the amount of sand if any, that may be found to have been delivered to any of the defendants' properties is an important factor in the determination of liability and the measure of damages. However, in this case unlike ***Polskie*** the application is for the issues to be determined by the same Judge, albeit on different dates. This in my view makes it arguable as to whether it is absolutely necessary for there to be a clear line of demarcation of the issues of liability and quantum on the face of the pleadings. It would appear that in this matter there may be sufficient demarcation to justify the severance of these issues.

[20] However, I agree with the view expressed ***Smith v. Hargrove (2)*** that the complexity of the assessment of damages is an important factor in the

determination of whether there should be severance. In this regard, I have noted that no expert witness has been appointed by the Court in relation to this aspect of the case. Having considered the submissions of counsel I have concluded that this case does not appear to be one which the determination of damages is of the complexity required to justify separate treatment.

[21] In ***Coenen v. Payne the*** discretion of the Court was exercised on a different basis. In that case, the plaintiff claimed damages for personal injuries and loss of earnings for three months arising out of a motor vehicle accident. He later amended his claim to include future loss of earnings. The trial had originally been scheduled for three days. As a result of the amendment it was estimated that another four or five days would be required. At first instance, the application for separate trials of the issue of liability and damages was refused. On appeal it was held that the case was one in which the order would have been appropriate. In arriving at its decision the court considered the time and expense which would have been involved in dealing with the issue of damages as it was said that the amendment involved the discovery of many additional documents and the determination of a serious question of law. Lord Denning MR said:-

> *"…the normal method hitherto has been to try liability and quantum at the same time. It has been the practice not to make an order for separate trials save in exceptional circumstances and on special grounds…The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trial wherever it is just and convenient to do so."*

[22] In that case the court considered the length of time it would take to try the issue of damages as well as the fact that witnesses had to come from Germany and experts and Doctors from London. That would clearly be an expensive and time consuming exercise which would be unnecessary if the plaintiff did not succeed on the issue of liability.

[23] In the present matter no such considerations exist. Sufficient time has been allocated for the trial and the experts appear to be concerned with the issue of liability. In addition, no compelling reason has been advanced to justify the attendance of witnesses more than once and the incurring of additional costs associated with the scheduling of additional time for a trial on the issue of damages. In the circumstances I agree with the submissions made by Mr. Hylton, Q.C. and Miss Davis that separate trials would be likely to result in additional expense.

Conclusion

[24] There is no question that the normal practice is for the issues of liability and damages to be tried together. It is also clear that that practice ought not to be varied unless sufficient circumstances exist to warrant such action. It is my understanding that the cases cited do not purport to lay down specific rules for the exercise the Court's discretion in these matters. They do however, emphasize the importance of the consideration of the circumstances of each case. There is also no question that the court has the discretion to order separate trials of those issues and that that discretion must be exercised in accordance with the overriding objective.

[25] This case was set for trial approximately one year ago for two weeks and witness statements and expert's reports have been filed. There has been no new development as in the ***Coenen*** case that is likely to have an adverse effect on the time allotted for trial. Counsel would have had to clear their respective calendars for this matter which is scheduled to begin in approximately three weeks. Against this background it is my view that a separation of the trial of the issues is likely to result in an increase of the costs of litigation and the inefficient use of the court's time.

[26] In the circumstances, the application is refused.

Leave to appeal granted.

Costs of this application to the Claimant and the First Defendant to be taxed if not agreed.